



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 477 OF 2014

THOMAS ABUGA ETHAMBO

CLAIMANT

v

SOPHIA KHALID RATTOS

RESPONDENT

JUDGMENT

1. The Claimant commenced legal proceedings against the Respondent on 2 October 2014 alleging unlawful termination of employment. He sought a total of Kshs 1,363,386/80 being pay in lieu of notice, accrued leave, severance pay, overtime and compensation.
2. When the Cause was mentioned on 20 November 2014, the Court declined to set a hearing date because there was no evidence that the Respondent had been served. The Court fixed the Cause for mention on 26 November 2014 to enable proof of service.
3. When the Cause was mentioned on 3 December 2014, there was on file an affidavit of service sworn by Margaret Nambala Wafula and filed in Court on 2 December 2014, deposing that the Respondent's Farm Manager, one Salim Didi was served with process on 21 October 2014, but that he declined to acknowledge service by signing or stamping on a copy of the documents served.
4. The Court being satisfied that service had been effected directed that the Cause proceed to hearing on 30 July 2015.
5. When the Cause was called out for hearing on 30 July 2015, there was on record an affidavit of service sworn by Alfred K. Chepkwony, Advocate and filed in Court on 29 July 2015, deposing to the fact that he personally served the Respondent's Farm Manager, Salim Didi with a hearing notice.
6. The Court therefore allowed the hearing to proceed.
7. The Claimant testified. His case was that he was employed by the Respondent in 2004 as a guard but he later became a general labourer and eventually a tea picker.
8. On the separation, the Claimant contended that the termination of his employment was unfair as he was not issued with notice of termination of employment.
9. Regarding the terms and conditions of service, the Claimant stated that he was not issued with a written contract, used to work 7 days a week including public holidays without payment of overtime, he did not go on leave during the tenure of employment and that he was not deducted contributions towards the

National Social Security Fund.

10. He concluded his testimony by stating that he was seeking the reliefs outlined in the Memorandum of Claim.

11. The Claimant produced several documents including a Statement of Account and Payment Advise for September 2013 issued by Kaimosi Tea Estate, and the farmer therein is named as Sophia Khalid Rattos, and various receipts also issued by Kaimosi Tea Estate Ltd.

12. After close of hearing, the Court directed that submissions be filed before 30 August 2015 and a mention was set for 6 November 2015 to confirm compliance. The interlude was occasioned by the Court being on leave.

13. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant's employment was unfairly terminated and appropriate relief including entitlements not dependent on the nature of separation.*

Whether termination of employment was unfair

14. The Claimant testified that he was not given notice of termination of employment.

15. Section 35 of the Employment Act, 2007 envisages written notice of termination.

16. With the Claimant's testimony that none was given remaining unchallenged/uncontroverted, the Court finds that the termination of his employment was unfair.

Appropriate remedies/orders

1 month pay in lieu of notice

17. The Claimant sought Kshs 10,377/60 under this head of claim.

18. Pursuant to the provisions of sections 35 and 36 of the Employment Act, 2007, the Court finds he is entitled to 1 month pay in lieu of notice as claimed.

Accrued leave

19. On account of leave, the Claimant sought Kshs 83,819/-. His testimony on leave was not challenged.

20. Leave is a statutory entitlement. The Claim was presented within 12 months of cessation of employment, and is therefore not barred by section 90 of the Employment Act, 2007 (continuing injury).

21. The Court finds in favour of the Claimant.

Severance pay

22. The Claimant did not suggest that he was declared redundant. He is not entitled to service pay.

Overtime

23. Although the Claimant's testimony that he worked 7 days a week and during public holidays remain unchallenged, he did not prove the contractually agreed working hours. He equally did not prove the prescribed minimum hours within the industry he was operating and the Court declines to find that he is entitled to overtime which was quantified as Kshs 1,099,539/-.

Compensation

24. Under this head, the Claimant sought Kshs 124, 531/20 being the equivalent of 12 months gross wages.

25. Compensation is a discretionary remedy, and the factors the Court ought to consider have been outlined in section 49 of the Employment Act, 2007.

26. Considering the length of service, the Court would award the Claimant the equivalent of 10 months' gross wages assessed as Kshs 103,770/-, as compensation for unfair termination of employment.

Conclusion and Orders

27. The Court finds and holds that the termination of the Claimants employment was unfair and awards him and orders the Respondent to pay him

(a) 1 month's pay in lieu of notice	Kshs 10,377/60
(b) Leave	Kshs 83,819/-
(c) 10 months wages as compensation	Kshs 103,770/-
TOTAL	Kshs 197,966/60

28. No order as to costs.

Delivered, dated and signed in Nakuru on this 19th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Morara instructed by Chepkwony & Co. Advocates
Court Assistant	Nixon