



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.251 OF 2015

(Before D. K. N. Marete)

FLORENCE ARINJI KHALAKAI.....CLAIMANT

VERSUS

EASTERN PRODUCE KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated vide a Memorandum of Claim dated 22nd October, 2015. 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 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 interest of the suit.*

The respondent in a Statement of Defence dated 16th November, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that she was employed by the respondent with effect from 1st August, 1995 as a Tea Plucker. At the time of termination, she earned Kshs.10,377.00.

It is the claimant's further case that she served the respondent with loyalty, diligence, full dedication and commitment until 30th March, 2015 when the respondent wrongfully, unlawfully summarily dismissed her from employment and refused to pay her terminal benefits. The estate manager informed her as follows; "*kesho usikuje kazi imekwisha*", (literally interpreted as do not come to work tomorrow, it is finished.) No reason was given to her for this inaction. The said manager would not explain the reason for such summary termination but said he had instructions from '*wakubwa*' (seniors) not to allow her to work. A week later, she was forcefully evicted from the company houses at 1800 hours never to return.

The claimant's further case is that the summary dismissal was unfair, illegal, unprocedural and in contravention of Section 41, 44 and 45 of the Employment Act, 2007 as follows;

8. Section 41 (c) of the Employment Act provides that when an employee intends to dismiss or terminate the employment of an employee from among other reasons 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 precisely explained to her the reasons for intended summary dismissal and neither was he accorded a chance to dispute the said allegations and/or call his witnesses in his defence.

9. Section 44(4) of the Employment Act lists grounds which amount to gross misconduct and which entitled the employer to summarily dismiss an employee: however the same provides that an employee should be given an opportunity to dispute the truthfulness of any kind of accusation. The claimant submits that the respondent did not give her a chance to dispute the correctness of any accusation before dismissing her from employment. No accusations were in fact availed to her and has been at a loss as to the reasons why she was unfairly summarily dismissed from employment.

10. The claimant avers that the termination was unfair because the respondent did not act in accordance with Justice/Equity and he failed to prove that the reason for termination was valid thus violated Section 45 (2) and 4 (b) of the Employment Act, 2007.

11. Article 43 (1) of the Employment Act, 2007 provides that any claim arising out of termination of a contract, the employer shall be required to prove 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.

She claims;

a. 2 months pay in lieu of notice

10377 x 2 months
20,754/-

Kshs.

b. leave dues from 2008 to 2014

One month basic salary x 6 yrs

Kshs. 54,144.9/-

c. Severance pay

15days x yrs worked x basic/30

15days x 19yrs x 9024/30

Kshs. 85,728/-

d. Breach of contract, January to September, 2015

but terminated on March, 2015. 10,377 x 6 months

Kshs.62,262/-

e. Overtime dues

45 yrs pwk

10hrs x 6 days = 60hrs-45hrs=15hrs

15hrs x 4wks=60 hrs p.m

$$60 \times 1.5 \times 9024/195 = 4164p.m$$

$$4164 \times 36 \text{ months} \\ \text{Kshs.149,904/-}$$

f. *Compensation for unfair termination*

Gross pay x 12 months

$$10,377 \times 12$$

Kshs.124,524/-

TOTAL CLAIMS

Kshs.497,316.9/-

and in the penultimate prays as follows;

- a. *Declaration that the dismissal 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. 497,316.9/-*
- 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 denies a case of unfair termination and puts the claimant into strict proof thereof. She relies on Section 57 of the Employment Act which provides that the burden of proof of unfair termination lies with the employee whereas that of justifying the grounds of termination of employment shall lie on the employer. It is the position of the respondent that she acted with equity and justice in determination of the employment of the claimant.

It is the respondent's further case that the claimant has not tendered evidence in support of unlawful termination of employment. On the contrary, the evidence of estate supervisor is convincing and the claimant's employment was terminated at the expiry of an employment contract *inter partes*. This contract was not renewable and did not invite any automatic renewal. The claimant has therefore not proven her case on a balance of probability and therefore a call for its dismissal.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is 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 was wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this. The claimant in her written submissions reiterates her case and submits a case of unlawful termination of employment. She relies on the authority of **Edward Isedia Mukasia Vs. Eldo Supermarket Limited, eKLR 2015 Kericho {30th June, 2015} D.K Njagi Marete** held on page 6 of the judgment that;

“Section 10 {7} of the Employment Act, 2007 binds employers to proof of terms of employment in the event of non production of a written contract of employment in all legal proceedings...”

iv. The respondent be and is hereby ordered to issue a certificate of service to the claimant.

v. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 26th day of May 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Mr. Bett instructed by Kibichiy & Company Advocates for the respondent.