



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 754 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**JULIET NDARU.....CLAIMANT**

*VERSUS*

**EAST AFRICAN GROWERS LIMITED.....1<sup>ST</sup> RESPONDENT**

**WILHAM (K) LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Claimant is a former employee of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Claimant was first employed by the 2<sup>nd</sup> Respondent but was later transferred to the 1<sup>st</sup> Respondent who deployed her to work at the 2<sup>nd</sup> Respondent's premises at Jomo Kenyatta International Airport, Nairobi. It was the claimant's evidence that on 15<sup>th</sup> November 1997 she was employed by the Respondent as a casual worker pursuant to a verbal appointment, with a daily wage of Kshs.300.00 payable weekly in arrears.

The Claimant avers that her casual engagement was later changed to periodic contracts although no appointment letter was issued. She worked for the Respondents continuously and diligently for 11 years and 2 months with an outstanding record until 2<sup>nd</sup> January 2009 when the Respondents verbally terminated her services. The Claimant avers that the termination was without any justifiable cause or reason. Further, the Claimant avers that she was never given the opportunity to make representations in respect of the same as is required by law. She states that she had not committed any act of misconduct and was never issued with any warning. That the reasons or allegations the Respondent used to terminate the Claimant's services were never expressly substantiated or explained to her. The Claimant avers that she was never issued with a certificate of service.

The Claimant avers that she never took annual leave for the entire 11 years period that she worked for the Respondents. Further, that during the subsistence of her employment, she had not been a member of any pension or provident fund. The Claimant also avers that she used to work overtime and on rest days without any compensation.

The Claimant states she is now jobless and has been unable to secure another job.

The Claimant avers that her employment was unfairly and unlawfully terminated and seeks the following remedies:

- a. Service or severance pay for 11 years  
(1/2 x 11 x 9 x 9000.00) Kshs.49,500.00
- b. Overtime, rest days & holidays worked Kshs.(to be ascertained  
after verification of records.
- c. 12 months' salary compensation Kshs.108,000.00
- d. 1 month's salary in lieu notice Kshs.9,000.00
- e. Pay in lieu of leave for 11 years Kshs.99,000.00

**Total**

**Kshs. 264,500.00**

On the other hand, the Respondents aver that they entered into a daily contract with the Claimant where her dues were to be paid on a daily basis and at the close of business each day. Renewal of the Claimant's contract was by mutual consent and depended on availability of work with the Respondents' companies. The Respondents deny that the Claimant's services were for a continuous period. The Respondents aver that due to the temporary nature of the Claimant's employment and in an effort to reduce theft and burglary in the Respondents' premises, the Claimant was issued with a wage point card via an Automated Teller Machine (ATM) card to access her wages.

The Respondent avers that according to the muster roll, the Claimant voluntarily left the casual engagement because of the seasonal nature of the business. The Respondent urged that the statement of claim should fail because the prayers sought were inapplicable to the suit.

### **Evidence**

During trial, the Claimant testified that she used to work from Monday to Sunday from 6 am to 9 pm in the evening. She further stated that the sheet attached to the Respondent's Response was given to them daily and they were paid via the ATM. She confirmed that her name was indeed on the sheet. The Claimant denied being issued with a notice and stated that at the time of termination she was offered Kshs.5,000 which she declined. Upon cross-examination, the Claimant conceded to the fact that she never read the back of the sheet that was issued to her and only signed the place designated for employee's signature.

On 7<sup>th</sup> February 2018, the matter was coming for the hearing of the Respondents' case. However, there was no appearance by the Respondents and the Claimant requested to be allowed to file submissions. The Court closed the Respondents' case since they had already been issued with a last adjournment when the matter was before Court on 20<sup>th</sup> July 2017. Further, parties were ordered to file their written submissions. Both the claimant and the respondents filed written submissions.

### **Claimant's Submissions**

On the issue of whether the Claimant was in continuous employment, the Claimant in her submissions dated 18<sup>th</sup> April 2018 submits that she worked for the Respondents continuously for a period of 11 years 2 months. The Respondents did not adduce any evidence in court to support their assertions. Therefore, the evidence adduced by the Claimant in court is uncontroverted and unchallenged. The Claimant relied on the case **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others (Milimani) HCCS No. 1243 of 2001** where the court stated that:

*"It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."*

On the issue of the legal status of the Claimant's employment, the Claimant relied on the provisions of Section 37 (1)(a) of the Employment Act 2007 to submit that she automatically converted to a monthly contract employee since she had worked for the Respondents continuously for more than one month.

On the issue of whether the Claimant's employment was unfairly terminated, the Claimant submits that her employment was unfairly terminated as the Respondents failed to adhere to the lawful procedure of terminating the Claimant's employment. The Claimant relied on section 43 (1) of the Employment Act 2007 which compels an employer to communicate to an employee reasons for which the employer is considering a termination, in a language that the employee understands. She further relied on section 44(4) of the Act which provides that an employee should be given an opportunity to dispute the truthfulness of the accusations leveled against him. The Claimant also relied on section 45 (1) of the Act which provides for what is unfair employment.

On the issue of whether the Claimant is entitled to the prayers sought in the claim, the Claimant submitted that she was entitled to the prayers sought. She relied on section 28 of the Employment Act 2007 whereby an employee is entitled to 21 working days of leave with full pay after every 12 consecutive months. The Claimant also cited section 35 (5) of the Employment Act 2007 whereby an employee is entitled to service pay for every year worked if the contract was terminated under section 35 (1)(c).

### **Respondent's Submissions**

On the issue of whether the Claimant was engaged as a casual employee and if so, whether her employment converted to regular employment under section 37 of the Employment Act 2007, the Respondents in their submissions dated 16<sup>th</sup> May 2018 submit that: The Claimant conscientiously engaged on a daily contract which would begin in the morning and end at the end of the day upon payment of the daily wages. The Respondents submit that they never intended the engagement of the claimant to be a formal contract hence section 37 of the Employment Act cannot aid the Claimant.

On the issue of whether the Claimant was unlawfully and unfairly terminated from employment, the Respondents submit that the termination of the Claimant's employment was not unfair and unlawful as she voluntarily left her casual engagement. The Respondents further submit that since the Claimant's contracts were terminable at the end of each day and without any notice whatsoever, the Respondents have discharged the burden of proving that the alleged termination was not unfair and/or unlawful.

On the issue of whether the Claimant is entitled to the reliefs sought, the Respondents submit that the Claimant is not entitled to severance pay because she was a temporary employee who did not work for a continuous breakable period. Further, severance pay is only paid to an employee who has been declared redundant.

On the claim of overtime, rest days and holidays, the Respondents submit that the Claimant is not entitled to the same since she was a casual employee whose daily wage was payable at the end of each day worked. Further, the Claimant has failed to ascertain the specific sum to be awarded and has not adduced any evidence to show that she unsuccessfully tried to ask for documents from the Respondents.

As regards the claim of 12 month's salary compensation for unlawful dismissal from unemployment and payment of 1 month's salary in lieu of notice, the Respondents submit that the Claimant is not entitled to the same as she voluntarily left her casual engagement. Further, that even if the Claimant's employment had been verbally terminated, she would still not be entitled to this claim as her employment is terminable at the end of each day worked. The Respondents rely on the case of **D.K. Njagi Marete vs. Teachers Service Commission [2013] eKLR** where Rika J stated that remedies are meant to redress economic injuries and not aimed at unjustly enriching aggrieved employees.

The Respondents further submitted that the non-requirement of a notice for termination in the case of casual workers is reinforced by section 35 (1) (a) of the Employment 2007 which provides that:

***“A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be-***

***a. Where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice:”***

On the claim for pay in lieu of leave earned but not taken for 11 years, the Respondents submit the nature of the Claimant's engagement never attracted any leave as it was from day to day and seasonal in nature.

On the claim for damages for wrongful dismissal, the Respondents submit that the claim is not payable as it is not provided under Section 49 (1) of the Employment Act 2007. The Respondents relied on the case of **George Onyango Akuti vs. G4S Security Services Kenya Limited eKLR** where the Radido J. stated as follows:

***“...It is trite in law that general damages are not awardable for wrongful termination. Wrongful termination is a concept of the common law and the authorities...limited any damages to the notice or reasonable notice period. What the Employment Act provided for is an award equivalent to a number of months' wages not exceeding twelve months based on the gross monthly wages. Indeed this is one of the primary remedies for unfair or wrongful termination.”***

The Respondent prays that the Claimant's claim be dismissed with costs.

#### **Determination**

From the evidence on record, the following are the issues for consideration by the court: -

1. Whether the Claimant was a casual employee and if so, whether her employment can be converted to regular employment under section 37 of the Employment Act, 2007.
2. Whether the Claimant's employment was unlawfully and unfairly terminated.
3. Whether the Claimant is entitled to the reliefs sought.

#### **1. Nature of claimant's employment**

The claimant's averment that she worked continuously from 15<sup>th</sup> November 1997 to 2<sup>nd</sup> January 2009 is not controverted by evidence from the respondent. The respondent was under a duty to produce employment records of the claimant or to adduce evidence to controvert her averments which the respondent has not done. Refer to the decision in **Trust Bank Limited –V- Paramount Universal Bank Limited**.

Section 10(6) and (7) of the Employment Act provide as follows –

#### **10. Employment particulars**

(1) ....

(2) ....

(3) ....

(4) ....

(5) ....

**(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.**

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

The respondent has not discharged its burden of disproving the averments of the claimant.

Section 3(6) of the Employment Act, 2007 provides that the terms in the Act are minimum terms to be presumed in every contract and are not derogable. Under Section 37(1) of the Act, the claimant's employment is presumed to have converted to a contract of service where wages are paid monthly, with entitlement to paid rest days and public holiday as provided under Section 37(2) and other terms and conditions of service as provided in Section 37(3).

**Whether the claimant's employment was unfairly terminated**

Having found that the claimant's employment was converted as provided in Section 37(1), she was subject to the provisions of Section 41 and 43 of the Act. Having been terminated without notice and without a hearing or reasons for termination, the termination of her employment was unfair in terms of Section 45(1) and (2) of the Act.

**Whether the Claimant is entitled to the reliefs sought**

Having been terminated unfairly, the claimant is entitled to compensation. Taking into account that she worked for more than 11 years and was subjected to casual terms of employment with all attendant uncertainties and all attendant disadvantages and limitations, and further taking into account the fact that she was never paid any terminal dues after such long service, I award her maximum compensation of 12 months' salary at Shs.300 per day being (300 x 30 x 12) Kshs.105,000.

The claimant is also entitled to one month's salary in lieu of notice which I award her at Kshs.9,000 and to leave for the period worked at 21 days per year at (300 x 21 x 11) being Kshs.69,300. I agree with the respondent's submission that the claimant is not entitled to general damages as was held in the case of **George Onyango Akuti –V- G4s Security Services Kenya Limited**.

**Conclusion**

In the end, I find that the claimant's employment converted by operation of Section 37(1) to a monthly contract of service with benefits as provided under Section 37(1), (2) and (3) and that she was unfairly terminated by the respondents. I consequently award her the following –

(i) Compensation	Kshs.108,000
(ii) Pay in lieu of notice	Kshs.9,000
(iii) Pay in lieu of leave	Kshs.69,300
<b>Total</b>	<b>Kshs.186,000</b>

The claimant further submitted that she is entitled to severance pay, overtime, rest days and holiday compensation. She is not entitled to the same as she did not plead these in her claim and cannot seek them in submission.

The respondents will pay the claimant's costs and interest shall accrue from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**