



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.280 OF 2017

JOSEPHAT KIPSANGA BIWOTT.....CLAIMANT

VERSUS

EASTERN PRODUCE KENYA

LIMITED(CHEMOMI ESTATE).....RESPONDENT

JUDGEMENT

The claimant, a male adult was employed by the respondent a Tea Plucker in September, 2009 to April, and 2016 he was terminated from his employment. The claim is that the termination of employment was unlawful and the claimant was not paid his terminal dues.

The claim is also that the unlawful termination of employment arose due to the facts that the claimant was unionised but his union was not notified of the same; he was not given a hearing; leave days dues were not paid; severance and notice pay were not effected as required. The claimant also avers that during the course of his employment he was underpaid contrary to regulations on minimum wage, he worked overtime and was not paid and he was not allowed to take any rest or public holidays where he served without compensation.

The claimant is seeking;

2 months' notice pay Kshs.20, 214;

7 years accrued leave pay Kshs.70, 749.00;

Unpaid housing allowance for 7 years Kshs.127, 348.00;

Redundancy dues Kshs.42, 499.00;

Compensation Kshs.139, 479.00

Costs of the suit.

The claimant testified in support of his claim that upon employment by the respondent he would be at work from 6am to 5pm from Monday to Saturday each week and was paid a wage of Kshs.8, 000.00 per month. The wage did not include a house allowance and for the overtime hours worked the respondent did not pay. The claimant was issued with pay slip and he had a contract of service.

The claimant also testified that while at work he got injured on his leg and on this basis the respondent dismissed him from his employment. The claimant had been treated at the respondent's dispensary but was told to go home until he got well. After two weeks home, the claimant decided to report back to work but was directed to await a phone call back which did not happen.

The claimant also testified that he was unionised but his union was not invited to any disciplinary hearing before his dismissal. The respondent had issued written contracts of service over time served. When he got an injury, he filed a claim against the respondent before the Kapsabet magistrate's court under CMCC No.219 of 2016 and which case is on-going. When he resumed duty the respondent told him that they were not taking new employee.

Defence

In defence the respondent's case is that the claimant was employed under fixed term contracts from 2013 to 2016 and was paid all his dues for the period. The claimant voluntarily terminated his contract of service on 16th April, 2016 and gave two weeks' notice and which

termination was accepted by the respondent. The particulars of alleged unlawful termination of employment do not apply and the payments sought are not due. The case should be dismissed with costs.

In evidence the respondent called Charles Ouma Arago a supervisor with the respondent and who worked closely with the claimant and testified that indeed the claimant was an employee of the respondent on a fixed term contract from 2010 to 2016. At the end of each contract the claimant would seek for reemployment and a new contract would issue. Three was a time the claimant left for a long period, he came back and reapplied and was issued with a contract. The last such contract was for the period of 1st January, 2016 to 30th April, 2016. The claimant served the respondent with a termination notice and which was accepted.

During employment the claimant was allocated accommodation within the respondent premises and camp but his home was nearby and would opt to reside at his home despite having the option to reside at the allocated premises. Prorate leave was paid upon exit.

At the close of the hearing both parties filed written submissions.

In addressing the claim before court the pleadings, the evidence and written submissions have been put into account and the issues which emerge for determination are;

Whether there is a case for unlawful termination of employment; and

Whether the remedies sought are due.

The claimant asserts that he got an injury while at work and was treated at the respondent's dispensary after which he was sent home to get well. After two weeks he reported back but was sent away. Following the injury the claimant has filed CMCC No219 of 2016, Kapsabet and which case is on-going.

The defence is that the claimant was under a fixed term contract, it had a termination clause and which the claimant applied and resigned from his employment. Terminal dues were paid after the resignation notice was accepted.

There are work records of the claimant produced by the respondent. One such record is the last contract of service under which the claimant served running for the period of 1st January, 2016 to 30th April, 2016. These facts are admitted by the claimant.

The last written contract had a start date and an end date. Such contract employment is allowed in law and under the provisions of section 10(3) (c) of the Employment Act, 2007 which provides that;

(c)Where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end.

In **Fatuma Abdi versus Kenya School of Monetary Studies [2017] eKLR** the court held that;

A fixed term contract of employment is a lawful mode of employment with a start and end date. In this case the Claimant made application for renewal of each contract and a new contract was issued for a fixed term. There was no time the Claimant worked without a written contract or went beyond any such written contract so as to create the expectation that even where a written contract was not issued, it would be renewed for another term.

On the fixed term contract the claimant held being a lawful mode of engagement, I find the evidence that termination of employment resulted from his injury while at work without basis. Among all the claims set out the claimant does not allege that he was not paid for the term of his last contract of service. With the end of the fixed term contract, such does not amount to unfair termination of employment.

On the remedies sought, on the finding that there was no unfair termination of employment, compensation is not due.

Notice pay is also not due as a contract ended on its terms and there was no renewal. On the evidence that the claimant resigned from his employment, this defence was not challenged in any material way and I take it the claimant did not reapply for the renewal of his contract and he served its term. It is also not lost to the court that during this period of the last contract the claimant got injured while at work, he received retreatment at the respondent's dispensary and was allowed time to go home.

On the claim for leave days due for 7 years, there is evidence that the claimant worked on a fixed term contract for the period of 2010 to 2016. Part of the records submitted by the respondent comprise contract dated 6th February, 2010 for the period of 6th February to 8th May, 2010;

Contract dated 1st November, 2009;

Contract dated 1st January, 2011;

Contract dated 1st March, 2014 for the period ending 30th August, 2014;

Contract dated 3rd March, 2014 for the period ending 31st December, 2014;

Contract dated 14th April, 2015; and

Contract covering the period 1st January to 30th April, 2016.

Each contract was served for its terms and lapsed. The claimant had a work schedule of 46 hours per week spread over 6 days in a week and 2 days of leave for each month worked. The claimant has attached several pa slips to his Memorandum of Claim and for the last fixed contract term ruling January to April, 2016 there are holiday wages paid and which pay is not set out as to what is encompassed. I take it this was in compensation for work over a *holiday* earned and not taken. However on the 2 days leave due to the claimant, section 28 of the Employment Act, 2008 requires the respondent to keep a work record on how such a right and benefit was enjoyed by the claimant as the employee. Without submission of any work records to this effect the leave due for the 4 months is due. On the wage of Kshs.9, 494.00 for the 8 days leave days earned such amounts to kshs.2, 531.75.

Section 31 of the Employment Act, 2007 requires an employer to provide housing or an allowance thereof. In this case the respondent asserted that there was housing provided to the claimant within its quarters and camp but he opted to reside outside in the neighbourhood where he would travel from to work. The allocated quarter to the claimant to reside is not set out. I take it there no was no such allocation as had this been the case, the contract of service ought to have defined the same or where the same was allocated though other method, the same identified once the claimant lodged this claim seeking payment of due house allowance.

For the period covered under the last fixed term contract, the claimant is entitled to a house allowance of Kshs.1, 424.10 x 4 months all being Kshs.5, 696.40.

On the claimant for redundancy pay, on the finding that the claimant was engaged on a fixed term contract which ended on its terms, such dues do not arise. In an event this case and the presented facts do not relate to a matter addressed under section 40 of the Employment Act, 2007 where redundancy dues arise.

Accordingly, judgement is entered for the claimant for the dues owing for Kshs.2,531.75 leave pay; Kshs.5,696.40 house allowance pay; and each party to bear own costs.

Delivered in open court at Eldoret this 29th day of June, 2018

M. MBARU JUDGE

In the presence of:

Court Assistants: Martin and Robert

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