



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

**AT KERICHO**

**CAUSE NO. 106 OF 2016**

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

**CARRISON KARIADO.....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

This matter is brought to court 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 terminated from employment by the respondent;*
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in this memorandum of claim;*
- c. Whether the claimant is entitled to an award of a certificate of service;*
- d. 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 he was employed by the respondent as a General Labourer (Tea Picker) with effect from 1st February, 2012. At the time of his unfair termination on 17th June, 2015, he earned Kshs.16,032.00.

It is the claimant's case that his employment with the respondent was reduced into contractual terms with effect from 2nd May, 2015 for a period of nine months ending on 1st January, 2016. The termination of service on 17th June, 2015 therefore amounted to a breach of the terms of contract.

The claimant's other case is that his termination was on ground that his employee No.118634 was not in the system and despite incessant enquiries from the respondent's clerk and manager, no answer was forthcoming. Efforts by the union to get an answer also fell on the deaf ears of the same manager, Gladys Kibois.

The claimant again avers that this was a breach of Section 41,43,45(2) & 44(4) of the Employment Act as follows;

*14. Section 41 of the Employment Act 2007 provides that when an employee intends to dismiss or terminate the employment of an employee from among other reason misconduct, it must explain to the employee in a language he/she 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 his termination from employment.*

*15. Section 43 of the Employment Act 2007 provides that any claim arising out of termination of a contract, the employer shall be required to proof the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.*

*16. Section 45 (2) of the Employment Act, 2007 provides that an unfair termination occurs when the employer fails to proof that;*

*a) The reason for termination is valid*

*b) The reason for the termination is a fair reason (s)*

*c) The employment was terminated in accordance with fair procedure*

*It is the claimant's case that the termination of employment by the respondent was unfair as it violated the requirements of the above section of the Employment Act.*

He prays as follows;

*a. Declaration that the claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstance the claimant is entitled to compensation as prayed for herein above.*

*b. The sum of Kshs. 750,846.60/- as set out herein above.*

*c. Cost of this suit and interests on at court rates from time of filing suit until payment in full and*

*d. A certificate of service as per section 51 of the employment Act.*

*e. Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent entirely denies the claim and avers that the claimant has no reasonable cause of action against the respondent. She further pleads that the claim is an abuse of the process of court and therefore should be dismissed with costs.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant wrongful, unfair and unlawful.
2. Whether the claimant entitled to the relief sought.
3. Who bears the costs of this cause.

The 1st issue for determination is whether the termination of the employment of the claimant wrongful, unfair and unlawful. The claimant in his written submissions dated 30th November, 2016 submits that

the issue of employment is not disputed and therefore a none issue.

He proceeds to narrate the sequence of events leading to his termination on 17th June, 2016 without regard to the law and processes enunciated under sections 41, 43 and 45 of the Employment Act, 2007 as pleaded. The claimant submits a case of falsification and manipulation of the respondent list of documents to paint a different scenario and therefore gain capital in this litigation. This is as follows;

*3. The claimant states that the last day he was on duty was the 18th of June 2016, when he came to work, but the respondent did not allow him to even commence. The documents alluded to by the respondents, purporting to indicate that the claimant was on duty on 18th and 19th of June 2016, and that he plucked 38.20kg of tea are in fact falsified and meant to mislead this honourable court. The respondent is the sole custodian of the attendance check list being relied upon by the respondent, and the same is computer generated, hence open to being altered through editing process. The claimant submits that in fact the respondent edited the said attendance checklist summary, in order to mislead court that the claimant was allegedly on duty on the dated he was in fact terminated. We submit that having failed to discharge the burden of proof, then this court ought to dismiss the said allegation.*

*4. The claimant further states that he was never contacted by the respondent as alleged, after he sought an explanation as to why his name and employment number was not in the respondent's records.*

*5. The claimant submits that there was lack of both substantive justification and procedural fairness in his termination. The claimant was not heard, he was never issued with termination notices and no reason given for his termination was given, and if at all, the same was not a valid reason.*

The respondent submits a case of absconding duty by the claimant leading to his termination of employment. It is her submission that this absenteeism was tantamount to gross misconduct and therefore the justification of termination of employment.

This is a case of your word against mine. It is an appropriate case for determination through the principle of balance of probabilities. That is, of the two cases, which is the more probable in the circumstances? I find a case for the claimant. This is the more probable and realistic of the two. Further, the respondent does not address or in any way dispute the claimant's submission of falsification of documents relied on in support of her case. This is telling. I therefore find a case of wrongful, unfair and unlawful termination of employment to the claimant by the respondent. This answers the 1st issue of for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won a case of unlawful termination of employment, the claimant becomes entitled to the relief sought. And here goes down the 2<sup>nd</sup> issue for determination.

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

- i. One (1) month salary in lieu of notice Kshs.12,490.00
- ii. Leave due but untaken Kshs.12,490.00
- iii. The cost of this claim shall be borne by the respondent

This court is however, is disabled in a computation of compensation for unfair termination of employment because the data provided for in the pay slips annexed to the claim are not clear as to whether the amounts paid were based on the harvest quantity or monthly salaries. The law requires that computation of compensation for unlawful termination of employment be pegged on the monthly

salary of the employee. This should be clearly pleaded and demonstrated in evidence. Any departure from the provisions of the law would be absurd and intolerable.

Delivered, dated and signed this **21st day of February 2017.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates.
2. Miss.Kipyego instructed by Kibichy & Company Advocates for the respondent.