



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 360 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

EVERLINE MANUNI.....CLAIMANT

VERSUS

MUDETE TEA FACTORY.....RESPONDENT

JUDGMENT

The Claimant filed suit against the Respondent on 7th December 2016, seeking damages for unlawful termination of employment, unpaid terminal dues and underpayment.

She states that she was employed by the Respondent as a general worker being on roll number 1259 as from May, 2003 to December, 2006, on a monthly salary of Kshs5,501/= until December 2013, when she alleges that her employment was terminated without any justifiable reason. As at the time of termination her salary was Kshs.17,951/=.

She contends that the termination was unlawful, unprocedural and ill motivated. That she was not served with any notice or payment in lieu thereof at termination. She alleges that she was not paid her terminal dues and also claims for underpayment between the periods of 2003 – 2007.

She tabulates her underpayments as follows:-

i) Payment in lieu of notice (Kshs.17,951 x 3) Kshs. 53,853

ii) House allowance for the period

between 2003 – 2006 $\frac{1}{3} \times 5,501 \times 48$ months Kshs. 88,016.02

iii) House allowance for the period

between 2007-2008 $\frac{1}{3} \times 8,572.20 \times 12$ months Kshs.34,288.80

iv) House allowance for the year 2009

$\frac{1}{3} \times 10894 \times 12$ months Kshs.43,576

v) House allowance for the year 2010

$\frac{1}{3} \times 11874.2 \times 12$ months Kshs.47,496.8

vi) House allowance for the year 2011

$\frac{1}{3} \times 13562.00 \times 12$ months Kshs.54,248.0

vii) House allowance for the year 2012

1/3 x 14,440.00 by 12 months Kshs.57,769.6

viii) House allowance for the year 2013

1/3 x 17,951.00 x 12 months Kshs.71,8044

ix) Service Pay as between 2003 – 2007

(5501/26 x 15 x 5) Kshs.15,868.26

She further tabulates her unpaid leave as below

x) 2003-2006 = 5501 x 3 Kshs.16,503

xi) 2007-2008 = 8,572.2 x 2 Kshs. 17,144.4

xii) 2009 Kshs. 10,894

xiii) 2010 Kshs.11,874

xiv) 2011 Kshs.13,562

xv) 2012 Kshs.14,440.40

xvi) 2013 Kshs. 17,951

She prays for the Respondent to be ordered to pay the unremitted statutory deductions and issuance of a certificate of service and for the entire claim to be allowed.

The Respondent filed its Memorandum of Reply on 16th February wherein it states that the Claimant was a seasonal employee engaged intermittently between the year 2003 and 2013 when the contract lapsed. The respondent attached the seasonal employment contract to the Response marked as “MTFL 1”.

That the seasonal employment was largely dependent on the prevailing processing capacity of tea supplied. That the Claimant’s services were only required during peak seasons when her remuneration would depend on the number of days worked per month. That the non-renewal of the contract in 2013 was informed by the Respondent’s processing capacity due to low supply of green tea leaves and effluxion of time.

The respondent denies that the termination of the Claimants services was unlawful as the contract terminated by effluxion of time. It denies that it failed to remit statutory deductions in favour of the Claimant and put the Claimant to strict proof. It alleges that it did not underpay the Claimant as all payments were clearly stipulated in the seasonal contract of employment. That the Claim for house allowance and notice pay are not payable and as such should be disallowed. On leave days the Respondent states that the same is only payable at the rate of 1¾ days’ pay on pro rata basis for each completed month of service payable at the end of each contract period. It is also the Respondent’s contention that service is not payable as the Claimant was a member of NSSF and all contributions thereof were remitted in her favour.

The Respondent prays that the Claim be dismissed with costs.

By an order of the Court of 21st March 2017, the parties were allowed to proceed by way of written submissions.

Claimant’s Submissions

It is submitted on behalf of the Claimant that she was a permanent employee and not a seasonal employee as alleged by the Respondent. That she was engaged as a general worker more specifically assigned in the sorting department where she worked until sometime in 2009. That the Claimant during this period was always engaged on a contractual basis but the work would continue seamlessly without stopping or interruptions of any nature. That there was no time that she would be told to wait at home pending the signing of any contract upon expiry of the three months contract, but she would continue with work and be called later and shown a place to sign engaging her services for the entire period from 2003 to 2013. During the pendency of the contract, the Claimant was bound to be available for work in the Respondent’s company and would never be engaged elsewhere as she would be needed at any time and her absence would amount to breach. Counsel referred to annexures 8 and 9 to show that the Claimant worked seamlessly without interruptions and as such was an employee as envisaged under section 37 of the Employment Act.

It is further submitted that since the Claimant was an employee under section 37, she was entitled to notice or payment in lieu thereof. That she was entitled to due process as provided for under section 45 of the Employment Act.

Counsel prays for the claims to be allowed as drawn in the memorandum of claim together with costs of the Suit.

Respondent’s Submissions

It is submitted on behalf of the respondent that the claimant was a seasonal employee relying on the seasonal contract marked as MTLF1 and payslips marked as MTLF 2 annexed to the Memorandum of Reply.

It is submitted that termination of the contract was justified as the same was occasioned by lapse of the contract whose renewal was not possible as a result of the low supply of green tea leaves. Counsel cites the case of **SAMUEL CHACHA MWITA VS KENYA MEDICAL RESEARCH INSTITUTE (2014) eKLR** where it was held:

“Under these provisions of the law, parties entering into an employment relationship can enter into a written contract that is permanent, fixed term, periodic or seasonal contract based on the need, purpose or the interests of both parties or the persons involved. Once there is a written contract, the court will seek to give meaning to such a written contract based on its terms in determining any issue that may arise especially any dispute. The court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract.. .fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract.”

That the Claimant was paid all her outstanding dues and as such the Respondent does not owe the Claimant any of the sums claimed. That remuneration was clearly set out in each seasonal contract where it was stated that the Claimant’s pay would be calculated taking into account the number of days worked in the month.

It is further submitted that the Claimant’s position that the employment converted from seasonal to permanent employment is unsupported by evidence and should not be allowed. That the Claimant did not provide payslips to show that she was employed for six consecutive months and as such the employment could not automatically convert. Counsel cites the case of **JOSEAH KIPKORIR V KAPKATET TEA FACTORY LIMITED (2016) eKLR** where it was held:

“...the fairest indicator for the terms of service of the claimant are his pay advise slips annexed to the claim. These indicate that he was paid at the end of the month but for days worked in the course of the month, and this varied from month to month. This corresponds with the submissions of the respondent that the claimant was employed as a seasonal employee and not on permanent basis. The evidence of the parties tilts in favour of the respondent's case and I therefore find a case of no termination of the employment of the claimant by the respondent.”

It is further submitted on behalf of the Respondent that the Claimants computation of alleged entitlements due to her cannot suffice as her entitlements were clearly set out in each employment contract. On her claim for house allowance, the Respondent states that the same was not provided for in the respective Seasonal Employment Contracts and as such the Claimant cannot claim under the same. With regard to the claim for unpaid leave, the respondent submits that the same was only payable at the rate of one and three quarters day pay on pro rata basis for each completed month of service and that in any case, the same was always paid at the end of each month of service taking into account the number of days worked during the month.

The Respondent submits that the Claimant is not entitled to any of the prayers sought and prays for the claim to be dismissed with costs.

Determination

The issues arising for determination from the foregoing are –

- 1) Whether or not the claimant was a seasonal employee.
- 2) Whether or not the contract was unlawfully terminated and
- 3) Whether the claimant is entitled to the prayers sought.

It is not in dispute that the claimant was in the employment of the respondent from 2003 to December 2013. The claimant avers that the employment, though on fixed term contracts, was seamlessly renewed and she was in continuous employment from May 2003 to December 2013. The respondent however avers that the contracts were not continuous but rather intermittent depending on prevailing processing capacity.

The claimant has produced her payslips as proof and states she maintained the same payroll number 1259 throughout the period she worked. The respondent did not comment on the issue of the same payroll number.

I have considered the evidence on record, especially the fact that the claimant maintained the same payroll number. I have also considered the number of payslips produced by the claimant and in most cases she worked continuously.

I therefore find that the claimant’s contract, though expressed in fixed term contracts was continuous from May 2003 to December 2013.

The contract having been renewed continuously for over ten (10) years, the claimant has acquired a legitimate expectation that the contract would continue being renewed and that if for any reason the contract was not to be renewed, she would be given adequate notice of the non-

renewal. I thus find that the termination of the claimant's contract without notification of non-renewal was unfair.

I further find that having been in continuous employment for more than 10 years the claimant's employment could not be terminated by non-renewal without giving her reasons thereof.

For the foregoing reasons the claimant is entitled to the following remedies—

1) Reasonable notice as was held in the case of KNIGHT –V- KENYA AIRWAYS. I consider three months' notice to be reasonable in the circumstances as each of her contracts was for three months, and award the claimant three months' salary in lieu of notice in the sum of Kshs.55,710.

The claimant's pay was expressed to be consolidated. The clause on monthly pay in the last contract reads –

Monthly Pay

Your consolidated monthly pay will be Kshs.18,570 and based on the number of days worked in a particular month including the authorised rest days and public holidays.

The claimant is thus not entitled to house allowance over and above her base pay.

The claimant is not entitled to service pay as she was a member of NSSF as is evident from deductions in her payslips.

The claimant was paid leave at the end of each contract and therefore she is not entitled to leave as prayed.

The claimant is entitled to certificate of service and I direct that the respondent issues the same within 30 days from date of judgment.

Having found the termination of the employment unfair and taking into account all the circumstances of her case especially the length of service of over 10 years the fact that she was subjected to short term contracts without job security of tenure for over 10 years, the fact that she is not entitled to any terminal benefits and the fact that she did not contribute to the termination of her employment which was abrupt and without notice, I award the claimant 12 months' salary as compensation in the sum of Kshs.225,000.

The respondent shall pay claimant's costs of this suit and decretal sum shall attract interest at court rates from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 6TH DAY OF DECEMBER 2018

MATHEWS NDERI NDUMA

JUDGE