



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 227 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

HEZRON SIMANI ALIGULA.....CLAIMANT

VERSUS

EASTERN PRODUCE KENYA LIMITED

(KIBWARI TEA ESTATE).....RESPONDENT

JUDGMENT

By his memorandum of claim dated 19th June 2014 and filed on 26th August 2014, the claimant avers that he was unfairly terminated by the respondent, a company that grows and processes tea. He seeks the following remedies –

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 below –

i. Two Month pay in lieu of Notice = basic + house allowance

Kshs.9,800 + 1,470 x 2 months..... Kshs.22,540

ii..... Service benefits/Severance pay days x years worked x

basic/30 days =30 x 12 x 9,800/30..... Kshs.117,600

iii..... compensation of unfair termination - Gross pay x 12 months

11,270 x 12 months..... Kshs.135,240

Total Claim Kshs.275,380

c) Costs and Interests.

d) Any other relief the court may deem fit to grant

The respondent filed a replying Memorandum dated 9th September 2014 in which it denies the allegations in the Memorandum of Claim. It prays that the claim be dismissed with costs.

At the hearing, the claimant testified on his behalf. The respondent called one witness HENRY KIPLAGAT KEMBOI, RW1 who testified on its behalf. The parties thereafter filed and exchanged written submissions.

Claimant’s Case

The claimant's case is that he was employed by the respondent at Nandi Tea Estate in 2000 and worked for 12 years until December 2012 as a tea picker. His last salary was Kshs.13,000. He worked from 6.30 am to 5 pm, sometimes even up to 7 pm from Monday to Saturday. Sunday work as voluntary. He was housed by the respondent. He was not paid any allowance. He was given one week off every year but did not go on annual leave. His employment was terminated on 29th December 2012 when the Manager told him to stop working. The Manager informed him that he would be paid but he stayed at the workplace for one week without pay. He therefore decided to go to his rural home.

He testified that after one month when he inquired why he had not been paid he was issued with a letter of termination.

The claimant testified that he was not given a hearing. He was addressed in English which he does not understand. He was a member of the union but the union was not informed of the termination of his employment. He denied that he absconded duty as averred by the respondent in the Memorandum of Reply. He further denied that he was arrested and charged with a criminal offence.

He testified that his boss took his wife with whom he had five children. He testified that his house was broken into and his household goods stolen.

He prayed for salary for December 2012, which he was not paid his terminal dues and costs of this case.

Under cross-examination, the claimant stated he was not issued with a letter of appointment. When shown a contract with his thumbprint in the respondent's bundle of documents, he responded that he affixed his thumbprint but was never issued with a copy of the same.

The claimant admitted that he was paid according to the quantity of tea picked and he took his off days.

He testified that he was stopped from working by the Manager by the name Bungei who asked the Supervisor to call him after he had reported for work. He denied having a problem at home or with his neighbour. He further denied that policemen were looking for him. He testified that he went home on 9th December 2012 to attend a funeral.

On re-examination, he testified that he was issued with a contract once only.

Respondent's Case

RW1 testified that he worked at Kibwagi Estate Limited of Eastern Produce Kenya Limited as a Supervisor. He knew the claimant. He was employed in 2009 when the claimant was already working for the respondent from 25th November 2007. The claimant was originally employed as a tea picker but was later reassigned to sanitation and was also a Village Headman. He was employed on full time basis.

He testified that in November 2013 the claimant was reported to have an intimate relationship with a student whom he wanted to marry. When this was reported by the youth of the Estate, he hid the girl at an unknown place. He was then given an ultimatum to produce the girl in four days, by 13th December 2012. The claimant left the work station and did not return until 29th December 2012 without the girl. On the same day, he saw RW1 and they had a talk. He was then given off days and was required to report to work the following day. He again did not report back until 17th February 2013 when he was informed that his employment had been terminated.

On 30th December 2012, the respondent had been informed that the police were looking for the claimant for defilement but he had disappeared.

RW1 testified that the claimant was not terminated but had deserted duty.

Under cross-examination, RW1 testified that the claimant was permanent and pensionable. He testified that while the claimant was a tea picker he worked from 7 am to 3 pm, that any work after 3 pm was voluntary. That he worked from Monday to Saturday. Sunday work was also voluntary.

The claimant was housed and was not paid overtime allowance as he was paid according to the kilos of tea he plucked per day. He testified that the claimant worked for 9 years and went on annual leave every year. RW1 referred to the documents produced by the respondent in Appendix 4 of the respondent's bundle from pages 7 to 11 (leave application forms).

He testified that the claimant worked as a Village Headman for which he was paid Kshs.356 per day, that as Village Headman, the claimant was in charge of sanitation. That he worked as Village Headman from 2009 to the time he left service. That the claimant was found with his neighbour's daughter and was supposed to be arrested after he disappeared with the girl.

He testified that the claimant had a wife and children and that the claimant was paid salary up to December 2012.

Determination

The issues arising for determination from the pleadings and evidence adduced by the witnesses are whether the claimant's employment was terminated or he deserted duty, and whether he is entitled to the remedies sought.

From the evidence on record, the claimant started working for the respondent sometime between 2000 and 2001 and was a good worker until December 2012 when according to the respondent he got involved in an intimate relationship with his neighbour's daughter. When the issue

was reported to the police the claimant disappeared first from December 13th to 29th and again from 30th December 2012 to 17th February 2013. When he reported back he was informed that his employment had been terminated.

The claimant's story to the effect that he was called by the Manager, Mr. Bungei around 9th December 2012 and stopped from work is not convincing for a man who had worked for so many years without incident and was a village headman. The claimant appeared not to be telling the truth on many matters. His evidence is not reliable.

The respondent on the other hand produced all the claimant's employment records.

I am therefore persuaded that the claimant deserted duty on December 30th 2012 when he was being pursued by the police.

For these reason I find that the claimant's employment was not terminated unfairly but he deserted duty.

This claim is therefore without merit and is dismissed with no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 27TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 16TH DAY OF JULY 2019

MATHEWS NDERI NDUMA

JUDGE