



Wetungu v Eastern Produce (K) Ltd (Savani Estate Kamkong) (Employment and Labour Relations Cause 253 of 2017) [2023] KEELRC 439 (KLR) (20 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 439 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 253 OF 2017**

**NJ ABUODHA, J
FEBRUARY 20, 2023**

BETWEEN

ERICK WAFULA WETUNGU CLAIMANT

AND

EASTERN PRODUCE (K) LTD (SAVANI ESTATE KAMKONG) .. RESPONDENT

JUDGMENT

1. The claimant in this case filed her statement of claim dated September 26, 2017 seeking for the following orders as against the respondent;
 - a. A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.
 - b. Payment of the sums of money claimed under paragraph 8 above
 - c. Costs and Interests
 - d. Any other relief the Honourable court may deem fit and just to grant.
2. The respondent did not enter appearance nor file any defence. The suit was heard *ex parte* on May 29, 2018 and judgment was rendered on June 25, 2018.
3. However, by consent of the parties, the *ex parte* judgment was set aside and the suit ordered to be heard afresh on October 6, 2022 when the claimant testified as Cw1 and the respondent called one Edward Kemei, its field supervisor as RW1.



The claimant's case

4. The claimant averred that he was employed by the respondent in 2013 as a tea plucker where he worked until February 2017. He stated that he was terminated because he filed a civil case for compensation for injuries he sustained in the course of his employment.
5. He further stated that he was not given any notice before his termination and was not taken through a disciplinary hearing.
6. It was his evidence that he used to report to work at 7.15am up to 6pm and used to work from Monday to Sunday. It was further his evidence that he never went on leave during his employment with the respondent.

The respondent's case

7. The respondent filed its replying memorandum on September 10, 2018 denying the claim and averred that on February 6, 2017, the claimant engaged his supervisor in a verbal confrontation insulting him after being given instructions and guidance of his work and that on the basis of his misconduct and disruptive nature of his presence at the estate the claimant was suspended on the said date with full pay.
8. RW1 in his evidence confirmed that the claimant was the respondent's employee and that he, CW1, signed the suspension letter on March 8, 2017 following a confrontation on March 7, 2017 where while in a meeting, the claimant used abusive language.
9. It was RW1'S evidence that the claimant was housed in the respondent's premises as a casual laborer and that he was paid his full money as per the kilos he had picked and not on a monthly basis.
10. On cross examination, RW1 maintained that the claimant was paid per kilo but calculated monthly.
11. With that evidence, the court directed parties to file written submissions. The respondent filed its submissions on November 4, 2022 whereas the respondent filed his submissions on November 8, 2022. These submissions have been considered in this judgment.

Determination

12. Flowing from the pleadings before court, the evidence on record and the rival submissions, the issues falling for the court's determination are:
 - i. Whether the claimant was a casual labourer
 - ii. Whether the claimant's termination from employment was wrongful, unreasonable and unfair?
 - iii. Whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.
13. On the first issue, the respondent seemed to have alluded that the claimant was a casual labourer being paid per kilo of tea plucked which was computed monthly. From his evidence in court, the claimant had worked for a period of over three years. Section 37 of the [Employment Act](#) provides as follows;
 37. Conversion of casual employment to term contract
 - (1) Notwithstanding any provisions of this Act, where a casual employee—
 - (a) 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; or



- (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 of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
- (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
 - (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
 - (4) Notwithstanding any provisions of this act, in any dispute before the industrial court on the terms and conditions of service of a casual employee, the industrial court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
14. From the above provision of the law, and taking into account that the claimant had worked for the respondent for over three years, it follows that the claimant's terms of employment converted by operation of the law to regular employment as provided in section 37.
 15. As regards the second issue, the claimant has submitted that on February 6, 2017, he was summarily dismissed by the respondent's manager for reasons that he had sued the respondent for injuries he had sustained in the cause of his employment.
 16. It was his submission that the respondent failed to follow the due process set out under section 36, 45 and 49 of the Employment Act resulting to unfair dismissal of the claimant from employment.
 17. The respondent on the other hand alleged that the claimant was terminated from employment for gross misconduct and that the claimant's actions of insulting the supervisor amounted to a fair reason for termination.
 18. It was also averred that the claimant was invited for a disciplinary hearing but he failed to show up hence the termination was fair.
 19. In determining whether the termination of the claimant's employment was lawful, the departure point is section 45 (1) and (2) of the Employment Act which makes the following provisions regarding unfair termination of employment—
 - (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and



- (c) that the employment was terminated in accordance with fair procedure.
20. The above provision is couched in mandatory terms requires that an employer must establish that the termination of an employee's contract of service has been done on the basis of valid and fair reasons(s) and upon following a fair procedure.
21. Section 47(5) of the *Employment Act* is to the effect that;
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
22. In the current case, the respondent has averred that the claimant was terminated from employment on allegation that he had insulted his supervisor and incited the other employees to down their tools.
23. From the above analysis, can this court conclude that the said allegations against the claimant were valid reasons for termination? I do not think so.
24. The respondent did not bring any other witness other the alleged insulted supervisor to substantiate the said allegations.
25. From the above analysis, I find that the reasons advanced for the claimant's termination were not valid in view of Section 43 of the *Employment Act* which provides inter alia,
- “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
26. I therefore find that the respondent has not discharged the burden of proving that the claimant was dismissed for a valid and fair reason.
27. Also, section 41 of the *Employment Act* stipulates that a fair procedure must be followed before an employee is terminated from employment. It provides inter alia;
- “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
28. In the instant case, although the respondent in their submission submitted that the claimant was called for a disciplinary hearing but did not attend, RW1 while giving evidence confirmed that the claimant was dismissed from employment on the same day he was accused of misconduct.
29. It therefore follows that the averment that the claimant was invited for a disciplinary hearing but did not attend is an afterthought which does not hold any water.
30. Flowing from the above findings that the termination of the claimant was for not valid reason and that further fair procedure was not followed, I make the declaration that the termination was unfair and therefore unlawful.



31. Lastly, I need to address the issue of the reliefs payable to the claimant. Section 49 of the Act provides for the remedies that this court may award for unfair termination or wrongful dismissal.
32. In respect of prayer (i) this court has already found that the termination of the claimant by the respondent was unfair and the same is declared as such.
33. As to prayer (b), the court finds that;
 - i. one month pay in lieu
 - ii. No notice was given before the claimant was terminated from employment. From the payslip tendered in court the claimant was earning a gross salary of Kshs 17,009
Notice pay- Kshs 17,009
 - iii. Compensation for unlawful termination, section 49(1) (c) of the Act provides the maximum compensation for unfair termination at twelve months' gross salary subject to statutory deductions. The claimant never presented before court any evidence of special skills he possessed for the work he was doing. From the evidence he was a piece-rate worker paid in accordance with the volume of tea picked per day measured in kilos. He had worked for the respondent for approximately 5 years. An award of six months salary as compensation for unfair termination would be reasonable in the circumstances. The claimant's net pay from the payslip presented to court was Kshs 17,009
 - iv. $17,009 \times 6 = 102,054$
 - v. Unpaid house allowance
Under this head, the court takes judicial notice that employees in tea estate are usually housed by the company. This position was confirmed by the respondent's witness while on the stand
 - vi. Pro rata leave, overtime dues and unpaid public holidays
These were not proved and as such I cannot make any awards under this head
 - vii. service pay
The claimant is not entitled to service pay as he was under NSSF scheme as evidenced by the NSSF provisional member statement of account.
34. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
 - i. A declaration that his termination was unfair and unlawful
 - ii. Notice pay.....17,009
 - iii. Compensation for unlawful termination..... 102,054
119,063
 - iii. Costs and interests

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF FEBRUARY, 2023

ABUODHA NELSON JORUM

Judge ELRC

