



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT KERICHO
CAUSE NO.16 OF 2015
(Before D. K. N. Marete)

KENNEDY OURU OKISE.....CLAIMANT

VERSUS

JAMES FINLAYS (K) LIMITED.....RESPONDENT

JUDGMENT

The matter was brought to court vide a Memorandum of Claim dated 22nd September, 2014. It does not disclose any issue in dispute on its face.

The respondent in 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 times material to this cause, he was employed by the respondent. This was at times between 2010 and 2013 when his services were unlawfully terminated with no payment of terminal dues. The claimant contends that the termination was unlawful as follows:

- a) *The claimant trade union was not informed of the intention to declare the claimant redundant.*
- b) *No leave pay was given.*
- c) *No two 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 in the course of employment, he was grossly underpaid in terms of the Regulation of Wages (General) (Amendment) Order then in force and also was not paid for overtime, rest days and public holidays worked. He prays as follows:

- a) *Two months 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/30 days

Kshs.19,852/-

c) Leave due

26 days x years worked x basic

+ house allowance/26

26 days x 3 years x 10,377/26

Kshs.31,131/-

d) Compensation for unfair termination

Gross pay x 12

10,377 x 12 months

Kshs.124,524/-

TOTAL CLAIM

Kshs.196,261/-

In the penultimate, he prays as follows:

- a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment, 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 the workers' union.

The claimant was employed on a five months fixed term contract on 22nd October 2013 at her Marinyn Estate. On 12th February 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 as follows:

Wages	Kshs.14,108.42
Travel	Kshs. 550.00
Leave (accrued)	Kshs. 3,092.96
Total	Kshs.17,751.38

The respondent therefore denies the claim for being unmerited and prays that the same 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. Whetyehr there was 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 are diametrically opposed on this.

The claimant in his written submissions reiterates his case that the termination of his employment was contrary to S.40 of the Employment Act. He was relieved of his duties but not adequately remunerated as per the law and no notice of termination was issued. He therefore urges the court to declare the termination unlawful and that he was not remunerated in accordance with the law.

The respondent in her written submissions also reiterates her case of a fixed term contract of employment for the claimant that lapsed on time and that the claimant was always aware and was also notified of the lapse of contract. It is her further submissions that the employment contract lapsed by effluxion of time and therefore there was no termination of employment as claimed.

The claimant in support of his case annexes the following documents to the claim:

- i. A letter of demand dated 18th August, 2014*
- ii. A document on computation of the terminal benefits of the claimant*
- iii. A letter of termination of seasonal employment dated 1st February, 2014 to the claimant*
- iv. Various pay advice slips for the claimants*
- v. A copy of the claimant national identity card*
- vi. A statement by the claimant and*
- vii. The claimant's witnesses*

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 him 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 her case annexes a letter of suspension dated 23rd October, 2013 for attempted arson.

The respondent in support of his case further annexes the following documents in support of his defence;

- i. CBA between KPAWU and the KTGA dated 20th June 2012*
- ii. The respondent's letter of appointment as seasonal ungraded staff*
- iii. Letter of termination of seasonal employment dated 12th February, 2014*
- iv. Pay advice slip for the period of 31st January, 2014 to 1st of March 2014*

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** *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.*

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 no 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 & 3rd issue dissipates 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 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.