



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 106 OF 2017

SAMWEL WAMBISAH.....CLAIMANT

v

EASTERN PRODUCE KENYA LTD.....RESPONDENT

JUDGMENT

1. Samwel Wambisah (the Claimant) lodged these proceedings against Eastern Produce Kenya Ltd (the Respondent) alleging unlawful dismissal.
2. Pursuant to leave of the Court granted on 15 June 2017 the Respondent filed a Response on 15 June 2017 and the Cause was heard on 2 May 2019 when the Claimant and the Respondent's Security Officer and General Manager testified.
3. The Respondent's last witness, a security guard testified on 9 December 2020.
4. The Claimant filed his submissions on 8 January 2021 while the Respondent's submissions on were not on record by the agreed date.
5. The Court has considered the pleadings, evidence and submissions.

Breach of contract

Unpaid acting allowance

6. The Claimant asserted that he was employed as a grade 1 Clerk on 12 March 1996 and that he was called in from time to time to stand in for the Accountant and perform other duties up to 2013 but was not paid a responsibility or acting allowance at the rate of 50% of the basic salary. He sought Kshs 1,994,058/- in total.
7. In the submissions, the Claimant set out the acting period as September 2003 to January 2003.
8. The Respondent however urged that this head of the claim was statute barred by dint of section 90 of the Employment Act, 2007.
9. The Employment Act, 2007 was not in operation in 2003.
10. The applicable statute was the Limitation of Actions Act.
11. It provided at section 4(1)(a) for a limitation period of 6 years for contractual actions. The claim was brought within the 6-years and therefore limitation does not arise.
12. The head of claim in respect of acting or responsibility allowance was in the nature of special damages which required strict proof.
13. The Court finds that this head of the claim was not proved to the required standard.

Unfair termination of employment

Procedural fairness

14. The Claimant was served with a notification dated 19 March 2016 to attend a disciplinary hearing. The notification set out the charges the

Claimant was facing.

15. On 21 March 2016, the Respondent suspended the Claimant pending a disciplinary hearing on 30 March 2016 and on 26 March 2016, the Claimant was formally informed of the postponement of the hearing to 5 April 2016.

16. An attempt by the Claimant to be accompanied by an advocate was rejected by the Respondent. The Respondent also rejected an objection by the Claimant on the composition of the panel.

17. The Claimant thereafter attended the disciplinary hearing and participated before he was informed of the dismissal. A trade union official was present during the hearing.

18. The Claimant was not satisfied with the dismissal and he appealed and the appeal was heard by a different panel.

19. Since the Claimant was informed of the allegations to confront and was afforded an opportunity to be heard and because there is no express legal requirement for the presence of an advocate during internal disciplinary hearings, the Court finds that the Respondent was in substantial compliance with the requirements of sections 35(1) and 41 of the Employment Act, 2007.

Substantive fairness

20. The Respondent had laid some 3 charges against the Claimant and these were failure to adhere to and follow direct instructions (continued holding campaign meetings on 7 February 2016 and 28 February 2016 despite being instructed not to) and gross insubordination (failing to adhere to instructions given by Senior Line Managers) and conduct violating the image and business of the Respondent.

21. In terms of sections 43 and 45 of the Employment Act, 2007, these are the reasons the Respondent was expected to not only prove but prove as valid and fair reasons warranting the summary dismissal of the Claimant.

22. To discharge the burden, the Respondent called 3 witnesses.

23. The Respondent's first witness was the Group Security Officer. He stated that the Claimant called unlawful meetings at the workplace to campaign for a trade union post.

24. The witness stated that permission was required before the holding of such meetings.

25. The Respondent's third witness corroborated the testimony of the first witness and also stated that he found the Claimant holding a meeting within the employer's premises.

26. The Claimant did not prove that he had secured the permission of the Respondent to hold trade union campaign meetings within the premises as contemplated by section 56 of the Labour Relations Act.

27. The decision of the Respondent was therefore anchored in law.

Breach of contract/statute

House allowance

28. The copies of pay slips produced in Court show that the Claimant was only getting basic salary.

29. Clause 20 of the collective bargaining agreement between the Kenya Plantation & Agricultural Workers Union and Siret Tea Company Ltd, Kakuzi Ltd (Kaboswa Estate), Eastern Produce Kenya Ltd and Kibwari Ltd provided for the Respondent to provide housing or pay the equivalent of 15% of basic salary as house allowance.

30. However, the Claimant's witness statement did not disclose whether the Respondent had provided him with housing. During testimony, he merely stated that he was seeking house allowance.

31. The Claimant did not lay an evidential foundation for the claim for house allowance and relief is declined.

Terminal benefits

32. In respect of terminal benefits, the Claimant sought Kshs 2,537,892/-. A breakdown or formula of how the amount was computed was not disclosed. Relief is declined.

Service pay

33. The Claimant was contributing to the National Social Security Fund and by virtue of section 35(5) & (6) of the Employment Act, 2007 would not be entitled to service pay.

Conclusion and Orders

34. From the foregoing, the Court finds no merit in the Cause and it is dismissed.

35. The Court makes no order on costs as the Claimant did not exhaust the dispute resolution mechanisms which apply where a trade union has a collective bargaining agreement with the employer.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF MARCH 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant in person

For Respondent C.F. Otieno & Co. Advocates

Court Assistant Chrispo Aura