



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.18 OF 2015

(Before D. K. N. Marete)

ALEX OTUNDO OGEMBO.....CLAIMANT

VERSUS

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

JUDGMENT

This matter was brought to court by way of a Memorandum of claim dated 22nd September 2014. It does not disclose an issue in dispute on its face.

The respondent vide a Respondent's Memorandum of Reply and submissions dated 4th June, 2015 denies the claim and prays 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 2006 and 2013 when the respondent unlawfully terminated his services and also refused to pay his dues. This was in contravention of the Employment Act, 2007. The particulars of unlawfulness are;

- a) *The Claimant trade union was not informed 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.*

The claimant's further case is that in the course of employment, he was grossly underpaid in terms of the Regulation of wages (General) (Amendment) in force at the time besides non payment for overtime, rest days and public holidays worked.

He prays as follows;

- a) *1 month pay in lieu notice*

Basic + house allowance

	$9024 + 1353.6 \times 2 \text{ months}$	<i>Kshs.20,754</i>
b)	<i>Service gratuity -</i>	
	$22 \text{ days} \times \text{years worked} \times \text{basic}/30$	
	$22 \text{ days} \times 8 \text{ years} \times 9024/30$	<i>Kshs.52,940</i>
c)	<i>Leave due</i>	
	$26 \text{ days} \times \text{years worked}$	
	$\times \text{basic} + \text{house allowance}/26$	
	$26 \text{ days} \times 8 \text{ years} \times 10,377/26$	<i>Kshs.83,016</i>
d)	<i>Compensation for unfair termination</i>	
	$\text{Gross pay} \times 12$	
	$10,377 \times 12 \text{ months}$	<i>Kshs.124,524</i>
	TOTAL CLAIM	<i>Kshs.281,234</i>

In the penultimate he seeks relief as follows;

- 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 its business is agricultural based and therefore its workforce is employed on permanent, seasonal/fixed term contracts. This is negotiated and captioned in the Collective Bargaining Agreement (CBA) with Kenya Plantation & Agricultural Workers Union (KPAWU) as union.

The claimant was employed on a five months fixed term contract on 20th March 2014 at Marinyn Estate. On 20th July 2014, he was served with a two weeks notice confirming that his contract was coming to an end as provided by clause 20 (c) (ii) of the CBA. On such expiry, he was paid his terminal benefits. The respondent therefore denies the claim for being unmerited and prays that it be dismissed with costs.

The matter variously came to court until the 28th January, 2016 when the parties agreed on a disposal of the same by way of written submissions.

The issues for determination therefore 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 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. The parties hold diametrically opposed version on this. The claimant in his written submissions dated 9th February, 2016 reiterates his case and submits that his termination of the employment was without notice and again, he was not paid his dues in contravention of the Employment Act. This was in contravention of Section 40 of the Employment Act which provides for redress in situations of breach of the employment contracts by employers.

The respondent in her written submissions also reiterates her case of a fixed term contract of employment for the claimant that had lapsed on time and that the claimant was always aware and was notified of the lapse of contract.

The respondent at Appendix 2 of the annexures to the defence, displays the letter of appointment of the claimant as a seasonal (ungraded staff) which offers his employment as a seasonal plucker. At appendix 2, the respondent again annexes a letter of termination of the seasonal employment of the claimant. The claimant in support of his case annexes a letter of suspension dated 23rd October, 2013 for attempted arson.

It was always the duty of the claimant to demonstrate and prove his case on a balance of probability and also preponderance of evidence. This is not done. He does not get out of his way to controvert the case of the respondent on the fixed term contract or even it lapse or lack of it. This case is therefore lost on the part of the claimant. It wholly tilts in favour of the respondent. I therefore make a finding of no termination of the employment of the claimant by the respondent and hold as such.

On the above finding of the 1st issue for determination, the 2nd and 3rd issues are lost. There was no unlawful termination of employment as such and also the claimant would not be entitled to the relief sought having lost on a case of termination.

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 **17th** 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.