



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 743 OF 2011

JOYCE MUENI WAMBUACLAIMANT

VERSUS

EAST AFRICAN GROWERS LTD.RESPONDENT

Mr. Makokha for Claimant.

Mr. Nyaberi for Respondent.

JUDGMENT

The suit was brought by way of a Memorandum of claim dated 11th May, 2012.

The facts on which the claim is founded are that, the Claimant was employed by the Respondent as a general labourer in August, 1998. That she worked continuously in that capacity until November, 2007, where upon her request to be retired on medical grounds following an accident that had incapacitated her, the request was not accepted by the Human Resource Manager who simply went ahead to terminate her employment. That the termination was summary in nature and the Claimant was not given any opportunity to explain why the termination should not take place.

The Claimant states that the termination was wrongful and without any lawful cause or justifiable reason.

That she was not paid any terminal benefits upon termination, was not paid for leave days not taken for the entire period of nine (9) years service, was not paid in lieu of notice and was not paid service gratuity which ought to be computed at 18 days salary for every completed year of service.

She also claims maximum compensation of twelve (12) months salary for the wrongful and unfair termination. At the time of termination she earned Kshs.9,000/= per month.

The Claimant states that inspite of demand and notice of intention to sue having been issued, the Respondent has failed to make good her claims.

Response.

The Respondent opposes the entire claim by a Memorandum of Response dated 15th August, 2011 in which it denies;

- i. *Ever employing the Claimant and in the alternative states that if the Claimant ever worked for it, it must have been in a temporary capacity as a casual.*
- ii. *The identity card no. 7408495 produced by the Claimant as evidence of her employment with the Respondent was not by itself evidence of employment, but also issued to facilitate payment through the bank.*
- iii. *The Respondent's response is speculative as to the nature of the Claimant's employment and was not able to produce any employment and/or payment records.*
- iv. *The Claimant was dismissed but left on her own volition upon being asked by the Respondent's Human Resource Manager to sign a contract, a thing she refused.*
- v. *That the Claimant was entitled to any benefits at all, as she was a daily paid casual.*

The Respondent submits that the suit is without foundation and should be dismissed.

Testimony.

The Claimant testified under oath and told the court that she was employed by the Respondent to pack produce of French beans and fruits for export. That she was not given a letter of employment. That she worked from Monday to Saturday from 6.30 a.m. till 7.00 p.m. in the evening. That she was paid Kshs.140/= per day until it was increased to Kshs.300/= per day in November, 2007. That she clocked in by placing her hand on a machine when she came in and went out and produced an identity card.

That in 2005, she had a motor vehicle accident while at work. That herself and fellow employees were being transported in a group but she sustained most injuries. She was admitted in Nairobi West Hospital for two (2) months.

Upon discharge, she continued to work while attending out-patient clinic. The doctor however recommended that she retires on medical grounds as the work place was cold and not conducive to her health.

That she reported the matter to the company nurse, **Ms. Salome** and a **Mr. Auma**, a manager. The manager immediately terminated her services

That she received compensation for the injuries sustained assessed at 30% disability.

She prays to be paid Kshs,9,000/= in lieu of notice calculated at Kshs.300/= times 30 days; Kshs.81,000/= in lieu of leave days not taken for the nine (9) year period. She states that she did not apply for the leave and was not given any; and payment of service gratuity for nine (9) years at the rate of 15 days salary for each completed year of service.

She withstood the cross-examination well and her evidence was consistent and credible. She stated that she had continued to work well though on a slower scale, whilst undergoing physiotherapy. She was doing light jobs.

She was not a union member and was not aware of the Collective Bargaining Agreement.

She confirmed that she was paid daily for the entire period and she worked daily as earlier explained. In the beginning, she was paid in cash but later, withdrew the money from an ATM. The work was performed in shifts. She worked on one table with a team of eight (8) employees daily.

Mrs. Beatrice Anam, testified on behalf of the respondent. She was a Human resource Assistant from the year 2008 to date. She told the court that her duties included recruitment, training and development of staff. That she had access to all employees files. That there were categories of workers, namely casuals,

permanent and contract employees.

That she did not see any record of the Claimant and her name was not in the permanent or contract list of employees. She was unable to confirm when the Claimant joined the employ of the Respondent and she speculated that she must have been a casual if at all she was employed by the Respondent. She told the court that she joined the Respondent after the Claimant had left in 2007.

She told the court further that casual employees were reduced from time to time depending on the produce.

She added that casuals are not given leave but may go on leave if they work for six (6) continuous days. She denied that the Claimant's employment was terminated.

She said she had no evidence to refute the claims by the Claimant that she had served continuously for nine (9) years.

She added that the Claimant is in the group that resisted to be put on contract though she has no documentary evidence to that effect. She explained that Mr. Auma was no longer working for the Respondent, hence he could not be called to testify.

Conclusion.

From the totality of the evidence before court, the court has come to the irresistible conclusion that the Claimant worked for the Respondent for a continuous period of nine (9) years spanning from August, 1998 to November, 2007.

That her employment was summarily terminated by Mr. Auma when she requested to be retired on medical grounds.

That she was not paid any benefits under the pretext that she was a daily paid casual and therefore not entitled to any terminal benefits.

She had no written contract, no payslip nor was any statutory deductions of National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) made on her behalf.

At the time of termination her net salary was Kshs.9,000/= paid at a rate of Kshs.300/= per day for 30 days.

That she had served for the entire period of nine (9) years without leave as she was presumed a casual by the Respondent.

The law.

As was stated by Hon. Justice Maureen Onyango in **Wilfred Bukachi Opwaka vs. Ready Consultancy Co. Ltd. I.C Case No.671 of 2012,**

“The law relating to casual employment is contained in Section 37 of the Employment Act. An employee employed on casual terms who works continuously for one month is deemed to be converted to monthly terms of contract at the expiry of one month.

Having worked for more than 1 month continuously, the Claimant was no longer a casual employee but employed on monthly contract.

He was therefore entitled to annual leave and termination notice as provided in Section 37 of the Act.”

I concur with the findings of Maureen Onyango, J. which is on fours with the present situation.

In *casu*, the Claimant having served continuously for nine (9) years is entitled to payment of a statutory minimum of 21 days leave for every completed year of service for nine (9) in the sum of Kshs.81,000/=;

The Claimant is also entitled to one month's salary in lieu of notice in the sum of Kshs.9,000/=. Furthermore, since the Claimant was not under any pension scheme and the Respondent did not register her with NSSF nor remit any NSSF dues on her behalf, she is entitled in terms of **Section 35** of the Employment Act, to service gratuity.

The court will assess the gratuity at the rate applicable to retrenched under **Section 40** of the Act at the rate of 15 days salary for each completed year of service in the sum of Kshs.148,000/=.

It is apparent that the Claimant's employment was terminated for no valid reason at all.

The Respondent has failed to demonstrate any justification for the termination as it is bound to do under **Section 47 (5)** of the Employment Act. On the contrary, the Claimant has proved on a balance of probability that there was no valid reason for the termination. She had sustained injuries in the course of her work and after performing light duties for a while was advised by her doctor to seek retirement on medical grounds from her employer.

Instead of declining the request, the Respondent summarily terminated her services without giving her an opportunity to explain why her services should not be terminated.

Accordingly, the termination of the employment of the Claimant was wrongful and unfair and contrary to **Section 45 (1)** as read with **Section 45 (2) (a)** and **(c)** of the Employment Act, as there was no valid reason to terminate her services and the termination was not in accordance with a fair procedure. Considering the length of service the Claimant had given the Respondent, the callous manner in which she was treated notwithstanding that she had suffered injuries in the course of her employment and sought sympathetic consideration; given that she was not paid a penny upon termination and that she was unlawfully treated as a casual for many years resulting in denial of benefits that accrued by fact of Collective Bargaining Agreement covering all unionisable employees, the court awards her 10 months salary for the unlawful and unfair termination of employment in the sum of Kshs.90,000/=.

Total award to the Claimant is kshs.228,000/=.

The Respondent is also to pay to the Claimant costs of the suit.

Dated and delivered at Nairobi this 4th day of February, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE