



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 1777 OF 2011**

**BETWEEN**

**FLORENCE NDINDA MUTHOKA.....CLAIMANT**

**VERSUS**

**EAST AFRICAN GROWERS LIMITED .....RESPONDENT**

*Rika J*

**CC. Mr. Kidemi**

*Mr. Makokha and Ms. Akhaabi instructed by Namada & Company Advocates for the Claimant*

*Mr. Nyaberi instructed by Omwoyo, Momanyi, Gichuki and Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. The Claimant filed her Statement of Claim on 18<sup>th</sup> October 2011, to which the Respondent replied in a Statement of Response filed on 23<sup>rd</sup> May 2012. The Claimant gave evidence and closed her case on 16<sup>th</sup> May 2013, while the Respondent called its Human Resource Assistant Beatrice Anam, who testified on 4<sup>th</sup> July 2013 when the hearing closed.
2. The Claimant's position is that she was employed on 7<sup>th</sup> April 1997 as a Packer. She packed horticultural products for the Respondent for export. She was not availed a letter of employment, worked 6 days a week, at the rate of Kshs. 310 per day. She was bereaved on 8<sup>th</sup> June 2009, sought leave of 2 days, which was granted by her Supervisor Mr. Koech. When she reported at the end of bereavement, Mr. Koech refused to let her continue with her work. There was no termination letter given, just a word of mouth to discontinue working.
3. She testified that she was in the course of her employment given recommendation letter. She was not a seasonal worker, but in continuous employment. She craves the assistance of the Court by grant of the following orders:-

- a. A declaration that termination was unfair;
- b. One month salary in lieu of notice at Kshs. 9,100;
- c. Annual leave pay for the period in service at Kshs. 9,100 x 12 years =Kshs. 109,200;
- d. Service pay at 18 days' salary for every completed year of service at Kshs. 65, 200; and
- e. 12 months' salary in compensation at Kshs. 109,200

Total.....Kshs. 293,020

She also claims interest on this amount from the date of filing of the Claim. She seeks to be paid costs of the Claim.

4. Cross-examined, she stated that she was not supplied with a letter of employment. She did not have any document describing her duties. She was paid every Saturday, through the Diamond Bank Automated Teller Machine. She was never paid in cash. There was no time she was paid in arrears of one month. She was not employed on casual terms. The letter of recommendation issued to her by the Respondent after she came from the burial, dated 29<sup>th</sup> March 2010, stated she worked on and off basis. Mr. Koech and another Supervisor called Walter had the power to employ. Employees would queue every morning and show their Diamond Bank ATM cards to be allowed into the Respondent's premises to work. Some of the ATM card-holders would be denied entry. They were allowed to work in the neighbouring companies.

5. Beatrice Anam testified she did not see a personnel file in the name of Florence Ndinda Muthoka at the Respondent. Beatrice looked at the Muster Roll and Labour Payment Sheet, and found the Claimant's name in them. She was casual, paid on a daily basis. She was paid Kshs. 310 per day. ATM card was not evidence of permanent employment. It was a system put in place by the Respondent for security reasons. There was no time the Claimant was paid money lumpsum in a month. Horticultural business is very sensitive and seasonal. It was not possible to issue casual employees with employment or termination letters. The letter of recommendation given to her was clear she worked on and off. Casual employees worked in other neighbouring companies whenever they were not taken in by the Respondent. Beatrice prays for the dismissal of the Claim.

6. Responding to questions from the Claimant's Advocate, Beatrice stated that the Claimant used to work as shown in the Muster Rolls. Employees signed the Labour Sheet on receiving payments. There was nothing to dispute the assertion that the Claimant worked for 6 days in a week. Seasons dictated production. Horticultural products are supplied to the Respondent throughout the year. The Respondent was in business continuously. Paragraph 7 of the Statement of Response states the Claimant was summarily dismissed. Paragraph 17 states she was offered a contract to sign which she declined. She just left employment of her own free will. The Respondent urges the Court to dismiss the Claim.

*The Court Finds and Awards:-*

7. It is ludicrous to suggest that the Claimant's employment relationship with the Respondent, from 7<sup>th</sup> April 1997 to 8<sup>th</sup> June 2009, was casual or seasonal. This is a cumulative period of 12 years. The Respondent conceded in cross-examination that it is in business throughout the year. It is packaging and exporting horticultural products throughout the year. The term 'seasonal' may apply to employees in the farms from which the Respondent sources its products; but is a term that cannot hold true in the case of employees of a Horticultural Export business, which is open and running throughout the year.

8. Section 37 of the Employment Act 2007 provides:-

*“Notwithstanding any provisions of this Act, where a casual employee-*

*[a] works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month;*

*[b] performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more-*

*the contract of service shall be deemed to be one where wages are paid monthly and section 35 [1] [c] shall apply to the contract of service.’’*

In any dispute involving casual terms of employment, the Industrial Court under Section 37 [4] of the Act has the discretion to vary the terms, and declare such an employee to have been employed on regular terms, and extend the full benefits of the Employment Act 2007, to such an employee.

9. The Claimant worked for 12 years, and whether she was on and off in a given week, would not result in her relationship with the Respondent being termed as casual or seasonal. She is properly to be treated as a regular employee, entitled to all the employment protections and social security provisions, given under the Employment Act 2007.

10. The Respondent states in its Response paragraph 7, that it summarily dismissed the Claimant. Other arguments by both Parties on the manner of exit are neither here nor there, the word of the employer on this being the conclusive evidence on how the Claimant left employment. The questions that follow the findings in the preceding paragraphs are these-:

- a. Whether there was valid reason or reasons for the decision to summarily dismiss the Claimant.
- b. Whether the decision was carried out fairly.
- c. Whether the Claimant is entitled to compensation and terminal benefits as prayed.

11. The Respondent proceeded from the wrong premise, holding the Claimant to have been a casual or seasonal employee, and therefore not entitled to the protections and guarantees of the Employment Act 2007. There was no need in the mind of the Respondent to justify termination, or act fairly in termination, as the Claimant was casual or seasonal, whose rights and obligations ended at the close of the day or end of the season. Having found that the Claimant was neither casual nor seasonal employee, the Court must then find that termination was not justified, there was no valid reason or reasons given by the Respondent for termination, and fair procedure was not met, as Sections 41, 43 and 45 of the Act demand. The Claimant is entitled to compensation.

13. The Claimant is likewise entitled to one month salary in lieu of notice at Kshs. 9,100. Service pay is granted at 15 days' salary for each completed year of service. The Respondent did not attempt to show it had placed the Claimant in any Pension Scheme, and service pay is therefore merited. 15 days' salary at the rate of Kshs. 9,100 per month for 12 years would result in a figure of Kshs. 63,000. There was no evidence that the Claimant was ever allowed to take her annual leave for 12 years, the Respondent believing as concluded, that the Claimant was casual or seasonal employee. She is entitled to 252 days of annual leave or the equivalent of 21 days' salary for each of the 12 years at Kshs. 88,200. Compensation is allowed at 3 months' salary at Kshs. 27,300. In sum-:

- a. ***Termination of the Claimant's contract was unfair;***
- b. ***The Respondent shall pay to the Claimant one month salary in lieu of notice at Kshs. 9,100; three months' salary in compensation at Kshs. 27,300; service pay at Kshs. 63,000; and leave pay of Kshs. 88,200- total Kshs. 187,600;***
- c. ***The full amount be paid by the Respondent to the Claimant within 30 days of the delivery of the Award; and***
- d. ***No order on the costs***

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of January 2014**

**James Rika**

**Judge**

