



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 203 OF 2015

(Before Hon. Justice Mathews N. Nduma)

EVANS KHAMISI KIDULA.....CLAIMANT

VERSUS

KAIMOSI TEA ESTATE (K) LIMITED..... RESPONDENT

JUDGMENT

1. The suit commenced by a memorandum of claim on 22nd June 2015. The claimant sought compensation for unlawful termination of employment and payment of terminal benefits to wit:

- (a) Overtime in the sum of Kshs 283, 397 and
- (b) Service pay calculated at 30 days for each completed year of service for 18 years, Kshs 502,704.
- (c) Interest and cost

2. The claim is opposed vide a memorandum of defence dated 15th September 2015.

3. The issues in dispute are:

- (a) Whether the claimant's employment was terminated by the respondent or the claimant voluntarily resigned from employment.
- (b) Whether the claimant is entitled to the reliefs sought.

Issue A

4. The Claimant was employed on 26th December 2001 and worked continuously until 7th March 2015. It is not in dispute that the claimant tendered a letter of resignation dated 7th January 2015 to the respondent. The resignation was accepted by the respondent by a letter dated 7th January 2015 and the claimant was informed that he was to serve two months notice and therefore the effective date of resignation would be the 7th March 2015.

5. From the facts not in dispute the claimant served the respondent for a period of 13 years. There is clearly no basis for the claim by the claimant that he had served the respondent for a period of 18 years. Similarly, the claimant pleaded in paragraph 3 of the memorandum of claim that the claimant resigned on 26th December 2001. There is no basis for the allegation by the claimant that his employment was terminated by the respondent.

6. The only issue for determination is therefore whether:

- (a) The claimant is entitled to payment of overtime for 11 years as calculated and
- (b) Service pay calculated at 30 days salary for each completed 18 years as claimed under paragraph 9 of the Memorandum of Claim.

7. The testimony by the claimant under oath in court contradicted his own pleadings by stating that he was employed by the respondent in 1999. He further contradicted his own pleadings by testifying that his employment was terminated by the respondent in March 2015.

8. The claimant did not place any tangible evidence before court that he had worked overtime over the years, had claimed payment of the same in respect of any particular year and the claim was not paid by the respondent. The claimant bears the onus of proving the claim on a balance of probabilities in terms of *Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya*. The claimant failed in this respect despite the fact that the respondent did not tender any evidence in rebuttal.

9. The claim lacks merit and is dismissed. In respect to the claim for payment of gratuity. It is not in dispute the claimant was upon resignation paid gross gratuity, in the sum of Kshs. 110,219 less deductions in terms of *Clause 32 of the CBA* between the respondent and the Union. An employee who had served for a period of more than 10 years was entitled to gratuity calculated at 22 days salary for each completed year of service and not 30 days as claimed by the claimant.

10. At the time of resignation, the claimant had served 13 years and not 18 years. The claimant earned a monthly basic salary of Kshs. 12,624. The salary applicable to this calculation is the monthly gross salary earned by the employee as at the date of resignation or termination.

11. A simple calculation of gratuity payable to the claimant as at the date of resignation was Kshs 164,112 less tax and Kshs. 22, 391 loan owed to KATEWO at the time.

12. Therefore, on the figures not in dispute the respondent understated gratuity due and owing to the claimant as at the date of resignation by a sum of Kshs (164,112 -110,219) Kshs. 53, 893.

13. The claimant is thus awarded gratuity not paid in the sum of Kshs 53, 893 less tax only with interest and costs. The rest of the claim is dismissed in its entirety.

14. Judgment is entered in favour of the claimant as against the respondent for a sum of Kshs 53,893 with interest at court rates from 7th March 2015 when the sum became due and payable less tax with costs.

Ruling Dated, Signed and delivered this 2nd day of May, 2019

Mathews N. Nduma

Judge

Appearances

M/S Nyamwaga for claimant

Mr. Ouma for Respondent

Chrispo – Court Clerk