



**Kimonge & another v Eastern Produce Kenya Ltd (Cause 170 & 171 of 2018  
(Consolidated)) [2024] KEELRC 459 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 459 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 170 & 171 OF 2018 (CONSOLIDATED)  
MA ONYANGO, J  
MARCH 4, 2024**

**BETWEEN**

**WILSON ONYANGO KIMONGE ..... 1<sup>ST</sup> CLAIMANT**

**HESBORN AURA OTENGO ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**EASTERN PRODUCE KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. The Judgment herein is in respect of two separate suits being Eldoret ELRC Cause No. 170 OF 2018, filed by Wilson Onyango Kimonge, whom for purposes of this judgment will be referred to as the 1<sup>st</sup> Claimant and Eldoret ELRC Cause No. 171 OF 2018 filed by Hesborn Aura Otengo hereinafter referred to as the 2<sup>nd</sup> Claimant. Both suits are filed against Eastern Produce Kenya Ltd, the Respondent herein.
2. On 15<sup>th</sup> February 2022, the court directed that the two matters be heard together as the facts giving rise to the disputes arose from the same set of events. ELRC Cause No. 170 of 2018 was selected to be the lead file.
3. The 1<sup>st</sup> Claimant in his Memorandum of Claim dated 25<sup>th</sup> April 2018 avers that he was employed by the Respondent, earning a consolidated wage of Kshs 8,222.50 per month and that during his employment he reported to work during the weekdays at 7am and left at 6pm in the evening thereby working for 11 hours daily from Monday to Saturday. He averred that he never went on annual leave during the entire period he was employed by the Respondent.
4. It is the 1<sup>st</sup> Claimant's case that on 6<sup>th</sup> July 2016, he was handed a letter by the Respondent to show cause why he had absented himself from work and was summarily dismissed on the said date without being given a hearing to explain his case.



5. The 1<sup>st</sup> Claimant contends that he lost his job through arbitrary summary dismissal despite the fact that there was a return to work formula between the Kenya Plantation and Agricultural Workers Union and the Eastern Produce Company Limited wherein among the issues agreed on was that all workers should resume their respective duties and no worker should be victimized over the strike. That the Respondent nonetheless terminated the 1<sup>st</sup> Claimant's contract. That this was unfair and contrary to the rules of the [Labour Relations Act](#).
6. The 1<sup>st</sup> Claimant stated that he was entitled to overtime, public holidays, annual leave and compensation allowance and dues in addition to the salary arrears as at the time of dismissal. He prayed for judgment against the Respondent as enumerated hereunder:
  - i. 2 months' pay in lieu of notice Kshs 16,445
  - ii. Annual leave Kshs 20,556.25
  - iii. Overtime Kshs 124,740
  - iv. Severance pay for years worked Kshs 23,023
  - v. 12 months' compensation for wrongful termination Kshs 98,670Total Kshs 283,434.25
7. The 2<sup>nd</sup> Claimant, vide his Memorandum of Claim dated 25<sup>th</sup> April 2018 avers that he was employed by the Respondent as a general worker from the year 2013 earning a salary of Kshs 11,765.87 per month.
8. The 2<sup>nd</sup> Claimant states that during his employment he reported to work during weekdays and on Saturdays from 7am to 6pm, thereby working for 11 hours daily without a break. That during the entire period he was in employment he never went on annual leave.
9. It is the 2<sup>nd</sup> Claimant's case that on 5<sup>th</sup> July 2016, the Respondent without any just cause or reasons terminated his services.
10. The 2<sup>nd</sup> Claimant avers that he is entitled to overtime, public holidays, annual leave and compensation allowance dues in addition to salary arrears as at the time of dismissal and other dues withheld by the Respondent. He prayed for the following reliefs:
  - i. 2 months' pay in lieu of notice Kshs 23,531.70
  - ii. Annual leave Kshs 28,238
  - iii. Overtime Kshs 178,494.70
  - iv. Severance pay for years worked Kshs 32,944.40
  - v. 12 months compensation for wrongful termination Kshs 141,190.40Total Kshs 404,399.40
11. In response to the Claimants' claims, the Respondent filed Replying Memoranda dated 22<sup>nd</sup> June 2018 on 25<sup>th</sup> June 2018 respectively in Cause No. 170 of 2018 and Cause No. 171 of 2018 which memoranda were similar in content. The Respondent averred that the 1<sup>st</sup> and 2<sup>nd</sup> Claimants engaged in an illegal strike and thereafter absconded duty despite there being a court order requiring all employees to resume duty. That the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were consequently summarily dismissed for gross misconduct.
12. According to the Respondent, the Union members went on strike on various dates between 30<sup>th</sup> June and 5<sup>th</sup> July 2016 demanding a wage increment. That on 1<sup>st</sup> July 2016, the Respondent applied to court



in a CBA dispute between it and Kenya Plantation and Agricultural Workers union, and was issued with orders restraining the Union's members from continuing with the strike.

13. It is the Respondent's case that some of the union members including the Claimants failed to abide by the court order and continued engaging in the strike and destroying the Respondent's property.
14. The Respondent further states that on 4<sup>th</sup> July 2016, it held a meeting with the Claimants' Union to address the industrial unrest where it was agreed that normalcy should be restored and that all the Union's members should resume duty immediately and, in any case, not later than 7am on 5<sup>th</sup> July 2016. It was further agreed that there would be no victimization.
15. The Respondent contends that on 5<sup>th</sup> July 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were identified as among the employees who absconded work without lawful cause. That they engaged in the strike and failed to honor the terms of the Return to Work Formula requiring all employees to resume work.
16. It is further contended by the Respondent that it issued a Notice to Show Cause letter to the Claimants outlining the allegations therein and further informing them of a disciplinary hearing to be conducted the following day at 10 am as well as their right to attend the hearing with a representative of their choice.
17. The Respondent states that the disciplinary hearing was conducted on 6<sup>th</sup> July 2016 wherein the Claimants were unable to offer a satisfactory explanation on the allegations raised and were subsequently dismissed for gross misconduct.
18. The Respondent further contended that the Claimants dues were paid through their bank accounts at KCB in June and in July 2016.

### **Evidence**

19. The Claimants were heard on 15<sup>th</sup> June 2023. The 1<sup>st</sup> Claimant testified as CW1. He adopted his witness statement recorded on 21<sup>st</sup> December 2021 as his evidence in chief and relied on his bundle of documents dated 25<sup>th</sup> April 2018.
20. CW1 testified that he started working for the Respondent in 2012 until 2016 as a tea plucker. He testified that he was paid per month depending on the amount of tea plucked which payment according to the CW1 ranged between Kshs 9,000 and Kshs 10,000. CW1 stated that he worked from 7am to 6pm and did not annual leave.
21. According to CW1, the reasons advanced by the Respondent for the termination of his contract was that he went on strike. He admitted to participating in the strike but maintained that the strike was peaceful and that there was no destruction of property.
22. CW1 stated that he was issued with the show cause letter on 5<sup>th</sup> July 2016 inviting him to a disciplinary hearing the next day. He stated that he attended the disciplinary hearing and was issued with the dismissal letter the same day, that is on 6<sup>th</sup> July 2016.
23. It was CW1's testimony that before the termination, he had never been involved in any disciplinary incident. He stated that he was not issued with a warning letter prior to being issued with the notice to show cause letter. He denied being aware of the court order stopping the strike. He conceded that he was paid for work done in June and in July but maintained that he was not paid his terminal benefits.
24. On cross examination, CW1 stated that he was employed on contract and that his employment was dependent on the quantity of tea plucked. That if a tea plucker was within target, the contract would be extended and if not, the contract was not extended.



25. When referred to his employment Contract, the Claimant agreed that his contract was lapse on 30<sup>th</sup> July 2016 and that it was terminated on 6<sup>th</sup> July 2016. He stated that he did not go to work during the period the strike was on until the day his contract was terminated.
26. CW1 stated that he was not owed any salary arrears by the Respondent. He maintained that he never went on annual leave. He stated that only permanent employees were entitled to annual leave and not employees on contract. He further that he used to work from 7am to 6pm on weekdays and Saturdays.
27. On re-examination, CW1 informed the court that it would not have been practical for him to go to work when the other employees were on strike.
28. The 2<sup>nd</sup> Claimant, Hesborn Aura Otengo testified as CW2. He adopted his witness statement recorded on 28<sup>th</sup> December 2016 as his evidence in chief and relied on his list of documents dated 25<sup>th</sup> April 2018 as part of his evidence.
29. CW2 told the Court that he started working for the Respondent in 2012 and was issued short term contracts of between 3 and 9 months. He stated that he was a tea plucker and was paid depending on the quantity of the tea he plucked which was roughly between Kshs 14,000 and Kshs 15,000 per month. CW2 maintained that he used to work from 6am to 6pm from Monday to Saturday and that he never went on annual leave.
30. CW2 told the court that he was not among the employees who went on strike. That he did not receive the court order stopping the strike. He testified that he received the notice to show cause letter on 5<sup>th</sup> July 2016, attended the disciplinary hearing on 6<sup>th</sup> July 2016 and was issued with the dismissal letter on 6<sup>th</sup> July 2016 which letter did not disclose the reasons for his dismissal.
31. It was CW2's evidence that he was not given prior notice of termination, that there was no complaint made against him and that he was never issued with a warning letter.
32. According to CW2, he was only paid salary earned in July 2016 and was not paid any other benefits.
33. On cross examination, CW2 stated that he did not work from the date the strike started until the day he was dismissed from employment. He stated that he did not go to work because he was afraid of his safety. That had he gone to work, the other employees would have beaten him for dishonoring the call for strike.
34. CW2 maintained that during the period he worked for the Respondent, he never went on leave but indicated that he was paid pro rata as indicated in his pay slip.
35. On re-examination, CW2 stated that some pay slips had pro rata leave while others did not.
36. The Respondent on its part called Joseph Maritim who testified on 6<sup>th</sup> July 2023 as RW1. RW1 introduced himself as the Respondent's Senior Estate Manager. He adopted his witness statement recorded on 15<sup>th</sup> November 2021 as his evidence in chief and also relied on the Respondent's documents dated 21<sup>st</sup> January 2019 and 25<sup>th</sup> September 2018 in the two files as part of his evidence.
37. According to RW1, the Claimants were terminated from work after they absconded duty during the illegal workers strike from 30<sup>th</sup> June 2016 to 5<sup>th</sup> July 2016. RW1 reiterated that there was a court order requiring the employees to go back to work but the Claimants refused to resume to work. In addition, it was RW1's testimony that the court order was served upon the union representatives who in turn informed their members.



38. RW1 maintained that the Claimants were on a fixed term contract depending on the season and would be contracted during the high seasons. It was RW1's evidence that the Claimants were paid their final dues at the end of July 2016 and that they were paid overtime whenever they worked overtime. He however disputed that the Respondent owed the Claimants payment of overtime.
39. RW1 told the court that the Claimants were taken through a disciplinary hearing on 6<sup>th</sup> July 2016 before they were dismissed.
40. On cross examination, RW1 maintained that the strike was illegal and that as a result thereof, there was massive destruction of the Respondent's property. RW1 stated that the Claimants were aware of the Court order requiring employees to go back to work as the communication was made through managers and shop stewards.
41. RW1 admitted that the Claimants were served with show cause letters on 5<sup>th</sup> July 2016 requiring them to attend the disciplinary hearing on 6<sup>th</sup> July 2016. He confirmed that the claimants were dismissed the same day they attended the disciplinary hearing. He also maintained that the claimants were represented by the union.
42. At the close of the Respondent's case, parties were directed to file written submissions. The Claimants submissions were filed on 31<sup>st</sup> July 2023 whereas the Respondent's submissions were filed on 15<sup>th</sup> August 2023.

### **Determination**

43. Having considered the pleadings, evidence and submissions on record, the issues that arise for determination are the following:
  - i. Whether the Respondent terminated the Claimants procedurally from employment.
  - ii. What orders should issue?

### **Whether the Claimants participated in an illegal strike**

44. It is common ground that the Respondent's employees were on an industrial strike between 30<sup>th</sup> June 2016 and 5<sup>th</sup> July 2016 which arose from disagreement over wage increase between the Respondent and the employees' union, Kenya Plantation and Agricultural Workers Union.
45. According to the Respondent, the court issued orders on 1<sup>st</sup> July 2016 restraining the Union's members from continuing with the strike. It was the Respondent's position that the said order was communicated to all its employees through the managers and shop stewards.
46. It was further the Respondent's position that it engaged the union in meetings to address the industrial unrest and that the parties signed a Return to Work Formulae. The Return to Work Formulae which was produced by the Respondent as evidence reads as follows at paragraph 2:

“That normalcy is restored and parties have agreed that all employees to resume duty immediately and, in any case, not later 7 am on Tuesday 5<sup>th</sup> July 2016; and,  
No victimization by either party subject to applicable law.”
47. The Claimants however, contended that they were not aware of the Court Order issued on 1<sup>st</sup> July 2016 restraining employees of the Respondent from participating in the strike.



48. The Claimants have not disputed not going to work during the period the of the strike upto the day that their contracts were terminated by the Respondent. The 1<sup>st</sup> Claimant admitted that he participated in the strike while the 2<sup>nd</sup> Claimant stated that he did not participate in the strike but was unable to go to work as he feared that he would be attacked by the striking workers for dishonouring the call for strike.
49. The show cause letters which also invited the Claimants for disciplinary hearing accused them of participating in an illegal strike on 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> July 2016, absenting themselves from work without lawful cause and failing to follows managements instructions/ultimatums to carry out their duties. The letter which was identical for both Claimant, is reproduced below:

Eastern Produce Kenya Ltd

Wilson Onyango Kimonge

C/R No.255621

5<sup>th</sup> July, 2016

Show Cause Letter

It is noted with concern that (i) you have participated in an illegal strike on 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> July 2016 (ii) absented yourself from your place of work without any lawful cause and (iii) failed to follow management's instructions/ultimatums to carry out your duties contrary to Section 44 (a) & (e) of the [Employment Act](#) and Clause 30(a) & (e) of the CBA. The company is thus considering the dismissal of your services.

In accordance with section 41 of the [Employment Act](#), please arrange to attend a hearing on 6<sup>th</sup> July, Divisional Manager's office- Kipkoigen so as to explain the above actions and explain why disciplinary action should not be taken against you. You are required to attend with an employee of your choice or your union representative.

Yours faithfully,

For Eastern Produce Kenya limited-Kibabet Estate

signed

Andrew Rutto

Asst. Field Manager

Cc: Branch Secretary Union

Cc. Senior Estate Manager

50. The summary dismissal letters which are similar for both Claimants did not state the grounds for dismissal. The letters are reproduced below:

Wilson Onyango Kimonge

C/R NO. 255621

6<sup>th</sup> July 2016

RE: Summary Dismissal Notice

Reference is made to the disciplinary hearing held at Kipkoigen Divisional Office on 5<sup>th</sup> July 2016 for which you did attended.



After carefully reviewing your case, the Company has come to the conclusion that your explanations are unsatisfactory and has decided to summary dismiss you from employment with effect from 6<sup>th</sup> July 2016 on the account of gross misconduct as envisaged in Section 44(4) of the *Employment Act* 2007, the *Labour Relations Act* 2007 and section 30 of the Collective Bargaining Agreement.

Upon normal clearance of your terminal benefits, if any, you will be paid the following:

- I. Wages earned up to the last working day
2. Pro-rata leave earned but not utilised
3. Overtime worked but not paid

You will also be issued with a Certificate of Service.

Please note that the above payments are subject to statutory deductions and any monies that you may owe the Company.

You have the right to appeal for any of the below reasons:

- a. The chairperson did not apply his mind in coming to a decision.
- b. The penalty taken was too severe
- c. New evidence which may influence the outcome of the enquiry
- d. The disciplinary procedure was not followed.

You are required to vacate the Company house within seven (7) days in compliance with Clause 21 of the current Collective Bargaining Agreement.

Yours faithfully -

For Eastern Produce Kenya Limited-Kibabet Estate

Signed senior

Estate Produce Kenya Limited –Kibabet Estate

cc: KPAWU

Labour Officer

Assistant Field Manager Kipkoigen

51. The Respondent did not produce the minutes of the disciplinary hearing or section 30 of the CBA cited in the letter of dismissal to enable the court understand the contents thereof and asses if the Claimants were guilty of gross misconduct on the grounds stated in the show cause letters.
52. Section 41 of the *Employment Act* sets out the procedure that the Respondent must comply with before terminating the employment of an employee while section 43 requires an employer to prove the grounds for dismissal.



53. In *Lamathe Hygiene Food v Wesley Patrick Simasi Wafula & 8 others* (2016) eKLR the Court of Appeal stated: -

“According to Section 41 of the *Employment Act* 2007, even where an employer summarily dismisses an employee, there has to be notification of the reason and hearing before termination on grounds of misconduct.”

54. In the case of *John Rioba Maugo v Riley Falcon Security Services Limited* [2016] eKLR the court held as follows:

“The speed with which the disciplinary process for the claimant was carried out could not have permitted him to prepare or adequately defend himself. He was issued with a show cause letter on 23rd April, 2014 and was expected to respond to it on the same day. The letter inviting him for a disciplinary hearing was issued to him on the very same day and the disciplinary hearing was held the same day. No minutes of the disciplinary hearing were produced to the court to enable the Court determine if the hearing was fair.

It would appear that the Respondent merely wanted to pay lip service to the provisions of section 41 by cosmetic compliance. It is obvious that the claimant was not informed of his right to be accompanied by a colleague or a union official to the hearing. Nothing was mentioned about what the Claimant stated in his defence at the said hearing.

I find that the Respondent failed to follow the procedure in the Act. The summary dismissal was therefore also procedurally unfair.”

55. Similarly in the case of *Michael Odhiambo Opiyo v Bidco Africa Limited* (2021) eKLR, the court stated that fair hearing includes notification of date, venue and time and charges in good time so that the employee prepares for hearing and attends the meeting with either a fellow employee or union official of his choice, not those chosen by the employer.

56. In the present case, the Respondent issued to the Claimants notices to show cause which doubled as notifications for disciplinary hearing on 5<sup>th</sup> July 2016. The hearings were scheduled for the following day 6<sup>th</sup> July, 2016 at 10 am for both Claimants. It is not stated at what time the notices were served upon the Claimant. There are no minutes of the disciplinary hearings to give clarity on what transpired at the hearing.

57. As was explained by the court in *John Rioba Maugo v Riley Falcon Security Services Limited* and in *Michael Odhiambo Opiyo v Bidco Africa Limited*, fair hearing includes notification of date, venue and time and charges in good time so that the employee prepares for hearing and attends the meeting with either a fellow employee or union official of his choice, not those chosen by the employer.

58. The Notice to show cause had several charges against the Claimants. The letter of dismissal did not state which among those charges the Claimants were found guilty of.

59. The notice given to the Claimants which was less than 24 hours from the evidence on record, was not sufficient for them to prepare for the disciplinary hearing. Further, without the benefit of minutes of the disciplinary hearing, it is not possible for the court to ascertain that there was a hearing as contemplated in Section 47. I am inclined to conclude that the Respondent merely wanted to pay lip service to section 41 of the *Employment Act*. It is the responsibility of the Respondent to prove that it complied with sections 41 and 43 which it has not done. From the evidence on record, it is apparent that what was called a disciplinary hearing was intended to be a mere formality.



60. From the foregoing it is my finding that the summary dismissal of the Claimants was unfair both procedurally and substantively.

**What orders should then issue?**

61. ....

The Claimants sought for the following prayers: -

a. 2 months' notice in lieu

The contracts of the Claimant provided for two weeks' notice or pay in lieu. This is however contrary to the *Employment Act* which provides for one months' notice where an employee is paid by the month or where the contract of employment is for a period longer than one month as was the case herein. I accordingly award the Claimants one month's salary in lieu of notice.

b. Annual leave

The Claimants stated that they never went on leave during the period they were employed by the Respondent. They maintained that leave was reserved for employees on permanent terms. RW1 also stated that at the time of dismissal the Claimants had not taken leave. It is therefore the finding of this court that the Claimants have proved on a balance of probability that they are entitled to annual leave which I award them for the duration of the contracts they were serving being 2 days per month as per their contracts. I award each of them 6 days annual leave.

c. Overtime

It was the Claimants worked from 7am to 6pm. Their contracts provided that they would be paid overtime for time worked over 46 hours per week. The Claimants however did not prove the number of days they worked overtime and the hours worked on such days. I find that this prayer has not been proved.

d. Severance pay for years worked

Severance pay applies to termination of employment as a result of redundancy. The facts of this case do not constitute a termination through redundancy. As such, this claim is declined.

e. 12 months compensation for wrongful termination

Having found that the dismissal of the Claimants from employment was procedurally unfair I award each of the Claimants 10 months compensation for unfair termination, taking into account the circumstances under which they were dismissed, their length of service and all the relevant factors under section 49(4) of the *Employment Act*.

62. In conclusion, I find and hold that the dismissal of the Claimants was procedurally unfair and enter judgment in their favour as against the Respondent in the following terms:

1<sup>st</sup> Claimant Wilson Onyango Kimonge

One month pay in lieu of notice..... Kshs 8,222.50

Annual leave..... Kshs 1,897.50

10 months compensation for unfair

Termination..... Kshs 82,225.00

Total Kshs 92,345.00



2<sup>nd</sup> Claimant Hesborn Aura Otengo

One month pay in lieu of notice..... Kshs 11,765.87

Annual leave..... Kshs 2,715.50

5 months compensation for unfair

termination..... Kshs 117,658.6

Total Kshs.132,139.97

63. The Claimants are also awarded costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON\* THIS 4<sup>TH</sup> DAY OF MARCH 2024**

**MAUREEN ONYANGO**

**JUDGE**

