



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 429 OF 2013

**KENYA PLANTATION & AGRICULTURAL
WORKERS UNION..... CLAIMANT**

V

FONTANA LIMITED..... RESPONDENT

JUDGMENT

1. In a Memorandum of Claim lodged with the Court on 10 December 2013, against Fontana Ltd (Respondent), the Kenya Plantation & Agricultural Workers Union (Union) stated the issue in dispute as *unfair termination of services and Refusal to pay Charles Nyongesa's terminal dues*.
2. The Respondent filed a Response on 27 January 2014 and the Cause was heard on 3 June 2015 and 19 January 2016.
3. The Union filed its written submissions on 18 February 2016 while the Respondent's submissions were filed on 23 March 2016.
4. The Court has considered the pleadings, evidence and submissions, and adopts the issues for determination as identified in the Union's submissions, with a few modifications.

Whether contract expired or a case of dismissal/desertion

5. According to the Union's Memorandum of Claim, the Grievant was informed to go home after he resumed duty from leave on 7 April 2012 and wait to be called. Attempts by the Grievant to know his employment status thereafter were inconclusive.
6. During testimony, the Grievant stated that although he was not initially issued with a written contract, he got a 6 month written contract on 6 July 2007 and when it expired, it was renewed for a further 8 months.
7. The last written contract, according to the Grievant was signed on 6 June 2011 (in cross examination he gave the date as 28 June 2011) and this contract was to expire on 28 February 2012, but he continued working until 23 March 2012 though there was no written extension or renewal.
8. He also stated that on 23 March 2012 he proceeded on a 14 day leave but when he resumed on 7 April 2012, he was not allowed into the workplace after which he reported to the Union.
9. The Respondent on the other hand contended that the Grievant's contract automatically expired on 28 February 2012, but he declined to renew it, though it was renewable.
10. The Respondent's Human Resources Officer told the Court that the Grievant's contract expired and he took 14 *pro rata* leave (which was pending) but returned only after 1 month and he declined to sign a new contract as instructed by a supervisor and Head of Department.
11. The witness denied that the Grievant worked after 28 February 2012 though his March 2012 NSSF contributions were paid.

12. The Respondent also called the Grievant's Supervisor to testify. He more or else echoed the testimony as advanced by the Human Resources Officer and stated that the Grievant took a 1 month break instead of 14 days after the expiry of the contract, but refused to be appraised when he returned before execution of a new contract.
13. It is not disputed that the Grievant was on a contract expiring on 28 February 2012. The provision on Period of Contract was to the effect

This contract for work is valid only for the period dated and signed. Your services with the company will cease at the end of the working days of contract date listed. If there is additional work the company may request you to sign another contract for further period of time. Precious quality of work, co-operation and your capability to work under pressure will be considered when deciding for renewal.

14. It is clear from the evidence that the Grievant's contract expired on 28 February 2012, and that any renewal or extension was not automatic. It was renewable at the option of the Respondent within certain parameters.
15. The Grievant confirmed proceeding on leave at the end of the contract. The Respondent's witness(ess) also confirmed that the Grievant proceeded on leave after the expiry of the contract.
16. Accepting that the contract had expired, it is not clear to the Court under what authority or mandate the Respondent allowed the Grievant to proceed on a 14 day leave.
17. Leave is a right or entitlement when the employment relationship is still subsisting and when an employee has pending leave days at expiry of contract, the logical and lawful thing to do is to commute and pay in cash the pending days.
18. The Grievant contended that he continued working after the expiry of the contract without a formal extension or renewal. He also stated that the Respondent had a clocking system to capture attendance.
19. The Respondent's second witness confirmed as much. Nevertheless, no the attendance records were not produced to rebut the Grievant's testimony.
20. The records would have made it easy to establish whether the Grievant worked between 28 February 2012 and 23 March 2012 when he was granted the 14 day leave.
21. The Grievant also produced his NSSF Statement of Account which shows that the Respondent remitted his March 2012 contributions.
22. NSSF contributions are payable before a certain date after the payroll month and the February 2012 contributions therefore were due sometime in March 2012.
23. Considering the failure to produce the attendance records, and that the Respondent granted the Grievant leave at a time when his contract had allegedly expired, the Court finds a factual presumption arises that the Claimant was serving on same terms and conditions as the expired contract at-will (a discredited and controversial doctrine in modern times), for an unknown term, which could be determined by appropriate notice within the statutory protections in the Employment Act, 2007.
24. The Court therefore reaches a conclusion that the Grievant's continued serving as an employee after 28 February 2012 and was therefore dismissed by the Respondent.

Whether dismissal was fair and lawful?

25. There was no suggestion that the Respondent fulfilled or complied with the protections granted to employees by section 41 of the Employment Act, 2007 (procedural fairness).
26. Further, the Respondent did not attempt to prove the reasons for dismissing the Grievant (section 43 of the Act) or that the reasons were valid and fair.
27. The feeble attempts or the disagreements surrounding the appraisals as testified by the Respondent's second witness do not meet the statutory threshold.
28. The Court finds that the Grievant's dismissal was unfair and not in accord with justice and equity.

Appropriate remedies Gratuity

29. The relationship between the parties was governed by a collective bargaining agreement. Clause

- 24 of the agreement provided for payment of gratuity after 5 years continuous service.
- 30.The Grievant's testimony that he was employed on 26 December 2005 was not controverted though written contracts were issued only from 15 June 2009.
- 31.The Court would therefore find that the Grievant served for about 7 years and would be entitled to gratuity. However, he did not attempt to quantify the same. The head of relief is therefore declined.

1 month pay in lieu of notice

- 32.The Grievant's basic wage at time of dismissal was Kshs 4,300/- and he is entitled to an equivalent as pay in lieu of notice.

Annual leave travelling allowance

- 33.Clause 6(d) of the collective bargaining agreement provided for Kshs 2,300/- leave travelling allowance.
- 34.The Respondent did not suggest this had been paid even on a *pro rata* basis.
- 35.The Court finds that the Grievant is entitled to leave travelling allowance.

Pay for days worked

- 36.The Grievant is entitled to wages up to 23 March 2012. He did not quantify the same and the relief is declined.

Compensation

- 37.The Grievant served the Respondent for about 7 years and considering that the Court has declined to award gratuity and unpaid wages for lack of quantification, the Court would award him the equivalent of 12 months gross wages as compensation (gross wage was Kshs 5,800/-).

Conclusion and Orders

- 38.The Court finds and holds that the dismissal of the Grievant was unfair and not in accord with justice and equity and awards him

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|----------------------------------|---------------|
| a. 1 month pay in lieu of notice | Kshs 4,300/- |
| b. Leave travelling allowance | Kshs 2,300/- |
| c. Compensation | Kshs 69,600/- |

TOTAL **Kshs 76,200/-**

- 39.Each party to bear own costs considering the ongoing social partnership between the parties.

Delivered, dated and signed in Nakuru on this 3rd day of May 2016.

Radido Stephen

Judge

Appearances

For Union Mr. Muli, Legal Officer, Kenya Plantation & Agricultural Workers Union

For Respondent Mr. Onyancha instructed by Wachira Mbuthia & Co. Advocates

Court Assistant Nixon