



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT KERICHO**  
**CAUSE NO.20 OF 2015**  
**(as consolidated with Cause No.21 of 2015)**  
**(Before D. K. N. Marete)**

**MIKE KIBERA MIRANGA.....CLAIMANT**

**VERSUS**

**JAMES FINLAYS (K) LTD.....RESPONDENT**

**JUDGMENT**

This matter was originated vide a Memorandum of Claim dated 22nd September, 2014. It does not disclose an issue in dispute on its face.

The respondent in a respondent's memorandum of reply and submissions dated 2nd March, 2015 denies the claim and urges that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, he was an employee of the respondent. He worked from 2012 to 2013 when he was unlawfully terminated and was not paid his terminal dues. The termination was also without compliance with the Employment Act. The particulars of unlawful termination are as follows:

- a) *The Claimant Trade Union was not formed of the intention to declare the claimant redundant.*
- b) *No leave pay was given.*
- c) *No one month's salary in lieu of notice was paid.*
- d) *The required severance pay was not paid.*

It is the claimant's further case that during his employment he was grossly underpaid having regard to the Regulation of Wages (General) (Amendment) Order in force at the time. He was also not paid for overtime, rest days and public holidays. He prays as follows:

- a) *1 month pay in lieu notice*

*Basic + House allowance*

9024 + 1353 x 2 months

Kshs.20,754

b) *Service Gratuity*

22 days x years worked x Basic Allowance/26

26 days x 1 year x 9,024/30

Kshs.6,617

c) *Leave due*

26 days x years worked x Basic

+ House allowance/26

Kshs.10,377

d) *Compensation for unfair termination*

10,377 x 12 months

Kshs.124,524

**TOTAL CLAIM**

**Kshs.162,272/**

In the penultimate he prays for:

a) *A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the Respondent, he was not remunerated as required by law.*

b) *Payment of the sums of money claimed under paragraph 9 above.*

c) *Costs and interests.*

d) *Any other relieve the Honourable Court may deem fit to grant.*

The respondent's case is that the grievant was employed by the claimant on a five months fixed terms contract on 18th June, 2013. On 12th November, 2013, he was served with a two (2) weeks notice and on termination of contract in terms of clause 20 'c' (ii) of the Collective Bargaining Agreement (CBA). He was paid his terminal dues as follows:

*Wages*

*Kshs.10,708.44*

*Travel*

*Kshs. 425.00*

*Leave (accrued)*

*Kshs. 3,866.20*

***Total***

***Kshs.14,999.64***

The respondent therefore submits a case of lawful termination of employment and therefore lack of need for notice but was due served with the same. He denies a case for service gratuity, leave and 12 months compensation as being undue and untenable in the circumstances of the case.

The matter came to court variously until the 29th January, 2016 when it was consolidated with Cause No.21 of 2015 with this as the lead case. The issues for determination are:

1. Was there a termination of the employment of the claimant by the respondent?
2. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?

#### 4. Who bears the costs of this cause?

The claimant in his written submissions dated 9th February, 2016 reiterates his claim. This is as follows;

*“The claimant claims that he was employed from 2012 to 2013 and to support the claims, a NSSF contribution statement has been filed by claimant indicating the claimant was employed on 30th April, 2012 and in the same year 2012, there was contribution made to NSSF, therefore the respondent cannot deny the Claimant had worked for longer period in their employment that six months as purported.*

*Your Lordship after the claimant has shown this Honourable court that the claimant has been in employment for more than six months for the Respondents. The claimant did not merit to be given 2 weeks notice of termination of employment, therefore the same was done unlawfully and therefore the claimant, should be paid for wrongful termination of employment.”*

He further argues and submits that he was in employment from 30th April, 2012 to the end of 2013 which is more than one year and therefore S.35 C (c) (5) are applicable.

The respondent in his final submissions reiterates his case for lawful termination and seeks the authority of s.10 (3), Employment Act besides a Collective Bargaining Agreement (CBA) between the Kenya Tea Grower Association (KTGA) and Kenya Plantation & Agricultural Workers Union (KPAWU), clause 20 on the engagement of seasonal employees of which the claimant was a member.

The respondent in further support of her case sought to rely on the authority of **Anne Theuri vs Kadet Limited Industrial Cause No.368 (N) of 2009**, where Justice Rika held that the claimant in that case who was on a fixed term contract would not benefit notice pay as he was aware that the contract was coming to an end. There was no legitimate expectation for renewal of the contract. The same applies to this case.

Further, in a ruling delivered by Justice Mbaru in between **Samuel Chacha vs Kenya Medical Research Institute, Cause No.1901 of 2013** the judge referred to Case No.428 of 2001 **Kyangavo vs KCB** where it was held that contracts are made by parties and the court cannot vary the terms and can only interpret the same. Where there is a negotiated contract that has lapsed, the court cannot vary it for extension.

Again, in the authority of **SA Rugby (PTY) vs CCMA & Others [2006] 27 IL) 1041 (LC)** where it was held that at common law, an employment contract for fixed term terminates automatically upon expiry of the period unless the parties agree, expressly or tacitly, to renew it. In this case the parties did not agree to renew the contract and a notice was issued informing the claimant that the contract would not be renewed.

The parties do not interrogate or build their respective cases and the annexures thereto therefore leaving this court to a position of mere conjecture. This could perhaps be contributed to the straight forward and simple nature of the case.

It was always the duty of the claimant to build his case on a preponderance of evidence. This is supported by the celebrated doctrine of civil law that he who alleges must prove. This is not done in the circumstances of this case. He does not get out of his way to controvert the case of the respondent on the fixed terms contract or even its lapse or lack of it. A case of unlawful termination of employment is not therefore established by the claimant.

The respondent on the other hand propels a clear case of employment as a Seasonal (Ungraded staff) and thus overwhelming the claimant's case. On a test of preponderance of evidence this case is lost on the part of the claimant and tilts in favour of the respondent. I therefore make a finding of a lawful termination of the employment of the claimant by the respondent and hold as such. And this answers the 1st issue for determination.

On the above finding of the 1st issue for determination, the 2nd and 3rd issues dissipate into nothingness. These are entirely lost. The claimant would not be entitled to the relief sought having lost on a case of termination of employment.

I am therefore inclined to dismiss the claim with orders that each party bears their own cost of the claim. This clears all the issues for determination.

Delivered, dated and signed this 19th day of May 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Rugut instructed by Chepkwony & Company Advocates for the claimant.
2. Mr. Masese instructed by the Federation of Kenya Employers for the respondent.