



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 745 of 2011

HELLEN AWINJA SAKALA..... CLAIMANT

VERSUS

EAST AFRICAN GROWERS.....RESPONDENT

JUDGEMENT

This matter proceeded before Hon. Justice. Kosgey who has since left the Court. I have gone through the proceedings that were short and clear and reached the conclusion that doing justice to the parties and for purposes of expediting resolution of the dispute I should prepare the Judgment based on the proceedings recorded by my predecessor.

By a memorandum of claim filed on 17th May, 2011, the claimant alleged that her services were wrongfully terminated by the respondent. She states that prior to her termination she continuously worked for the respondent for a period of 6 years; that is from 17th May, 2004 to May, 2010 at salary of Kshs. 300 per day.

The claimant averred in her memorandum of claim that she was verbally dismissed from her employment by the respondent without any explanation. She further avers that the respondent despite her dismissal has refused to pay her terminal benefits to compensate her for wrongful dismissal.

The claimant therefore seeks the courts intervention to order the respondent to pay her Kshs. 203,400 terminal dues itemised as follows:

- 1. One month's salary in lieu of notice
Being Kshs. 300/- per day x 30 days..... 9,000
- 2. Compensation for untaken leave
for entire period of service.....54,000
- 3. Service/gratuity calculated at 18 days
salary for every completed year of service32,000
- 4. compensatory damages for wrongful and
unfair termination calculates at 12 months gross pay....108,000

The respondent refuted the claimant's claim contending in the main that the claimant was never its employee but on the other hand contending that even if she was, she was a casual on daily wage.

The claimant in her testimony before court reiterated the contentions contained in her memorandum of claim. She produced an ATM card as proof she was an employee of the Respondent. The ATM card, she stated, was issued by Diamond Trust Bank in conjunction with the respondent. It was her evidence that she used to earn Kshs. 300/- per day paid after 2 days.

The respondent on the other through its Human Resource Assistant, testified that the claimant was not in their database as a regular employee. She was however able to trace her name in the Muster Roll for casual employees. It was her testimony that casual employees are recruited on daily basis and that they are not on continuous employment basis since their recruitment depended on the amount of work available. The respondent produced an extract of the Muster Roll (ex.4) bearing the name of the claimant and showing that she was absent from work on some days.

It is a rule of evidence that a party who intends the court make a finding in his or her favour in any matter submitted to it for determination must lead facts and produce evidence that can reasonably assist the court in reaching such a finding. In this particular case, it is the claimant who wanted the court to find that she was unlawfully terminated after being a continuous employee of the respondent for a period of 6 years. She further sought from the court an order to the respondent to pay her damages for such wrongful termination the quantum of which she detailed in her statement of claim. However the evidence adduced by the claimant as well as her own testimony did not meet the threshold required to make the court doing justice in the matter to find in her favour.

To illustrate, the claimant states in her statement of claim that she was a continuous employee of the respondent yet in her own evidence she states that she was on daily wage of Kshs. 300/- payable after every 2 days. It would have been helpful if the claimant could have called some additional evidence however weak to vouch further for her allegation that she worked continuously for the respondent for a period of 6 years as alleged. Evidence of a colleague, acquaintance or labour officer may have been quite helpful. The respondent does not make matters any better as it maintains the claimant was a casual employee who was hired daily depending on availability of work. The court fully understands the respondent's position since the onus to prove the claim lies with the claimant.

The Court would like to observe that in cases similar to this one, it would be helpful if the claimants were advised to seek the intervention of labour officers prior to bringing them to court. The labour officers are empowered to demand employment records of any employee for purposes of investigating and possibly determining any labour dispute brought to their attention. The testimony of such labour officer would have been of useful assistance to the court in reaching a just determination of the matter.

The Court in the circumstances is left with very scanty and shaky evidence that cannot justify a finding in favour of the claimant as prayed in the memorandum of claim.

Based on the testimony of the claimant and as corroborated by the testimony of the respondent the Court finds that the claimant was a casual worker on a daily wage of Kshs. 300/- payable after two days. If that be the position, the court is unable to make any finding on the issue of wrongful termination.

Section 35(1) of the Employment Act, 2001 provides that a contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—

(a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice.

The claimant's employment fell within the parameters of this section hence was terminable at the close of any day without notice.

The claim therefore fails and is hereby dismissed with no order as to costs.

Dated and Delivered at Nairobi this 26th day of October 2012

**Abuodha J
Judge.**

..... For Claimant

..... For respondent