



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 46 OF 2018

(Before D. K. N. Marete)

KIPYEGON KILEL RICHARD.....CLAIMANT

VERSUS

MOGOGOSIEK TEA FACTORY CO. LTD....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 24th May, 2018. It does not disclose an issue in dispute on its face.

The respondent in a Memorandum of Response dated 11th July, 2018 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about January, 2006, he was employed by the respondent in the Boiler stoker section at a gross salary of kshs.38,188.60 at the time of termination. The respondent in some of these months paid NSSF contributions for the claimant.

The claimant's other case is that he served the respondent with loyalty and diligence until April, 2016 when he was wrongfully and unlawfully dismissed and also denied payment of terminal benefits. These are;

- a) *One Month salary in lieu of termination notice Kshs.38,188.60*
- b) *Unpaid leave for the years between 2006 – 2016 (10yrs *Kshs.38,188.60) Kshs.381,886.00/=*
- c) *Gratuity/service pay (Kshs.38,188.60 * 10yrs) Kshs.381,886.00/=*
- d) *12 months wages compensation as per section 15 of the Labour Institutions Act (12 Mths * 38,188.60)Kshs.458,263.2*

TOTAL Kshs.1,260.223.6/=

He prays for relief as follows;

- a) *Kshs.1,260,223.6/=*
- b) *General damages for violation of the claimant's constitutional rights.*
- c) *Interest at court rates.*
- d) *Certificate of Service.*
- e) *Reinstatement to his former Job at the Respondent*

The respondent's case is a denial of the claim. Her version of facts in this cause is as follows;

4. *The Claimant was employed on a contractual basis, in which the contract is renewed after 3 months.*

5. The Contract was renewable upon application and dependent on the season of the crop.

6. The Respondent denies having terminated the Claimant's from employment constructively and instead avers indeed the Claimant was dismissed as per Section 41 (1) of the Employment Act 2007.

7. The Respondent avers that Section 44(4) of the Employment Act was adhered to.

8. The Claimant avers that in fact, pursuant to an agreement between the Claimants amongst other employees, The Claimant was paid his terminal dues in full.

9. In response to specific allegations in the Claim the Respondent avers as follows;

a) The Claimant is not entitled to payment for unlawful termination as prayed.

b) The Respondent avers that it complied with the law and in particular the provisions of the Employment Act (2007).

The matter came to court variously until 16th July, 2018 when the parties agreed on a determination by way of written submission.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?

2. Is the claimant entitled to the relief sought?

3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant wrongful, unfair and unlawful. The claimant in his written submissions dated 10th July, 2018 submits a case of unlawful termination of employment in contravention of section 41(1) and 44 (4) of the Employment Act, 2007. This is as follows;

... Section 41 (1) of the Employment Act 2007 provides that when an employer intends to dismiss or terminate the employment of an employee for among other reasons misconduct, it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The respondent never complied with the above provision of law thus the dismissal was unlawful.

*Further, Section 44(4) of Employment Act lists matter which amount to gross misconduct and which would entitle an employer to summarily dismiss an employee, however the same provided that an employee should be given an opportunity to dispute the truthfulness of the accusation. It's our submissions that the claimant was never given an opportunity to dispute the allegations made against him before being dismissed contrary to the aforesaid section if any. We therefore urge ... (the court) to award the claimants 12 months salary as provided for by **section 49 (1) (c) of the Employment Act and Section 15 (c) of the labour Institutions Act.***

The claimant in further support of his case relies on section 10(7) of the Employment Act, 2007 as follows;

“If any legal proceedings an employer fails to produce written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of the employment shall be on the employer.”

This burdens the employer to produce all evidence of any contractual relationships of employment that have not been reduced in writing.

The respondent in her written submissions dated 30th July, 2018 espouses a case of lawful termination of employment. This is based on the ground that the claimant was a seasonal employee who was not in any event permanent. On this she seeks to rely on the authority of **Josphat Njuguna v Highrise Self Group [2014] eKLR** where the court observed as follows;

“The provisions of section 37 (1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates.”

Further, the respondent sought to rely on the authority of **Persteeno Omondi v Steel Makers Ltd [2007] eKLR** where Makau, J. observed thus;

“In view of the foregoing finding that the claimant was a casual employee who was not protected by the law from abrupt termination, the compensation sought in his claim cannot issue. Likewise, the prayers for leave and service pay are declined

because the claimant never served for any 12 consecutive months. The NHIF and NSSF statement produced by the claimant is enough evidence that the claimant never worked continuously for any single year.”

The claimant’s case comes out furtively against the respondents. It is overwhelming and speaks for itself. It brings out a case of termination of employment without regard to the subsisting law of employment and the Constitution. The termination was without regard to procedure and the provisions of the subsisting Collective Bargaining Agreement between the respondent and the claimant’s union. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

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

- i. One (1) months salary in lieu of notice.....Kshs.38,188.60
- ii. Eight (8) months salary as compensation for unlawful termination of employment=Kshs.38,188.60 x 8 =
Kshs.305,508.80

Total of claim.....Kshs.343,697.40

- iii. The costs of this 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. Mugumya instructed by P. Sang & Company Advocate for the claimant.
2. Mr. Ngetich instructed by Ngetich, Chiira & Associates Advocates for the respondent.