



**REPUBLIC OF KENYA**

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

**CAUSE NO. 276 OF 2012**

JANET KANINI MUOLA .....CLAIMANT

**VERSUS**

EAST AFRICAN GROWERS LTD.....RESPONDENT

**JUDGMENT**

By her Memorandum of Claim dated 22<sup>nd</sup> February 2013 and filed in Court on the same day the Claimant herein **Janet Kanini Muoka** sued the Respondents **East African Growers and Wilham (K) Limited** alleging unlawful/unfair termination and non-payment of outstanding dues.

She seeks the following reliefs:

- a. A declaration that the dismissal or termination of the Claimant's employment was unlawful and unfair and the Claimant is entitled to her terminal dues and compensatory damages.
- b. An order for the Respondents to pay the Claimant, jointly and severally, her due terminal benefits and compensatory damages totaling to Kshs. 350,460/- .
- c. Interest on (b) above from the date of filing suit till payment thereof.
- d. Cost of this suit plus interest thereon.

The Respondents filed a reply to the Memorandum of Claim on 28th September 2012 in which they aver that the Claimant was engaged as a casual labourer at a daily wage of Shs. 310/- per day. The Respondent further avers that the Claimant's engagement was not on a continuous basis and that she was engaged from 2004 and not 1997. The Respondents maintain that the Claimant's engagement did not attract notice, annual leave, gratuity or compensatory damages. The Respondents pray that the claim be dismissed with costs.

The case was first mentioned in court on 19<sup>th</sup> April 2012 when Mr. Ohenga appeared for the Claimant but there was no appearance for the Respondents. The case was again mentioned on 8<sup>th</sup> November 2012 when Mr. Mulanya appeared for the Claimant and Mr. Masese holding brief for Mr. Nyaberi appeared for the Respondents. On 25<sup>th</sup> March 2014 the case came up for hearing when Mr. Makokha holding brief for Mr. Mulanya appeared for the Claimant while there was no appearance for the Respondents. After ascertaining that the Respondents had been properly served I allowed the Claimant to proceed with the hearing in the absence of the Respondents. After the hearing the Claimant filed written submissions which were served on the Respondent together with a mention notice but the Respondents did not attend court.

The Claimant testified that she was employed by the 1<sup>st</sup> Respondent in January 1997 as a packer. She was not given an employment contract but was issued with an employment card. In 2004 she was

assigned the duties of clearing then in 2009 she was again transferred to packing. She worked from 8.00 am to about 8.00 pm and sometimes when there was a lot of work she worked up to 10.00 pm. She worked for 6 days every week. Her lasp pay was Shs. 300/- per day.

On 29<sup>th</sup> June 2009 she reported to work as usual. She was called by James Chege, the Supervisor who informed her that she was required at the Human Resource Office. She reported as required and met a Mr. Solomon who told her to go off for one week after which she will be called. She was however not called. After one week she went to the office and was to go for another one week. She was never called back and was never given any reason for the termination of her employment. She was not involved in any disciplinary issue. She was not paid any terminal benefits.

She worked continuously but was never given annual leave. She was not a member of NSSF.

I have considered the Memorandum of claim and the annexure thereto, the Response and the documents annexed there to and the evidence of the Claimant. The issue for determination are the nature of the Claimant's terms of employment, whether she was unfairly terminate and whether she is entitled to any of the reliefs sought.

### **1. Nature of Claimant's employment?**

The Claimant submits that having worked continuously from 1997 to 2009 the Claimant was not a casual employee as alleged by the Respondent. He relies on the decisions of this court in the cases of Wilfred Bukachhi Opwaka V Ready Consultancy Co. Ltd Cause No. 671 of 2012, William Opetu V Mukesh Patel Cause No. 909 of 20111 and Joyce Mueni Wambua V East African Growers: Cause No. 734 of 2011.

In the case of Wilfred Bukachi Opwaka I stated the following:-

“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 one month continuously, the Claimant was no longer a casual employee but employed on a monthly contract. He was therefore entitled to annual leave and termination notice as provided in Section 37 of the Act.”

The Respondents have in the Reply to the Memorandum of Claim averred that the Claimant started working in 2004 and did not work continuously. They attached to their Response records from Muster Roy for May 2004 and October 2005. They also attached labour payment sheets for Wilham/East African Growers for 12<sup>th</sup> and 13<sup>th</sup> Feburary 2008. These are not sufficient records to demonstrate continuity of Service from 2004 to 2009 as averred by the Respondents.

As was pointed out in the submissions of the Claimant the employer is obliged by Section 10 and 74 of the Employment Act to keep records of employment. Section 10(6) specifically provides that where records are not produced it shall be the duty of the employer to prove or disprove any allegation made by the employee.

In this case the Claimant alleged that she worked from January 1997 to 29<sup>th</sup> June 2009 when she was terminated. The Respondents have not discharged their burden to disprove the Claimant's allegations.

For these reasons I find that the Claimant was in continuous employment of the Respondent from 1<sup>st</sup> January 1997 to 29<sup>th</sup> June 2009 was therefore not a casual employer but a month to month employee. This is confirmed by the Labour Payment sheets attached to the Response to the Memorandum of Claim where the Claimant signed for payment of Kshs. 7305 which is payment for about 24 days at the rate of Sh. 300 per day.

### **2. Whether the Claimant's employment unfairly terminated?**

The Claimant testified that on 29<sup>th</sup> June 2009 she was informed by the Supervisor to go to the Human Resources office where Mr. Solomon told her to take an off duty for one week and when she came back after the week was over she was told to go off duty for another week. She was told she will be called but was never called.

Section 41, 43 and 45 of the employment Act set out the requirements to be fulfilled for termination to be lawful and fair. The employee ought to, be informed of the reasons for termination and given an opportunity to defend herself or himself and there should be valid reason for such termination of the Claimant was therefore unfair and I find accordingly.

### **3. Whether the Claimant is entitled to the prayers sought?**

The Claimant prayed for payment of notice, annual leave not taken, service/gratuity and Damages. She also prayed for costs and interest.

#### **i. Notice**

Having decided that the Claimant was on a month to month contract, she was entitled to one months' notice or pay in lieu. Section 35 (1) (c) provides for 28 days' notice, At a wage of Shs. 300/- per day, she was entitled to Kshs 8400/-. I award her the same being salary in lieu of notice.

#### **ii. Annual leave**

The Respondents admitted in their Response that the Claimant did not take annual leave for the entire period she worked. From January 1997 to June 2009 is 12 years 6 months. At 21 days per year. She is entitled to 262.15 days leave. At Shs. 300 per day this amounts to Kshs. 78,750. I award her the said sum in lieu of annual leave.

#### **iii. Compensation**

Having worked for more than 12 years subjected to casual terms of employment and denied terms of regular employment, it is my opinion that the Claimant is entitled to maximum compensation of 12 months' salary. I therefore award her Kshs. 108,000 being 12 months' salary at Kshs. 300 per day.

#### **iv. Damages**

The circumstances under which the Claimant's employment was terminated does not warrant payment of genera damages as she did not suffer any damages that are not related to the termination of employment for which she has been paid compensation.

The claim for damages is dismissed.

#### **Costs**

The Respondent will pay the Claimant's costs for this suit.

#### **Interest**

The Claimant is entitled to interest at court rates from date of judgment.

Orders accordingly.

Dated and delivered at Nairobi this 26<sup>th</sup> day of June 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

No appearance for Claimant/Applicant

No appearance for Respondent