



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2057 OF 2012

MARTHA KERUBOCLAIMANT

VERSUS

EAST AFRICAN GROWERS LTD RESPONDENT

JUDGEMENT

1. In the Memorandum of Claim, the claimant's case is that she was employed by the Respondent in September, 2003 in the Hygiene Department until 6th setpember, 2012 when the Claimant was terminated from her employment. There was no notice or hearing before termination and during the period of employment she had received training in food hygiene practices and issued with a job card but not a contract of service.

2. The claim is also that the Claimant was earning Kshs.412.00 per day at the time of termination. She was verbally terminated without any reason. The Claimant is seeking notice pay; pay for rest days for the 9 years of service; unpaid annual leave for 9 years; service pay for 9 years; and compensation.

3. In evidence the Claimant testified that upon employment by the Respondent she would be at work for 6 or 7 days a week or more hours when there was a lot of work. She was a cleaner and then underwent training in hygiene at Kabete and was issued with a certificate in 2004. On 6th septemer, 2012 the Claimant was told that the Respondent had no work but there was no justifiable reason given. Upon termination the Claimant realised that her NSSF and NHIF dues were never paid.

4. The Claimant also testified that upon employment she was not given any contract but had a job card which she used to access the respondent's business premises.

5. Upon cross-examination, the Claimant testified that she would clock in every day at work. The daily wage was only paid after every two weeks and through a bank deposit. The Claimant remained in the continuous employment of the Respondent and was taken for training.

Defence

6. In defence, the respondent's case is that the Claimant was engaged by on an *ad hoc* bass in the hygiene department and paid at end of each day. The Respondent being in the business of horticultural produce and dependent on raw materials for processing in export only engaged the Claimant on a needs basis. The Claimant was paid a daily wage of Kshs.300.00 which was not on a continuous engagement. The Claimant was therefore a causal employee.

7. In 2004 the Claimant was made to undergo training procedures in food hygiene so as to be compliant

with procedures and standards of proper food hygiene since she was taken as a casual from time to time. Such training did not confer employment on permanent basis. As there was no express contract, the remedies sought are not due and claim should be dismissed with costs.

8. In evidence, the Respondent witness was Beatrice Annam, the human resource officer of the respondent. She testified that the respondent, due to its nature of business takes casual employees each day. Where there is a vacancy for a permanent job there must be an interview which was not the case for the claimant. The Claimant remained a casual employee on a day contract and based on work availability. The Claimant was issued with an ATM card so as to access the bank for her daily wage and due to security reasons. The permanent employees do not have a cash card. The casual employees were at all material times that they are not required daily but upon being taken in they receive training. Work at Respondent is seasonal and when work is low the permanent employees are able to attend.

Determination

9. The respondent's case is that the Claimant was employed as a casual employee on an *ad hoc* basis. This is contested by the claimant.

10. The law allow the employment of casuals but there are the parameters within which such employment should be based upon. Section 2 of the Employment Act defines who a *casual employee* is;

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.

10. A casual employee is paid at each end of day and work must end within 24 hours at a time. Where the work required to be undertaken by a casual continues or the nature of work to be undertaken is not reasonably able to be completed within the 24 hours or within a month, the employer has the option of issuing a written contract for seasonal, fixed-term or on a contract that is task or time specific. Such would prevent the employee being placed under circumstances of not knowing the nature of engagement and duration.

11. Where employment is not regulated by a written document, where such employment as a casual or on verbal terms continues for over a month, the provisions of section 37 of the Employment Act apply automatically. The employee becomes effectively a full time employee with work benefits.

12. The time/clock in sheets submitted in defence are not dated; such are done by one hand; these are records from an extract and it is apparent to the court that even where the Claimant is listed therein, the evidence of the Respondent is that the Claimant was engaged in work, she was not paid daily but after two weeks through the bank and while at work she underwent training so as to be good in her duties.

13. On the material presented before court, in terms of section 10(6) and (7), I find no credibility to the defence in terms of the Claimant only being employed for 3 days as set out in the work sheets submitted. Where the Claimant remained in the employment of the Respondent for periods of over one month, the wages paid in two weeks and not daily and that the Respondent took the time to have the Claimant trained so as to be effective in her work, the Claimant became a full time employee of the Respondent by operation of the law.

14. Termination of employment must be with notice, reasons and the employee must be given a hearing. Where there are no such procedures followed, the termination becomes unfair under the provisions of section 45 of the Employment Act.

Remedies

15. Notice pay is due in a case of unfair termination and where there was no notice issued. The Claimant is awarded Kshs.12,360.00.

16. The claim for rest days for 9 days per week is premised on the evidence that the Claimant worked for 6 to 7 days a week. The computation of the dues owing on this evidence was nil. Based on her own testimony, it is apparent the Claimant was not at work for 7 days per week continuously for the entire duration of 9 years. Even where the Respondent has not submitted any documents, the Claimant has not set out her claim in this regard clearly for the court to award. Such is declined.

17. The above assessment apply with regard to leave pay claimed for 9 years. On the evidence that the Claimant was at work for 6 or 7 days and without clarity as to the exact number of days owed for 7 full days a week, the evidence of not taking leave is left hanging. To award on this evidence and without the Claimant making any effort to set out her case would be to reward in a case not deserving.

18. The claim for service pay is premised on the fact that no statutory dues were remitted to NSSF and NHIF. On the basis that the Claimant was treated as a casual, such dues were not deducted or remitted. Section 35 requires an employer to remit statutory dues. Where there is no evidence of remittance, the Claimant is entitled to service pay for 15 days' pay for each full year served. The Claimant was employed in September, 2003 to September, 2012 all being 9 full years. Service pay is awarded at Kshs.55,620.00.

19. On the finding that the Claimant was unfairly terminated from her employment with the respondent, compensation is due. I find a compensation of one month as appropriate in this case at Kshs.12,360.00.

Judgement is hereby entered for the Claimant for;

(a) Compensation for Kshs.12,360.00;

(b) Notice pay Kshs.12,360.00;

(c) Service pay Kshs.55,620.00;

(d) Costs of the suit.

Delivered, dated and signed in open court at Nairobi this 3rd day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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