



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 40 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**BEATRICE JALUHA RUMWAMU .....CLAIMANT**

**-Versus-**

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

**JUDGMENT**

Vide Memorandum of Claim dated 15<sup>th</sup> February and filed on 16<sup>th</sup> February 2016 through M/S Chepkwony & Company Advocates, the Claimant avers that she was employed by the Respondent as a tea picker from 13<sup>th</sup> November 2013 and worked until 15<sup>th</sup> January 2016 when her employment was unlawfully terminated. She prays for the following remedies-

- a) A declaration that termination process as carried out by the Respondent is unlawful and that during her employment with the respondent, she was not remunerated as required by law.
- b) Payment of the sums of money claimed under paragraph 9 above.
- c) Costs and Interests.
- d) Any other relieve the Honourable may deem fit to grant.

The Respondent filed a Reply to the Memorandum of Claim on 26<sup>th</sup> February 2016 through M/S Kibichiy & Company Advocates denying the allegations in the Claim.

The case was fixed for hearing on 27<sup>th</sup> March 2017 when the Claimant testified on her behalf led by Mr. Rugut. The Respondent who was represented by Ms. Kipyegon called one witness CHARLES OUMA AROGO. The parties thereafter filed and exchanged written submissions.

**Claimant's Case**

It is the Claimants case that she was employed by the Respondent as a tea picker in November 2013. She was paid according to the quantity of tea picked and earned between Kshs. 5,000/- and 7,000/- per month. She was housed by the Respondent. Initially she was paid in cash but later was paid through an ATM and was issued with payslips, samples of which are in her bundle of documents. She worked from 6am to 6pm on Monday to Saturday and rested on Sunday. During high season she worked on Sunday. She did not work on Public Holidays.

The Claimant testified that she was injured while at work on 27<sup>th</sup> November 2013. She was given sick leave then put on light duty after her condition improved in 2014 up to January 2016 when she was terminated. She testified that she was dismissed when she filed a case for compensation for the injury in Kapsabet Chief Magistrates Court. She testified that the Respondent told her it cannot work with an injured employee.

The Claimant testified that she was not given a hearing or paid terminal dues but was paid for tea picked in January 2016. She prayed for remedies as set out in her memorandum of Claim.

Under cross examination the Claimant testified that she was issued with fixed term contracts which were renewed upon expiry and that her last contract was to expire in February 2016 but she was dismissed before it expired. She testified that she was injured on 27<sup>th</sup> November 2013 and was not fully healed as at the time of hearing, that she resumed duty in 2014 on light duty but still worked as tea picker. She testified that she was at work up to 15<sup>th</sup> January 2016 and that the Supervisor prevented her from working on 16<sup>th</sup> January 2016 on grounds that there was no work. She went to see the manager and the union but was told there was no work.

### **Claimants Submissions**

In the written submissions filed on behalf of the Claimant it is submitted that she had proved that her contract was terminated verbally without notice and she is entitled to the prayers as set out in her claim.

### **Respondent's Case**

RW1 CHARLES OUMA AROGO testified that he was a Grade 1 Supervisor at the Respondent's Chemumu Estate in Kapsigak Division and he knew the Claimant well, that she worked for the Respondent from 2013 to January 2016 as a tea picker. He testified that she worked on fixed term contracts continuously as her contracts were renewed upon expiry. Her last contract was from 1<sup>st</sup> December 2015 to 31<sup>st</sup> January 2016 but she did not complete the contract. He testified that she worked for one day on 14<sup>th</sup> January 2016 and did not report for work the following day, that she absconded duty. He testified that her contract expired on 31<sup>st</sup> January 2016 and she was paid for tea picked that month. He testified that her contract was not terminated as she alleges.

Under cross examination RW1 testified that the Claimant reported for work from 7am to 3pm and when there was a lot of work she was allowed to work according to her ability. He testified that there were breaks in the Claimant's contracts.

RW1 testified that he was not aware the Claimant was injured or that she had filed a case for compensation in Kapsabet Magistrates Court. He testified that the company did not take action against her after she absconded.

### **Respondents Submissions**

In the written submissions filed on behalf of the Respondent it is submitted that the Claimant was not unfairly dismissed or her contract otherwise unfairly terminated but her contract lapsed. It is submitted that the Respondent met all its obligations under the contract. The Respondent relied on the case of **Isaiah Makokha v Basco Products Limited [2014] eKLR** in which the court held that termination of contract through expiry where there is no agreement to renew does not amount to unfair termination.

### **Determination**

I have considered the pleadings, the viva voce evidence and written submissions filed by the parties. The issues arising for determination are in my opinion the following-

1. Whether the termination of the Claimant's employment was unfair;
2. Whether the Claimants are entitled to the remedies sought.

### **1. Whether the termination of the Claimant's employment was unfair**

It is the Claimant's averment that her contract was terminated because she got injured and filed suit for compensation in Kapsabet Magistrates Court. There is however no evidence that the Claimant was injured or that she filed suit in against the Respondent. The issue of injury is not mentioned in the Claim and RW1 testified that he was not aware about the Claimant's injury or of the filing of the case in Kapsabet Court.

The Respondent produced records of attendance showing the Claimant was at work from 2<sup>nd</sup> to 14<sup>th</sup> January 2016, on casual leave on 15 and 18<sup>th</sup>, off duty on 17<sup>th</sup> and absent from 19<sup>h</sup> January to 31<sup>st</sup> January 2016. The record reflects the quantity of tea she picked during the days she was at work. The Respondent produced the Claimant's payslip for January 2016 which reflects that she was paid for 640.80 kilos of tea picked in the month of January 2016.

I find that the Claimant has not proved that her contract was terminated due to her injury or the filing of a claim against the Respondent. I further do not find any evidence of unfair termination of her employment contract

### **2. Whether the Claimants are entitled to the remedies sought**

Having found that the Claimant has not proved that her employment was unfairly terminated she is not entitled to pay in lieu of notice as claimed or at all. She is not entitled to severance pay which is only payable where an employee is declared redundant as she was not declared redundant. She is further not entitled to overtime as she was paid on the basis of the quantity of tea picked and not on hourly basis. She is further not entitled to compensation for unfair termination.

The Claimant is however entitled to pay in lieu of annual leave. RW1 testified that the company does not give leave to employees on contract. The law provides that any employee who works for a minimum of two months is entitled to annual leave. This is provided for in both the Employment Act as well as in the Regulation of Wages and Conditions of Employment (Agricultural) Order.

RW1 confirmed that the Claimant worked continuously from 27<sup>th</sup> November 2013 to 15<sup>th</sup> January 2016, a period of 2 years and 2 months. At 21 days per year worked and based on the CBA minimum rate of pay indicated in her contract of Kshs 10052, I award the Claimant pay in lieu of leave of 45 days at Kshs. 15,078/-.

In view of the amount awarded the Respondent shall pay Claimants costs limited to instructions fees only.

Orders accordingly.

**Dated Signed and Delivered This 19<sup>th</sup> Day of October, 2017**

**MAUREEN ONYANGO**

**JUDGE**