



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 25 OF 2018

(Before D. K. N. Marete)

DAVID CHEPKWONY & 27 OTHERS.....CLAIMANTS

VERSUS

TIRGAGA FACTORY LIMITED.....1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY LIMITED...2ND RESPONDENT

JUDGEMENT

This matter was originated by way of an Amended Statement of Claim dated 20th June, 2018. The issues in dispute are therein cited as;

- a. Whether the claimants were unlawfully, unprocedurally and unfairly terminated from employment by the respondent.*
- b. Whether the reason given by the respondents for termination of the claimants amounts to a FAIR REASON.*
- c. Whether the claimants is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in this statements of claim;*
- d. Whether the claimant is entitled to an award of a certificate of service;*
- e. Who should pay costs and interests of the suit?*

The respondent in a Statement of Response dated 3rd July, 2018 denies the claim and prays that the same be dismissed with costs.

The claimants' case is that at all material times to this cause, they were employed by the respondent in different departments and on diverse dates beginning in July, 2013 to the year 2016. They, at the time of unlawful termination of employment, earned individual gross salaries as set out in the computation presented in this claim.

Their claim is further presented as follows;

- 4. The claimants served the Respondent dedicatedly, unsavoury and without any warning or lawful warning in their employment records until the date of their unfair termination from service by the Respondent sometimes in November, 2017 without any lawful reason and/or justification.*
- 5. The Respondent unlawfully and unprocedurally terminated the employment of the claimants without giving any reason by locking them out of her premises, denying them entry.*
- 6. Upon the termination of Claimants unlawfully, unprocedurally and unfairly the Claimants reported the same to the Kenya Planters and Agricultural Workers Union in which they were members which wrote to the respondent and in fact had a meeting with the respondent management to resolve the dispute on the 18th October, 2016 which didn't yield as agreed at the meeting as the claimants were blocked out again in June, 2017 in breach of the agreement.*
- 7. That the aforesaid termination was unfair, unprocedural and unlawful as the Respondent did not grant the claimants a fair hearing and neither did the Respondent explain in an understandable manner the reason for termination;*

It is the claimant's other case is that their dismissal was illegal, unfair and unlawful and violated the provisions of sections 41(1), 43, 44(4) and 45(2) of the Employment Act, 2007. This is as follows;

11. The claimants further avers that the Respondent did not in any way notify the Claimant of any wrong-doing on his side as an employee contrary to what the law provides for. And further that the Claimants' termination is unlawful, unprocedural and unfair for the following reasons;

- a. No Notice of termination of employment was issued to the Claimant as envisaged under Section 35 of the Employment Act, 2007;*
- b. No Notice of termination was issued to the Claimant Union as envisage under section 40(a) of Employment Act, 2007;*
- c. No Notice was issued to the Local Labour Officer as envisaged under Section 40 (b) of the Employment Act, 2007;*
- d. The Claimant was not given their pay in lieu of the notice pursuant to Section 36 and 40(f) of the Employment Act, 2007;*
- e. The Claimant was not issued with notice as envisaged under Section 40 (1) (a) and (b) of the Employment Act, 2007 and*
- f. That the Respondent did not comply with Section 40 (e) (g) and Section 49 (c) of the Employment Act, 2007.*

Again, they put it thus;

15. The Claimants avers that the Respondents offends her basic rights and specifically article 41 and 47 of the Constitution that calls for fair labour and administrative action to all citizenry a basic and a non-negotiable human rights on grounds that;

- i) The Respondent working environment was not reasonable as the Claimant was subjected to witch-hunt and ill motive;*
- ii) The Claimant were discriminated against by the respondent;*
- iii) The Claimant was unfairly terminated without a valid reason.*

They pray as follows;

- a) A declaration that the termination of claimants' employment on account of negligence was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant;*
- b) The sum of Kshs.13,193,848.2/= as tabulated herein below*
- c) A maximum compensation as per Section 49 (c) of the Employment Act, 2007;*
- d) A Certificate of Service as per Section 51 of the Employment Act;*
- e) Costs and interest of this Suit;*
- f) Any other award as the honorable court deems fit to grant in the circumstance of this case.*

The respondent's case is a denial of the claim.

The respondent's further case is that the claimants applied for jobs as casual employees or a three (3) month contract which depended on their work load and seasons. She denies unlawful termination and avers that their term of employment was casual and in terms of the contract and applicable law. She puts it thus;

19. The Respondent denies contents of paragraph 15 of the facts of the statement of claim that the claimants were subjected to unreasonable working condition, witch-hunt, discriminatory, unfair, unlawful and wrongful termination and invites the claimants to strict proof thereof.

23. In response to the Prayer (a) to (e) of the facts of the statement of claim, the respondents avers as follows;

- a. In response to prayer (a), the respondent avers the claim should be dismissed as the claimants have failed to set out with a reasonable degree of precision that the claimants were unfairly, unlawfully terminated which is complained of, the provisions said to have been infringed and the manner in which they are alleged to have been infringed as pleaded in paragraph 9, 10, 11, 12 and 15 of the facts of the statement of claim dismissed.*
- b. In response to paragraph (c), the respondent avers that no compensation is awardable.*
- c. In response to prayer (d) the Respondent aver that the Claimant has never requested for a Certificate of Service.*

d. In response to prayer (e), the Respondent avers that the Claimant is not entitled to any interests but should instead bear the costs of this suit and the interest accruing therein.

e. In response to prayer (f), the Respondent avers that the court cannot grant that which is not provided for under the law and that which is not prayed for.

The matter came to court variously until 19th July, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimants wrongful, unfair and unlawful?
2. Are the claimants entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue is whether the termination of the employment of the claimants wrongful, unfair and unlawful. The claimants in their written submissions dated 1st August, 2018 reiterate their claim and submit a case of unlawful termination of the employment. They submit as follows;

Clause 22 b of the CBA agreement elaborates on the seasonal employment, and provides that seasonal employees maybe employed for a maximum of three consecutive months and depending on the peak/flush seasons. My lord, from the NSSF statement you will notice that the claimants were employed for more than 3 consecutive months and at the same point they worked for more than 12 continuous months during their employment. These employees have been working for the Respondents for between 8 to 19 years. Their employment did not depend on the peak/flush season as they were not employed based on peak season, then there should be a clear sequence of their employment in the NSSF statement.

It is our humble submission that the claimants were engaged in continuous employment with the company and enjoyed the provisions of clause 15 of the CBA agreement on termination of service which provides that employees who served for more than three years will be issued with two months' notice or payment of two months' salary in lieu of notice by either party. This same provision and our argument that the claimants were regular and permanent employees is confirmed by the AGREEMENT signed by the respondent and the Kenya Plantation and Workers Union on 27th September 2017. Where the responded did not dispute the fact that claimants were employees in the company and ordered in paragraph r that the employees who are out of the company be paid their terminal dues, further in paragraph 6, the terminal dues comprise of;

- i. *Salaries for days worked and not yet paid upto the last day of service if any*
- ii. *Two months salary in lieu of notice*
- iii. *Approved overtime worked and not yet paid*
- iv. *Accrued leave not yet paid if any*
- v. *Gratuity as per the parties*
- vi. *Less any monies owed to the company*

...the respondent herein proposed to compensate the employees under clause 13 which applies to permanent employees. This is a clear indication that indeed the claimants were regular and not seasonal employees and subsequently covered under clause 15 and not 22 of the CBA agreement.

The claimants' further buttress their case by relying on the authority of section 37 (3) and (4) of the Employment Act, 2007 which provides for conversion of casual employment to term contract as follows;

37 (1) Notwithstanding any provisions of this Act, where a casual employee

1. *Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or*
2. *Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.*
3. *...An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.*

4. Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.”

The claimants’ further sought to rely on the authority of **Kenya Plantation & Agricultural Workers Union v Finlays (K) Limited [2017] eKLR**, where this court observed as follows;

It is her submission that the grievants put in long periods of service under specific service contracts or none of these thereby acquiring the status of permanent employees in terms of the CBA inter parties. I agree. This matter distinguishes itself from the ostensible findings of my sister, Mbaru, J. above in that here, there was a superior contract in terms of the subsisting CBA. This should have superseded the fixed term contract (s) et al involving in the instant case and borne a situation of permanent employment capable of unlawful termination at the close of the term or at all or any other circumstances. The termination on grounds of fixed term contract does not therefore suffice and a case of unlawful termination of employment ensues.”

The claimant’s in the penultimate submitted a case of unlawful termination of employment in that the reason and circumstances of the case arouse such cause. This is as follows;

45. (1) No employee shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

Further, the claimants sought to rely on section 41 and 43 of the Employment

Act, 2007 which further delineate the ingredients of unfair termination of employment as follows;

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

And ,

43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

The claimant in finality sought to rely on the authority of **Alphonse Machanga Mwachanya vs Operation 680 Limited [2013] eKLR**, where Radido, J. summarized the principles in section 41 of the Employment Act, 2007 as follows;

a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation.

c) That the employer has heard and considered any explanations by the employee or their representative;

d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The respondent's in their written submissions dated 10th August, 2018 reiterate their case and submit lawful termination of employment. It is their case that there is no evidence on record that the claimant's were dismissed or were in continuous employment. They have not proved their case on a balance of probability and are not entitled to the relief sought.

The respondent's further submit that the claim is an abuse of the process of court in that the claimants were paid their terminal dues on 9th November, 2017. This is supported by the lists of documents dated 5th July, 2018, a – h which collaborates the fact that each claimant was paid their respective terminal dues and the check register together with the delivery book. Therefore the claim should be dismissed for want of particulars and evidence on the part of the claimants as parties are always duty bound not only to state their claims but prove the same. The judgements attached to the list of documents filed on 5th July 2018 supports our position for the dismissal of the claim.

This submission by the respondent does not add up. Inasmuch as the claimant the claimants' may have received terminal dues as a consequence of the mutual agreement of the respondent and the union, I must add that this is not enough to extinguish the claimants' rights under their contract and terms of service. The claimants' case is that they served continuously for so long periods that they would not be regarded as casual employees. Their term had converted to permanent employment. This is not in doubt and I agree with them. Any hypothesis of the claim being an abuse of the process of court on this ground would not hold water. The claimants' are entitled to their dues per the new found terms of service. This is the case here.

This clearly comes out as a case of wrongful, unfair and unlawful termination of the employment of the claimants by the respondents. The claimants overwhelmingly bring out a case of unlawful termination of employment. This is because they adduce substantial evidence in controversy and contradiction of the theorem and case of seasonal and casual employment presented by the respondent. The nature of their duties and the long periods of service completely oust any case of casual employment of the claimants. Section 37 of the Employment Act, 2007 – conversions of casual employment to term contract is all applicable in the circumstances of this case. I therefore find a case of unlawful termination of the employment of the claimants by the respondents and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimants are entitled to the relief sought. They are. Having won on a case of unlawful termination of employment, they become entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. A declaration be and is hereby issued that the termination of the employment of the claimant's was unfair, unlawful and a fundamental violation of their rights.

ii. That the respondent be and is hereby ordered to meet and pay the claimants' dues as follows;

1. David Chepkwony

- One (1) months salary in lieu of notice –Kshs.18,570.00
- Eight (8) months compensation for unlawful termination of employment ...Kshs. 18,570.00x 8 =.....Kshs.148,560.00

Total.....Kshs.167,130.00

2. Bernard Kipkirui Bett

- One (1) months salary in lieu of notice -Kshs28,264.00
- Eight (8) months compensation for unlawful termination of employment ...Kshs. 28,264.00x 8 =.....Kshs.226,112.00

Total.....Kshs.254,376.00

3. Caroline Chepnetich

- One (1) months salary in lieu of notice.....Kshs.23,500.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.23,500.00 x 8=.....Kshs.188,000.00

Total.....Kshs.211,500.00

4. Leonard Kibet Ngeno

- One (1) months salary in lieu of notice.....Kshs.29,940.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,940.00x 8=.....Kshs.239,540.00

Total.....Kshs.269,460.00

5. Francis Cheruiyot Langat

- One (1) months salary in lieu of notice –.....Kshs.28,194.00
- 8 months compensation for unlawful termination of employment – Kshs.28,194.00x 8=.....Kshs.225,552.00

Total.....Kshs.253,746.00

6. Daniel Kiprotich Towett

- One months salary in lieu of noticeKshs.27,677.40
- Eight (8) months compensation for unlawful termination of employment – Kshs. 27,677.40 x 8=.....Kshs.221,419.60

Total.....Kshs.249,096.20

7. Jonah Kipkoech Sigei

- One (1) months salary in lieu of notice.....Kshs.29,940.00
- Eight (8) months compensation for unlawful termination of employment – Kshs. 29,940.00x 8=.....Kshs.239,540.00

Total.....Kshs.269,460.00

8. Jenniffer Chebet

- One (1) months salary in lieu of notice.....Kshs. 35,711.65
- Eight (8) months compensation for unlawful termination of employment – Kshs. 35,711.65 x 8=..... Kshs.285,693.20

Total.....Kshs.329,404.85

9. Liner C. Mutai

- One (1) months salary in lieu of notice.....Kshs. 26,000.00
- Eight (8) months compensation for unlawful termination of employment – Kshs. 26,000.00 x 8=..... Kshs.208,000.00

Total.....Kshs.234,000.00

10. Biarose Chepkirui

- One (1) months salary in lieu of notice.....Kshs. 29,051.75
- Eight (8) months compensation for unlawful termination of employment – Kshs. 29,051.75x 8=.... Kshs.232,414.00

Total.....Kshs.261,465.75

11. Joseph Kipkirui Changtoek

- One (1) months salary in lieu of noticeKshs.29,220.0
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,220.00x 8 = ...Kshs.233.760.00

Total.....Kshs.262,980.00

12. Reuben Rop

- One (1) months salary in lieu of notice.....Kshs.18,000.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.18,000.00x 8 =Kshs.144,00.00

Total.....Kshs.162,000.00

13. Clarah Keror

- One (1) months salary in lieu of notice.....Kshs.20,800.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.20,800.00x 8 =Kshs.166,400.00

Total.....Kshs.187,200.00

14. Kipngetich Chirchir

- One (1) months salary in lieu of noticeKshs.34,000.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.34,000.00x 8 =Kshs.272,00.00

Total.....Kshs.306,000.00

15. Langat Kipkirui Simion

- One (1) months salary in lieu of notice...Kshs.23,000.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.23,000.00x 8 =Kshs.184,00.00

Total.....Kshs.207,000.00

16. Chelangat Sally Mildrate

- One (1) months salary in lieu of noticeKshs.20,800.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.20,800.00x 8 =Kshs.166,400.00

Total.....Kshs.187,200.00

17. Robert Kiplangat Kirui

- One (1) months salary in lieu of notice.....Kshs.20,800.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.20,800.00x 8 =Kshs.166,400.00

Total.....Kshs.187,200.00

18. Agnes Cherotich

- One (1) month salary in lieu of notice.....Kshs.23,800.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.23,800.00 x 8=.....Kshs.190,400.00

Total.....Kshs.214,200.00

19. Micah Cheruiyot Telei

- One (1) months salary in lieu of notice.....Kshs.29,220.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,220.00 x 8=.....Kshs.233,760.00

Total.....Kshs.262,980.00

20. Langat Bernard

- One (1) months salary in lieu of notice.....Kshs.29,220.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,220.00 x 8=.....Kshs.233,760.00

Total.....Kshs.262,980.00

21. Robert Towett Kipkoech

- One (1) month salary in lieu of notice.....Kshs.29,220.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,220.00 x 8=.....Kshs.233,760.00

Total.....Kshs.262,980.00

22. Betty Chepkemioi

- One (1) months salary in lieu of notice –.....Kshs.29,220.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,220.00 x 8=.....Kshs.233,760.00

Total.....Kshs.262,980.00

23. Cherono Joyce

- One (1) months salary in lieu of notice.....Kshs.22,600.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.22,600 x 8 =.....Kshs.180,800.00

Total.....Kshs.203,400.00

24. David Kiprotich Chepkwony

- One (1) months salary in lieu of notice.....Kshs.29,220.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,220.00 x 8=.....Kshs.233,760.00

Total.....Kshs.262,980.00

25. Bernard Kiprono Tangus

- One (1) months salary in lieu of noticeKshs.8,554.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.8,554.00 x 8=.....Kshs.68,432.00

Total.....Kshs.76,986.00

26. Benard Kiplangat Ngetich

- One (1) months salary in lieu of noticeKshs.29,000.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,000.00 x 8=.....Kshs.232,00.00

Total.....Kshs.261,000.00

27. Betty Chebet Anjeline

- One (1) months salary in lieu of noticeKshs.28,264.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.28,264.00 x 8=.....Kshs.226,112.00

Total.....Kshs.254,376.00

28. Betty Chepkoech

- One (1) months salary in lieu of notice.....Kshs.29,220.00
- Eight (8) months compensation for unlawful termination of employment – Kshs.29,220.00 x 8=.....Kshs.233,760.00

Total.....Kshs.262,980.00

iii. The costs of the claim shall be borne by the respondent.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Koech holding brief Mr. Nyaata instructed by Nyaata & Company Advocates for the claimants.
2. Mr. Maina holding brief for Mr. Ngetich instructed by Ngetich, Chiira & Associates Advocates for the respondent.