



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2231 OF 2012

(Before Hon. Justice Mathews N. Nduma)

SOPHIA WAWIRA NDWIGAH.....CLAIMANT

VERSUS

EAST AFRICAN GROWERS LIMITEDRESPONDENT

J U D G M E N T

1. The suit commenced by a Memorandum of Claim on 5th November, 2012 seeking compensation for summary dismissal and payment of terminal benefits to wit:-

- i. One months salary in lieu of notice, Kshs. 12,360.
- ii. Rest days per week for 8 years Kshs.316,416.
- iii. 21 days annual leave for 8 years Kshs. 69,216.
- iv. Service pay calculated at 15 days salary for each completed year of service (8 years) Kshs. 49,440.
- v. Interest and costs.

Facts of the Claim

2. The Claimant was employed by the Respondent in July 2004 as a daily paid worker earning Kenya Shillings 412 per day. She was paid fortnightly a sum of Kshs.12,360 per month.

3. The Claimant states that he worked continuously for the Respondent for a period of 8 years as a Hygiene Officer. The Claimant told the court that she was at all material times treated as a casual and so he was not registered with NSSF and NHIF; she was not given off days per week; did not take annual leave and was not paid service gratuity.

4. That she worked 6 days a week on either of the two shifts from 4 am in the morning until 10 am or from 3pm in the afternoon until 9 pm in the night.

5. The Claimant had no letter of appointment and worked continuously until 6th September when the Respondent without giving any notice nor reason terminated the contract of employment without paying the Claimant any terminal dues. The Claimant prays that she be awarded as prayed in the suit.

6. The Claimant testified under oath in support of all the above particulars of claim and relied on documentary evidence annexed to the statement of claim.

Response

7. The Respondent filed a Memorandum of Response on 13th December, 2013 in which the employment of the Claimant as an hygiene personnel is admitted. The Respondent avers that the Claimant was a daily paid worker and was paid Kshs.300 per day and at the end of

each day.

8. That the Respondent dealt with horticultural produce and her employment depended on availability of raw materials.

9. The Respondent denies that the employment of the Claimant was continuous.

10. The Respondent states that the Claimant was not entitled to termination notice; off days or any annual leave since she was a temporary staff.

11. The Respondent denies that the termination of her employment was unfair in the circumstances of the case.

12. The Respondent called RW1 Kibaya Josselyn a Human Resource Officer of the Respondent for the past seven (7) months. She relied on records in her testimony and told the court that the Claimant was a casual employee. That the Claimant worked for the Respondent and a sister company called Wilham Limited. That the Claimant was first employed in 2004 in the hygiene department. She was provided a wage card to enable her receive her payments. There was no written contract as she was engaged daily. She worked as and when there was work. RW 1 told the court that the Claimant's employment was terminated in the year 2012 but she was not sure which month it was. It was low season so the Claimant was not engaged. That the Claimant is not entitled to any rest days, notice, leave or service pay.

13. That the suit be dismissed with costs. Under cross examination by counsel for Claimant, RW 1 admitted that she had no personal knowledge of this case as she did not find the Claimant in employment. She did not have the Claimant's records in court. She produced master roll and labour sheets filed by the casuals to record their attendance and dues. The master roll produced was for the year 2007 only. She confirmed that the Claimant worked between the years 2004 to 2012. She was orally informed that there was no more work and she left. She confirmed the increase in the daily rate earned by the Claimant by the time she left employment.

Determination

14. The issues for determination are:-

- i. Whether the Claimant was a casual worker or not.
- ii. Whether the Claimant is entitled to the reliefs sought.

Issue i

15. Section 37 of the Employment Act, 2007 provides –

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

a. 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

b. 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.”

16. Section 35 (1) (c) provides –

“where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”

17. From the facts of this case, the Claimant worked as a Hygiene Personnel in the hygiene department for the Respondent between the years 2004 and 2012. It is manifestly clear that though at all material times the Claimant was treated as a daily paid casual, from the date the Employment Act, 2007, came into effect in August 2008, the employment of the Claimant converted to that of an employee who was paid monthly ; and the employment could only be terminated by giving the claimant at least 28 days notice.

18. Furthermore, the Claimant became an employee entitled to basic minimum conditions of employment in terms of part v of the Act, titled “Rights and Duties in Employment”.

19. Accordingly, the Claimant was from the year 2008 entitled to at least 21 days leave in each completed year of service; was entitled to one off day in every week; was entitled to be registered and contributions made to NSSF and NHIF failing which, upon termination the Claimant was entitled to payment of service gratuity in terms of section 35(5) & (6) of the Act.

20. It is apparent that even after the new Act came into operation, the Respondent did not implement the same with respect to the Claimant.

21. The Claimant has proved on a balance of probabilities that she is entitled to all the terminal benefits claimed with effect from August

2008 to the date of termination in June 2012. The court so orders.

Termination

22. The Claimant having converted to a monthly employee was not only entitled to provision of Medical Services paid for by the Respondent but her employment could not be terminated without notice; notice to show cause or provision of valid reasons for the termination.

23. In the present case, RW 1 testified that the employment of the Claimant was terminated because there was no more work to be done by her. If this was the case, then the Respondent was bound to adhere to section 40 of the Employment Act, on termination on the basis of redundancy. The Respondent did not invoke this provision at all but simply assumed that the Claimant was a casual and only needed to be told to go home verbally, which the Respondent proceeded to do.

24. Ignorance of the law is no defence.

25. Considering all the circumstances of the case, the Claimant has proved on a balance of probabilities that the termination of her employment was wrongful and unprocedural. The termination violated sections 41, 43 and 45 of the Act and was therefore unlawful and unfair.

26. The Claimant is entitled to compensation in terms of section 49(1) (c) as read with sub-section 49(4) of the Act. In this regard, the Claimant had served the Respondent for a period of 8 years. She lost her job summarily without any modicum of colour or respect. The Claimant was not paid any terminal benefits or compensation upon termination of employment. The Claimant did not contribute at all to the termination. The Claimant suffered lack of minimum conditions and terms of service for a period of 4 years to her loss and detriment. This is an appropriate case to award the Claimant the maximum compensation of the equivalent of 12 months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.148,320.

27. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-

i. Equivalent of 12 months salary in compensation in the sum of Kshs.148,320.

ii. Four (4) years rest days not given Kshs.158,208.

iii. Unpaid annual leave of 21 days for 4 years Kshs. 34,608.

iv. Service pay for four (4) years Kshs. 24,700.

Total award Kshs.365,836.

v. Interest at court rates from date of filing suit with respect of (ii), (iii), & (iv) above and with effect from date of judgment with respect to (i) above until payment in full.

vi. Costs of the suit.

Dated and Signed in Kisumu this 12th day of October, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 2nd day of November, 2018

Maureen Onyango

Judge

Appearances

Mr. Atuti for Claimant

Mr. Nyachoti for Respondent

Daniel Ngumbi – Court Clerk