



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 757 OF 2011

(Before Hon. Justice Maureen Onyango on 26.1. 2015)

VERONICA KATUKU & ANOR CLAIMANTS

-VERSUS-

EAST AFRICAN GROWERS LTD RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 10th May 2011 and filed in court on 20th June 2011 Veronica Katuku Kyeli and Susan Odaki Abungu allege unlawful/unfair termination by the respondent M/s East African Growers Limited and seek the following orders:-

- (a) A declaration that the dismissal or termination of the claimants' employment was unlawful and unfair and the claimants are entitled to their terminal dues and compensatory damages.**
- (b) An order for the respondent to pay the claimants their due terminal benefits and compensatory damages:-**
 - 1st claimant, Veronica Katuku Kyeli – Kshs 275,400/=**
 - 2nd claimant, Susan Odaka Abungu – Kshs 206,790/=**
- (c) Interest in (b) above from the date of filing suit till payment thereof.**
- (d) Cost of this suit plus interest thereon.**

The respondent filed its response to the claim on 29th February 2012 in which it denies the claim by both claimants and avers that the claimants were seasonal employees and their contracts were oral, that the claimants persistently absented themselves from duty and that this culminated in them being summarily dismissed. The respondent further avers that the claimants, being casual employees, were not entitled to annual leave. The respondent further avers that the claimants left employment after refusing to sign employment contracts introduced by the respondent which would see them being paid salary monthly because they were used to payment on a daily basis. The respondent further avers that the claim is time barred as it was not filed within 3 months from the date of termination as provided by the law.

The case was heard on 19th June and 25th September 2013. Mr. Makokha instructed by Namada & Co.

Advocates appeared for the claimants while Mr. Nyaberi instructed by Omwoyo, Momanyi Gichuki & Co. Advocates appeared for the respondent.

Mr. Makokha withdrew the case of the 2nd claimant Susan Odaki Abungu and the case proceeded with the 1st claimant's case only. The claimant thereafter filed written submissions. The respondent however did not file written submissions even after the time for filing the same was extended severally.

The claimant's case is that she was employed by the respondent on 10th April 1999 to pack French beans. She was not given a letter of appointment but was issued with an employment identification card which she also used to withdraw her wages. She worked daily from 6.30 am to 6.30 pm or later, depending on quantity of work, for 6 days every week. She was paid daily and only signed for payment. She worked continuously until 15th April 2010 when a supervisor by the name Obura told her that there was no more work and she should go back home. Other workers continued working. She was never given notice. She never went on annual leave and was never paid in lieu of leave for the entire period she worked. She was not a member of NSSF or NHIF. She was never given a letter of termination of employment. She prayed for payment as claimed in the memorandum of claim. She denied opposing the introduction of employment contracts which would change the mode of payment of her wages from daily to monthly.

The respondent called Beatrice Anam RW1 – The Human Resource Assistant who testified that East African Growers Group of Companies comprised of Wilham Kenya Ltd, Shalimer Flowers and Maya Freight. She testified that the group employed three categories of employees; permanent, contract and casual. The claimant was a casual paid Kshs 300/= at the end of each day. Casuals do not take annual leave because they worked only upto the end of the day. The respondent at one time offered the claimant payment on contract but she refused to sign because she was used to payment on a daily basis. The claimant being a casual was only entitled to a day's notice. They were not entitled to service pay. She urged the court to dismiss the claim.

In the claimant's written submission, the issues for determination have been set out as follows:-

- 1. Was the claimant in continuous employment of the respondent.**
- 2. What was the legal status of the claimant's employment with the respondent.**
- 3. Was the claimant dismissed by the respondent.**
- 4. Is the claimant entitled to her prayers.**

I will adopt the issues as set out in the claimant's submissions.

1. Whether the claimant was in continuous employment of the respondent:-

The claimant testified that she worked continuously for 6 days every week from 10th April 1999 upto 15th April 2010 when she was told by Mr. Obura the supervisor to go away. RW1 testified that the claimant was a casual and worked only when work was available. She however could not state when the claimant started working as she had records for only January, February and March 2010. Section 10(7) of the Employment Act provides that where an employer fails to produce records it is the burden of the employer to prove or disprove an alleged term of contract. Employment dates of employees constitute part of records that employers are required to keep under Section 10 and 74 of the Employment Act.

The foregoing being the case, I find that the respondent has failed to disprove that the claimant starting working with the respondent on 10th April 1999 and hold that she was in continuous employment until her employment from 10th April 1999 was terminated by the respondent on 15th April 2010.

2. Legal status of claimant's employment:-

The respondent's case is that the claimant was a casual and did not work continuously. As I have already

found above, the claimant was in continuous employment of the respondent from 10th April 1999 to 15th April 2010. Section 37(1) (a) of the Employment Act provides that an employee in continuous employment for one month automatically converts to monthly contract terms by operation of the law. Having worked for more than 1 month continuously the claimant was not a casual but monthly contract employee.

3. Whether claimant was dismissed by the respondent:-

The claimant testified that on 15th April 2010 she was told by the supervisor Mr. Obura not to report to work after that day. RW1 however stated that Mr. Obura was not a supervisor but a team leader and was not authorized to recruit or terminate the contract of any employee. No evidence of Mr. Obura's position or his roles and duties was produced. No reason was given by the respondent why Mr. Obura was not called to testify on what transpired on 15th April 2010 or to controvert the evidence of the claimant. Apart from denying Mr. Obura's capacity to terminate employment of any employee, the respondent did not deny that he indeed terminated the employment of the claimant.

The definition of "employer" in the Employment Act includes an agent, foreman, manager or factor of the employer. A foreman is a person in charge of a group of workers and a team leader would therefore fall within the definition of a foreman. Mr. Obura as a team leader, had the ostensible authority to act on behalf of the employer. The respondent did not produce any evidence to show that the claimant had been made aware or was aware that Mr. Obura had no powers to dismiss an employee.

The procedure for dismissal is provided for in Section 41 of the Act. The respondent did not comply with the same. The reason given for termination, that the claimant refused to sign a contract, was never proved. No copy of the contract alleged to have been issued to the claimant was produced nor was the person who is alleged to have issued it to her called to testify.

The termination of the claimant's employment was in the circumstances unfair and I find accordingly.

4. Whether the claimant is entitled to the prayers sought:-

The claimant prayed for notice, leave, service pay and compensation.

Having been terminated without notice, I grant her 30 days pay as notice in the sum of Kshs 9,000/= based on her daily wage of Kshs 300/= per day for 30 days.

RW1 confirmed that the claimant did not take leave as according to the respondent, she was not entitled to the same since she was a casual. Section 28 of the Employment Act provides for annual leave for every employee upon completion of 2 months on *pro rata* basis, irrespective of the nature of employment. The claimant is therefore entitled to leave for the entire period of employment from 10th April 1999 to 15th April 2010, a period of 11 years. This translates to 231 days based on 21 days per year. At the rate of Kshs 300/= per day this amounts to Kshs 69,300 which I award her.

Having not been a member of NSSF or any other retirement benefits scheme, the claimant is entitled to service pay for 11 years as provided in Section 35(5) as read with 35(6) of the Act. I award her 15 days pay per year worked in the sum of Kshs 49,500/=.

The claimant further prayed for maximum compensation in the sum of Kshs 108,000/=. Having worked for 11 years and taking into account all the circumstances of her case, I award her 12 months salary as compensation in the sum of Kshs 108,000/=.

The claimant further prayed for costs and interest. Having been successful in her claim I award her costs. I also award her interest on decretal sum at court rates from date of judgment.

Orders accordingly.

Dated and delivered in Nairobi this 26th day of January, 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)