

5. Service pay

30 days x 5 years worked basic pay/30 days

30 days x 5 yrs x 9024.15/30 Kshs. 45,120.75

6. Compensation for unfair termination

Gross payx12 months 10,377x12 months Ksh. 124,524

TOTAL CLAIM

Kshs. 509,106

The Claimant prayed for a declaration that the termination process as carried out by the Respondent is unlawful and during her employment with the Respondent she was not remunerated as required by law; payment of Kshs. 509,106 as tabulated above, costs and interest and any other relief that the honourable court may deem fit to grant.

The Respondent filed a Replying Memorandum denying the averments in the Memorandum of Claim. The Respondent pleaded that there is no reasonable cause of action against it, that the claim is an abuse of court process and should be dismissed with costs.

At the hearing of the case the Claimant testified that she was employed by the Respondent from 2010 to July 2014. She was working on contracts of 5 months. She was paid according to the quantity of tea she picked and was issued with payslips. She worked from 7 am to 6 pm but was not paid overtime. In 8th July 2014 she was informed by the Manager Christine Miyoma that there was no more work for her. She was not given a letter of termination. She urged the court to order the Respondent to pay her as prayed.

Under cross examination the Claimant stated that she did not work continuously as she stopped working every time her contract expired. Her last contract was from January to July 2014. She stated that nobody told her when to start or stop working but she was informed that working hours were from 7 am to 5 pm. She testified that she was not provided with housing by the Respondent.

The Respondent called Abraham Tabut, the Divisional Manager in charge of Kapsumbeiwa Estate of Eastern Produce Kenya Limited who testified that he was the manager in charge of the unit where the Claimant worked. He testified that the Claimant was employed on various occasions depending on the contract she was given as a plucker. She worked on fixed term contract and the duration was dependent on the season, with short contracts for the low season and longer contracts for the high season.

He testified that her last contract was for 2 months from 10th June to 31st July 2014. Before that she was on a 4 month contract from February to May 2014.

Abraham testified that the Claimant did not complete her last contract. She worked up to about 19th July then absconded duty up to 30th July when her contract expired. He testified that the Claimant did not qualify for any benefits apart from the kilos she plucked. He testified that for previous contracts the claimant was paid for kilos plucked and 2 days leave per month on prorata basis. He testified that the Claimant is not entitled to the prayers she sought in the claim.

Under cross examination Abraham stated that he was currently working in Simatwet Division of Kapsumbeiwa Estate where the Claimant was working. He stated that the Claimant's manager was Christine Miyoma but she had moved to a different estate. He testified that the attendance checklist for July 2014 indicated that the claimant worked up to 18th and was paid for kilos plucked only because she had breached the contract.

Submissions

In the submissions filed on behalf of the claimant it is submitted that Abraham confirmed that she was an

employee of the respondent. It is further submitted that her contract was verbally terminated by an agent/employee of the Respondent without any apparent reason and that she is entitled to payment of terminal dues as tabulated in the claim.

For the Respondent it is submitted that the burden of proving unfair termination lies with the claimant as provided in section 47 of Employment Act while the Respondent's burden is to justify grounds of termination. The Respondent relied on the case of **Jackson Butiya v EPK Cause No. 335 of 2011** where the court held that the Claimant had not discharged his burden like in the present case and was not entitled to remedies.

The respondent further relied on the case of **Leyland UK Limited v Shift [1981] 1 RLR 91** where Lord Denning noted:

" ...the correct position 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."

It was submitted that no evidence was tendered during the trial that the termination of the Claimant was unfair. It was submitted that the Respondent's witness confirmed in his testimony that the claimant's services were terminated at the expiry of her last contract which she did not complete. It was submitted that the Claimant is not entitled to the prayers sought.

Determination

As has been submitted for the Respondent the burden of proving that a termination occurred in on the employee who alleges so while the Respondent's burden is to prove validity of reasons for termination. Refer to section 47(5) Employment Act. In the present case the Claimant's testimony is that her employment was terminated by the Manager who informed her on 8th July 2014 that there was no more work for her. She however does not have a copy of the contract which she alleged commenced in January 2014 and was to expire in July 2014.

The Claimant admitted that she worked on fixed term contracts that were not continuous and was paid according to kilos of tea that she picked. She also admitted that her last contract was expiring in July 2014. The issue for determination is therefore if the Claimant's contract was terminated unfairly as she alleges or she absconded duty before expiry of the same as stated by the Respondent's witness.

Since the Claimant alleges she was terminated verbally by the Manager Christine Miyoma, while the Respondent contends that the Claimant absconded duty before the contract expired it is the burden of the Respondent to prove that the claimant absconded duty. The Respondent's witness testified that they have records indicating that the Claimant absconded duty but the said records were not submitted to court. The witness further confirmed that Christine Miyoma still works for the Respondent but in a different estate. No explanation was given why Christine was not called to confirm or controvert the contention of the Claimant that she was verbally terminated by Christine.

It is the duty of the Respondent to prove that termination was in accordance with the law, the fact of the termination not being in contention. Among the records that the Respondent is required to keep under section 10 of the Employment Act are date of commencement of the contract, form and duration thereof and particulars sufficient to enable the employee's entitlement upon termination to be precisely calculated. (Refer to section 10(2) and (3)(a)(i). Having failed to produce such records or to controvert the Claimant's contention, I find that the Respondent unfairly terminated the employment of the Claimant.

Remedies

The Claimant prayed for two months salary in lieu of notice at the rate of 18,048.3. The Respondent did not confirm or deny the amount Claimed. In any event as I have already stated above it was the Respondent's responsibility to keep and produce records to ascertain what is payable to the Claimant upon termination of employment which it has failed to do. Since the Claimant did not produce any evidence to

prove that she is entitled to 2 months notice or pay in lieu thereof and taking into account her contention that she was on a five month contract expiring at the end of July 2014 but was terminated verbally on 8th July 2014, I award her one month's salary in lieu of notice in the sum of Kshs. 9,024.

The Claimant is not entitled to leave due as claimed as she did not present any evidence to prove that she was not either given leave or paid in lieu thereof. Further, the contract she produced for the period 1st August 2013 to 31st December 2013 provides for payment of 2 days annual leave per month together with salary. The claim is therefore dismissed.

The Claimant further prayed for rest days. Her contract on record provides that the monthly rate of pay is inclusive of rest day. The claimant is therefore not entitled to pay for rest days as she did not adduce any evidence that the same was not paid in accordance with the contract or at all. The prayer for rest days is therefore also dismissed.

The Claimant further prayed for overtime dues. In her testimony she stated that she was only informed about the working hours but she reported to and from work as she wished. She further testified that she was paid according to the kilos of tea that she picked. I therefore find no proof of overtime and dismiss the prayer.

The Claimant prayed for service pay. Service pay is payable to employees under section 35(5) of the Employment Act and is not payable to an employee who is a member of NSSF by virtue of section 35(6). The claimant's payslips reflect that she was a member of NSSF. She is therefore not entitled to service pay and the prayer is dismissed.

The Claimant prayed for compensation. Having found that she was unfairly terminated and taking into account all relevant factors I award her two months' salary as compensation in the sum of Kshs. 20,754.00.

In view of the amounts claimed and the amounts awarded I order costs to be paid by the Respondent using the Scale for fees in Magistrates courts.

Dated, Signed and Delivered this 4th day of May, 2017

MAUREEN ONYANGO

JUDGE