



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 30 OF 2017

(Before D. K. N. Marete)

KENYA PLANTATION &

AGRICULTURAL WORKERS UNIONCLAIMANT

VERSUS

FINLAYS (K) LIMITED.....RESPONDENT

JUDGEMENT

This matter came to court vide a Memorandum of Claim dated 9th June, 2017. The issue in dispute is there in cited as;

Victimisation and wrongful, unlawful and unfair dismissal of Peter Otiyang and Kipyegon Koros.

The respondent in a Reply to Memorandum of claim dated 15th September, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that as a union in this sector, she has a valid Recognition Agreement with the respondent. They have also negotiated several such agreements in their course of business.

It is her further case that the respondent employed the grievants in January 2007 and April 2010 respectively as seasonal employees. Mr. Peter was employed in the Engineering department as a cleaner, a job he held for three (3) years when the Respondent appointed him as a tractor driver. He was sometimes issued with new contracts and other times he worked without a contract. These contracts were signed and taken back by the employer and no copy was issued to the grievant.

The claimants other case is that Mr. Koros was employed in the Engineering Department as a cleaner with renewals of contracts which culminated in a fixed term contract on the instructions of the respondent. This *in toto* earned them a stint of 5 and 8 years service respectively.

The claimant's penultimate case is that 3rd August, 2015 and 31st August, 2015 the respondent unfairly and unlawfully terminated the service of the grievants on grounds of expiry of contract. This was reported and pursued *inter partes* but despite effort at conciliation and even the appointment of a conciliator, the matter ended in a deadlock. At the time of such termination, the grievants earned Kshs.12,300.00 and 10,200.00 respectively per month.

She prays as follows;

1. A declaration that the termination of the grievants is wrongful, unfair, unlawful and that it amounts to victimization;
2. (i) An order compelling the Respondent to reinstate the grievants without loss of benefits;
(ii) An order directing the Respondent to pay the grievants for the entire time they have been out of employment.
3. An order (should prayer (2) hereinafter fail) directing the Respondent to pay the grievants as follows;

	<u>Peter Otiyang</u>	<u>Koros Kipyegon</u>
i. Gratuity;	Kshs.45,099.99	Kshs.59,839.99
ii. Unspent leave;	Kshs.61,500.0	Kshs.00.00
iii. Payment in lieu of notice;	Kshs.12,300.0	Kshs.10,200.0
iv. Twelve (12) months' Compensation	Kshs.147,600.0	Kshs.122.400.0

4. Certificate of service

5. Costs of the cause

6. Interest on (2), (3) and (5) herein above.

The respondent's case is that the grievants were employed on a one year term as Ungraded General Worker and General Worker respectively beginning 1st August, 2013 and ending on 31st January, 2014. This was renewable and was indeed renewed on several occasions.

It is her other case that these fixed term contracts did not at any one time contemplate permanent employment and remained as such - *fixed term contracts*. The grievants therefore should not have expected any permanence in their terms of service.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was 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 was wrongful, unfair and unlawful. In this they sought to rely on the authority of section 43 (1) and 45 (2) (a) which provide the prerequisite of fair termination of employment as follows;

43 (1) in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 (2) A termination of employment by an employer is unfair if the employer fails to prove-

a) *That the reason for termination is valid;*

The claimant further seeks to rely on the authority of **Kenya Union of Domestic Hotel, Education Institution and Hospital Workes v. Northe Coast Beach Hotel eKLR (2014)** at paragraphs 13 and 18 where Rika, J. observed as follow;

...Consequently, even before looking at the various claims for terminal benefits, the answer with respect to the claim for unfair termination must be in favour of the Grievants. The Respondent refused to renew their contracts arguing that the fixed terms contracts had expired. The Grievants agreed to the terms of those contracts. The terms and conditions of employment contained in the CBA superseded all other terms and conditions that confer superior benefit to the Employee are to be upheld. The Grievants were entitled to regular employment; should have been treated as regularly engaged; and enjoy the substantive and procedural rights on termination of employment, under Section 41, 43 and 45 of the Employment Act 2007.

The respondent in support of her case and also in rebuttal of the claimant's case seeks to rely on the authority of **Samuel Chacha Mwita v Kenya Medical Research Institute (2014) eKLR**, where Mbaru, J. observed as follows;

*...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 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 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 o the employer. In other word, the proximate cause of 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...(Emphasis Ours.)*

The parties submit contrasting positions on the tenancy of the fixed term contract in respect of the terms of service. The claimant relies on clause 20 (d) of the Collective Bargaining Agreement dated 6th June, 2012 which provided as follows;

Any seasonal worker, who is required by management to continue with employment after six consecutive months' service, shall be deemed to be engaged as a permanent employee and his service as seasonal worker shall be taken into consideration for the purposes of calculating any long term benefits stipulated in this CBA.

It is her submission that the grievants put in long periods of service under specific service contracts or none of these thereby acquiring the status of permanent employees in terms of the CBA *inter partes*. I agree. This matter distinguishes itself from the ostensible findings of my sister, Mbaru, J. above in that here, there was a superior contract in terms of the subsisting CBA. This should have superseded the fixed term contract (s) *et al* involving in the instant case and borne a situation of permanent employment capable of unlawful termination at the close of the term or in any other circumstances. The termination on grounds of fixed term contract does not therefore suffice and a case of unlawful termination of employment ensues. And this answers the 1st issue for determination.

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

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

i. A declaration be and is hereby issued that the termination of the employment of the grievants by the respondent was wrongful, unfair and unlawful.

ii. That the grievants be and are hereby reinstated to employment with effect from 5th December, 2017 at 800 hours.

iii. That this reinstatement be effected without loss of benefits, promotion and emoluments, all in all.

iv. Six (6) months salary as compensation for unlawful termination of employment

a) Mr. Peter Otiyang Kshs.12,300.00 x 6 months = **Kshs.73,800.00**

b Mr. Kipyegon Koros Kshs.10,200.00 x 6 months = **Kshs. 61,200.00**

v. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 4th day of December, 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Miss. Omwaka for the claimant union.

2. Mr. Koech instructed by Bett & Company Advocates for the respondent.