



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.108 OF 2016**

***(Before D. K. N. Marete)***

**REUBEN ASACHE.....CLAIMANT**

**VERSUS**

**EASTERN PRODUCE (K) LTD.....RESPONDENT**

**JUDGMENT**

This matter was originated by way of a Memorandum of Claim dated 10th June, 2016. The issues in dispute are therein cited as;

- (a) Whether the claimant was unlawfully, unprocedurally and unfairly summarily dismissed from employment by the respondent;*
- (b) Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this statement of claim;*
- (c) Whether the claimant is entitled to an award of certificate of service;*
- (d) Whether the claimant is entitled to payment for breach of contract and*
- (e) Who should pay costs and interests of the suit;*

The respondent in a Replying Memorandum dated 29th June, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on 1st May, 2011, he was orally employed by the respondent as a General Labourer at Kshs.10,000.00 per month. At the time of his unfair termination, this had gone up to Kshs.15,000.00.

The claimant's further case is that he served with dedication, unsavory and without any warning on his employment record until 30th June, 2016 when he was unlawfully terminated from service. This was purposely;

*5. The claimant avers that the respondent orally terminated him from employment when the claimant demanded for his lawful dues, to wit:- leave allowance, overtime dues etc. the claimant further avers that he was not given any valid reason leading to his termination from employment by*

*the respondent and further the claimant states that his efforts to seek the audience with the respondent concerning his termination was futile.*

*6. That the claimant avers that the respondents actions to terminate him solely on the claimants actions of demanding his lawful entitlement was unjustified and the same is in blatant breach of the provisions of the law as contained in the Employment Act and the Constitution.*

It is the claimant's further case that his termination of employment was a derogation of the Employment Act, 2007 as follows;

*7. The claimant submits that the Respondent terminated his services summarily without following the right procedure laid down in the Employment Act, No. 11 of 2007.*

*8. The Respondent violated Sections 41(1) of the Employment Act 2007 which provides that when an employer intends to dismiss or terminate the employment of an employee.....it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that the respondent never explained to him precisely the reasons for the termination of service and neither did the respondent allowed him to dispute the reasons given for his unfair termination of service.*

*9. Section 43(1) of Employment Act provides that in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination of the employment shall be deemed to have been unfair...Claimant contends that the Respondent never explained to him precisely the reasons for the termination of service and neither did the respondent prove that the said reasons of termination as valid reasons.*

*10. Section 44(4) of the Employment Act lists matters which amount to gross misconduct and which entitles the employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness of the accusations leveled against him/her.The claimant submits that the respondent did not give him a chance to dispute the correctness of the accusations before dismissing him.*

*11. Section 45 (2) of the Employment Act 2007 provides that unfair termination occurs when the employer fails to proof that:*

- a) The reason for termination is valid*
- b) The reason for termination is a fair reason(s)*
- c) The employment was terminated in accordance with fair procedure*

The claimant further avers that his termination was unfair and illegal as follows:-

*(i) The respondent did not give the Claimant Termination notice as provided by Section 35(1) c & 36 of the Employment Act.*

*(ii) The Respondent denied the Claimant's employment without following the procedure laid down in the Employment Act specifically the procedure laid out in Section 15, 41 and 45 of the Employment Act.*

*(iii) The Respondent terminated the Claimant's employment without proving that the reason for termination was valid as provided under Section 43 of the Employment Act;*

*(iv) The Respondent did not regulate the working hours of the Claimant as provided by Section 27*

of the Employment Act.

(v) The Respondent failed to pay the Claimant her 12 months wages for loss of Employment as provided under Section 15 of the Labour Institutions Act and Section 49(c) of the Employment Act.

He prays as follows;

(a) The claim be allowed in entirety with costs and interest be borne by the Respondent;

(b) The other further and better relief the Honourable Court may deem just and fit to grant

**CLAIMS:**

1. A declaration that the termination of employment was discriminative, malicious, unfair, unprocedural and a fundamental violation of the rights of the claimant and thus the claimant is entitled to compensation.

2. A certificate of service as per Section 51 of the Employment Act;

3. Costs and interest of this suit.

This is computed as follows;

i. One month pay in lieu of notice

As L.N. No. 71 of 1/5/2912 regulation of

Wages (General) (Amendment) order, 2012

Kshs. 17,250/=

ii. House allowance for the period of 4 years 9 months

Translates to 57 months

Monthly house allowance = kshs.2250 for 57 months

57 x 2250

Kshs. 128,250/=

iii. Overtime dues

45 hours per week (statutory hours as per

regulation of wages order)

Claimant worked from 7a.m to 6p.m. daily making 10 hours

10 hrs x 6 days = 60 hrs – 45 = 15 hrs overtime per week

15 hrs x 4 weeks = 60hrs per month

60 x 1.5 x 15,000 / 195 = 6923.07/= per month

6923.07 x 37 months

25,153.84/=

Kshs.

iv. 12 months salary compensation

*For unfair termination*

$17,250 \times 12 \text{ months}$  Kshs.  
207,000/=

v. *Leave accrued but not paid*

*One month salary x number of years worked*

$1750 \times 4 \text{ years}$  Kshs.  
69,000/=

vi. *Service pay at 15% salary per year x number*

*of years worked*

$15\% \times 1750 \times 4$  Kshs.  
124,200/=

**TOTAL**

**Kshs.801,853/=**

The respondent presents a case of outright denial of the claim. It is her further case that the claim does not disclose a reasonable cause of action and is an abuse of the process of court and should therefore be dismissed with costs.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair, unprocedural and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair, unprocedural and unlawful. The claimant in his written submissions fomented a case of unlawful termination of employment

The claimant further sought to rely on Section 8 of the Employment Act, 2007 which provides that;

*“The provisions of this Act shall apply to oral and written contracts”*

*The claimant's contract of writing was reduced down to writing as per the letter of employment stated thereon. Section 9(2) provides that:-*

*“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub-section (3)”*

*That requirement was clearly complied with by the respondent.*

The claimant also sought to rely on Section 45 of the Employment Act, 2007 which provides that;

*“No employer shall terminate the employment of an employee unfairly.*

*A termination of employment by an employer is unfair if the employer fails to prove;*

- a) *That the reason for the termination is valid*
- b) *That the reason for the termination is a fair reason*
  - (i) *Related to the employee's conduct, capacity of compatibility; or*
  - (ii) *Based on the operational requirements of the employer.*
- c) *that the employment was terminated in accordance with fair procedure*

It is his submission that the respondent did not fulfill these legal provisions and therefore rendered the termination unlawful.

The claimant further sought to rely on the authority of *Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR* where the honourable court held that;

*“for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”*

Further,

*Section 45 (4) (b) of the Employment Act, 2007 provides;*

*... that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.*

Again,

*In the case of Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd (2013) eKLR Justice Radido summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;*

- a) *That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*
- b) *That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation.*
- c) *That the employer has heard and considered any explanations by the employee or their representative.*
- d) *Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

He further relied on the authority of *Kabengi Mugo V Syngenta East Africa Limited Industrial Cause Number 1476 of 2011* where the honorable court held that;

*“The Kenyan employment law no longer accepts the “at will doctrine” whereby an employer can fire employees at will, for any reason or no reason.”*

In the case of *Donald Odeke V Fidelity Security Limited Industrial Cause Number 1998 of 2011; (2011) LLR 277* where the honorable court held that;

*“It does not matter what offence the employee is accused of. If the employee is not heard, the*

*termination is ipso facto unfair.”*

In this the claimant concludes his case for unlawful and unprocedural termination of employment.

The respondent in her written submissions enlists a case of lawful dismissal on the following grounds;

*Absenting himself from work*

*Failure to report to duty*

*Leaving the work place untidy and dirty*

*Smoking in the work place*

*Allocating himself duties*

*Found in possession of overalls which had been allegedly stolen.*

*Leaving the work place without leave/permission*

*Failure to perform the duties allocated.*

These annexures demonstrate a case of misconduct on the part of the claimant in relation to his employment and workplace. This is further supported by the respondent's submissions as follows;

*“The claimant herein absconded duty and this is evidenced by the attendance sheet. This was a gross misconduct on the part of the claimant. If your honour peruses the list of documents filed by the respondent dated 13<sup>th</sup> July, 2016 and 18<sup>th</sup> July, 2016 it indicates that the claimant has been suspended and warned on several occasions. It is our humble submissions that the claimant was involved in gross misconduct activities sufficient enough to warrant his dismissal.”*

The respondent in her brief written submissions also reiterates her case and submits that the claimant has not indeed proven a case of unlawful termination. She seeks to rely on the authorities of **Jackson Butiya V. EPK cause no.335 of 2011** where the court noted as follows;

*“...the duty to prove there was unfair termination was on the claimant. The claimant, like in the present case did not discharge this duty and was not entitled to remedies sought.”*

She also sought to rely on the authority of **Leyland UK Vs. Shift (1981) RLR 91** where Lord Denning observed as follows;

*“the correct test is: was it reasonable for the employer to dismiss the employee? If no reasonable employer would have dismissed the employee, then the dismissal was unfair.”*

The respondent in conclusion relied on her submission that this case involved employment through a fixed term contract and in the circumstances, the contract lapsed and therefore ousts a case of unlawful termination of employment.

The claimant in a Claimant's Response to the Respondent's Submissions dated 10th November, 2016 seeks to interrogate the respondent's submissions vide this response dated 30th November, 2016. Here the claimant questions the authenticity of the alleged contract and submits on its veracity as follows;

*“... the authenticity of the alleged contract is questionable by the claimant; the respondent has never issued any such document upon the claimant to read, or have it read to him by the respondent, and thereafter signed.....*

*The said contract is allegedly signed by the claimant's thumb print. My lord a look at the said thumb print, on the face of it, automatically shows mischief on the part of the respondent. The said thumb print is huge, and further, it is not in sync with the other thumb prints purported to have been appended by the claimant.*

*The claimant submits that the only true signature he fixes on any formal document is the specimen in his verifying affidavit, and any thumbprint fixed on the purported contract of employment is vehemently denied.*

*... the respondent prepared a fictitious contract of employment, forged the claimant's specimen signature in form of a thumb print, and wants to use the same in court to justify their action of unlawfully dismissing the claimant."*

A scrutiny of the claimant's submissions above comes out positively in his favour. This destroys the respondent's case *in toto*. I therefore find a case of wrongful, unfair and unlawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having established a case of unlawful termination of employment she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

(i) A declaration be and is hereby issued that termination of the employment of the claimant by the respondent was wrongful, unfair, unprocedural and unlawful and a violation of the rights of the claimant.

(ii) One (1) month's pay in lieu of notice Kshs. 15,000.00/=.

(iii) Six (6) months compensation for unlawful termination of employment.

Kshs. 15,000.00 x 6 = Kshs. 90,000.00

(iv) The respondent be and is hereby ordered to issue a certificate of service to the claimant within 30 days of these orders of court.

(v) That the costs of this claim shall be borne by the respondent

Delivered, dated and signed this **31st day of January 2017**.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Miss Soita instructed by Mwakio Kirwa & Company Advocates for the Claimant.

2. Mr. Kipyegon instructed by Kibichiy & Company Advocates for the Respondent