



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET**

**CAUSE NO.253 OF 2017**

**ERICK WAFULA WETUNGU.....CLAIMANT**

**VERSUS**

**EASTERN PRODUCE (K) LTD (SAVANI TEA ESTATE)..... RESPONDENT**

**JUDGEMENT**

The claimant filed the Memorandum of Claim on 26<sup>th</sup> September, 2017. The respondent was served with summonses on 2<sup>nd</sup> November, 2017 stamped on the returns but has not entered appearance or filed any defence. There is an Affidavit of Service sworn by George Ochieng confirming service upon the respondent and receipt by the secretary, Sally Chelangat.

The claimant was heard on his case in the absence of the respondent.

The claimant, an adult male was employed by the respondent as a Tea Plucker earning a wage of Kshs.15,000.00 per month. On 6<sup>th</sup> February, 2017 the claimant was terminated from his employment without any reasons, notice or hearing. This followed a work injury the claimant had and for which he was suspended from duty.

The claim is that the respondent failed to follow due process in terminating the claimant's employment. The procedures set out under sections 36, 45 and 49 of the Employment Act were not followed and this resulted in unfair termination of employment.

The claimant is seeking payments as follows;

- a) Notice pay for one month at Kshs.17,250.00;
- b) Compensation for 12 months at Kshs.180,000.00;
- c) Unpaid house allowance Kshs.92,250.00;
- d) Pro rata leave Kshs.4,375.00;
- e) Overtime dues Kshs.55,348.00;
- f) Service pay/gratuity Kshs.22,500.00;
- g) Unpaid public holidays Kshs.3,124.00;
- h) Accrued leave not taken Kshs.51,249.99

Total dues Kshs.426,132.99

The claimant testified in support of his case. The claimant started working for the respondent in 2013 as a Tea Plucker. He got injured while at work and the respondent accused him of suing the company. The supervisor Mr Kemei called the claimant and verbally terminated his employment. This was confirmed by the manager Mr Sitienei. The claimant was directed to vacate respondent's camp where he was resident. The house allocated to him belonged to the respondent and he was not paying rent. There was no notice before termination. There was no lawful reasons given for the same. The claimant was paid Kshs.9, 000.00 upon his termination of employment and nothing else.

The claimant also testified that while he was in employment, he never took a lunch break as legally required. He would start work from 7am to 5pm and the overtime hours were never compensated. The respondent paid for his NSSF and NHIF. The last salary paid was

kshs.15,000.00 per month.

At the close of the hearing, the claimant filed written submissions.

Without appearance and defence by the respondent, the claimant's case is not challenged. However, the claims shall be assessed with regard to the applicable law.

The failure by the respondent to file defence has left the court with only the evidence of the claimant. Where termination of employment is not supported by any written notice, reasons thereof or any challenge to his sworn evidence, the court must believe the claimant.

Section 35 read together with section 36 of the Employment Act, 2007 requires that before termination of employment, an employer must give the employee notice of payment in lieu thereof. Also under section 41 of the Act, an employee must be given notice and hearing on any issue relating to misconduct, capacity or work performance. Where the procedures set out under section 41 of the Act are not adhered to, such termination of employment is deemed unfair in accordance with section 45 of the Act.

In this case, where the claimant sustained a work injury and filed a claim against the respondent as the employer, such is not a lawful reason to be sued against him for termination of employment. A work injury is regulated in law and the applicable law, the Work Injury Benefits Act, 2007 allow an employee to lodge a claim and be compensated.

Where the claimant lost employment following his efforts to assert his rights, and where such termination failed to abide substantive or procedural fairness, this amounted to unfair termination of employment as under section 45 of the Employment Act, 2007.

Where termination of employment is without due process, notice pay is due. The claimant was earning an average wage of kshs.15, 000.00 per month and such is awarded in Notice pay.

On the finding there was unfair termination in terms of section 45 of the Employment Act, 2007 compensation is due under section 49 of the Act. In the circumstances of this case where the claimant was paid kshs.9,000.00 at the time of termination of employment, and putting into account the provisions of section 45 (5) an award equivalent to 6 months gross wage is appropriate and the claimant is awarded Kshs.90,000.00.

On the claim for house allowance, the claimant testified that he was living in the respondent's camp without paying rent. On his own evidence he confirmed housing was allocated by the respondent and upon termination of employment he was directed by Mr Sitienei to vacate the allocated quarter. This claim is declined.

On the claim for pro-rata leave, the claimant did not set out how these dues arose. Even in the absence of the respondent filing a defence and in terms of section 28 of the Employment Act, 2007 the claimant duty was to set out the basis of his claims and particularly for leave due.

Overtime pay is claimed on the basis that the claimant would report to work from 7am too 5pm. A look at the different pay slips and statements filed by the claimants, there is the element of different quantities of produce collected each month. The same is quantified and applied differently each month. I take it this took into account the hours at work and the produce picked each month. On this basis to award for overtime pay whereas the claimant was paid for produce picked would be a double payment. The assessments of the dues herein are premised on the average wage payable per month putting into account the different harvest quantities in a given period. Such addresses any overtime hours put into the claimants work.

Service pay and or gratuity on the evidence that the claimant was registered with the NSSF and NHIF is not due as there is no agreement produced to justify that this benefit arose out of agreement or other written contract between the claimant and the respondent. Such is not due in this case.

The claim for unpaid public holidays is placed at Kshs.51, 249.00. The nature of Public Holidays the claimant was at work is not articulated. On the pay statements submitted by the claimant each has a

payment for *Holiday Wages*. Without breaking this down as to how it arose, this having been a paid benefit to the claimant, such work on *Holiday* is addressed.

**Accordingly, judgment is entered for the claimant with a finding that his employment was unfairly terminated; compensation awarded at kshs.90, 000.00; notice pay at Kshs.15, 000.00; and costs of the suit.**

**Delivered in open court at Eldoret this 25<sup>th</sup> day of June, 2018.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistants:.....

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