



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 26 OF 2014

RICHARD SHITEHI ISIAHO

CLAIMANT

v

EASTERN PRODUCE KENYA LIMITED

(KIBWARI ESTATE)

RESPONDENT

JUDGMENT

1. Richard Shitehi Isiaho (Claimant) commenced legal proceedings against Eastern Produce Kenya Limited (Respondent) on 10 February 2014 alleging unlawful termination of employment and seeking a total of Kshs 253,574/- as compensation and other entitlements.
2. The Respondent filed a Response on 28 February 2014, but on 25 May 2015 (after close of Claimant's case), the Claimant filed an Amended Memorandum of Claim. This amendment was without leave and the Court expunges it from the record.
3. Incidentally, the Claimant had made an oral application on 27 April 2015 in the course of the hearing to amend the Memorandum of Claim to anchor the cause of action on unfair termination of employment rather than redundancy. The application was allowed.
4. The Cause was heard on 27 April 2015 and 22 June 2015 and the Claimant filed his submissions on 29 June 2015 while the Respondent filed its submissions on 6 July 2015.

Claimant's case

5. The Claimant's case is that he was employed by the Respondent on 8 October 2000 as a tea-plucker and that he was dismissed on 22 April 2013.
6. On the circumstances leading to the dismissal, the Claimant stated that he got injured in the workplace as a result of which he sued the Respondent.
7. Because of the suit arising out of the workplace accident, the Respondent's Manager summoned him and told him that because of the suit he could not continue in employment, but that he was not given notice of termination of employment nor afforded an opportunity to be heard.
8. The Claimant denied failing to appear for work and further stated that his wages would depend on the tea harvested but by time of separation he was earning an average of Kshs 16,000/-. He produced his pay slips for August 2010 and April 2013.

Respondent's case

9. The Respondent called its Divisional Manager at the tea estate. He stated that the Claimant had worked with the Respondent for over 10 years as a tea-plucker but he did not have employment records.
10. According to the witness, the Claimant deserted work on 22 April 2013 and he produced

- attendance records for the period 1 March 2013 to 31 May 2013.
11. And because the Claimant deserted work it was not possible to give him notice of termination of employment nor call him to a disciplinary hearing. The Claimant could not be found.
 12. On the question whether the Claimant was dismissed for suing the Respondent, the witness stated that the Claimant sued the Respondent after deserting employment.
 13. Under cross examination, the witness testified that the Claimant was provided with housing in Bondeni village but he did not have his contacts. He further stated that the Claimant was not paid any dues.
 14. The Court has considered the pleadings, evidence and submissions and reduced the issues for determination as, whether Claimant absconded, *whether the termination of the Claimant's employment was unfair and appropriate remedies.*

Evaluation

Whether Claimant absconded/deserted

15. The attendance list summary produced by the Respondent suggest that the Claimant was on annual leave upto around 2 April 2013 (the list has the words ANNL which the Respondent's witness did not explain).
16. The summary marks the Claimant as AB with effect from 14 April 2013. The Court assumes AB indicates absent.
17. The Respondent's witness testimony was that the Claimant deserted duty from 22 April 2013. This evidence appears inconsistent with the attendance summary produced in Court.
18. Considering the inconsistency, and bearing in mind that it is the duty of the employer to keep employment records, the Court can only find that it is more plausible that the Claimant did not desert work.
19. In this regard, the Court reaches the conclusion that the Claimant was dismissed for suing the Respondent despite the fact that copies of the injury suit were not produced to enable the Court determine whether the suit predated the dismissal or not.
20. The Court will now examine whether the dismissal was unfair.

Burden on employees

21. Section 47(5) of the Employment Act, 2007 requires an employee to meet a low threshold burden of showing there was unfair termination of employment.
22. Under section 35 of the Act, an employer should give a written notice of termination of employment. The Claimant's testimony was that he was not given notice.
23. Lacking the written notice, the Claimant discharged the burden required of him.

Procedural fairness

24. Section 41 of the Employment Act, 2007 obligates the employer to conduct a hearing when contemplating the dismissal of an employee on the grounds of *misconduct, poor performance or physical incapacity.*
25. If the Claimant had deserted duty, this would amount to misconduct for which the Respondent could dismiss him but after conducting a hearing, desertion being a misconduct. The Respondent contended it was not possible to hold a hearing because the Claimant had deserted and it did not have his contacts.
26. The Court finds it strange that an employer would fail to have contacts of its employee of over 10 years standing. The Claimant was apparently housed. It also beats logic how he could have moved out without being noticed by the Respondent or its agents.
27. In the view of the Court, the Respondent ought to have taken reasonable steps to contact the Claimant to explain his absence, if at all, but it failed.
28. The Court therefore finds the dismissal as unfair.
29. With the conclusion reached it is not necessary to determine whether the Respondent has discharged the burden placed upon employers by sections 43 and 45 of the Employment Act,

2007.

Appropriate remedies

2 months pay in lieu of notice

30. The Claimant sought 2 months pay in lieu of notice, which he quantified as Kshs 20,755/-. Clause 29(d) of the collective bargaining agreement produced by the Respondent provided for at least 2 months notice in case of employees with more than 5 years service.
31. The Claimant was not given notice and would therefore be entitled to the equivalent of 2 months wages in lieu of notice.
32. The Respondent did not interrogate or controvert the computation of wages in lieu of notice as pleaded and the Court would find for the Claimant.

Service pay

33. Under this head, the Claimant sought Kshs 108,288/-.
34. The Claimant annexed to his Memorandum of Claim a Provisional Member Statement of Account from the National Social Security Fund.
35. Pursuant to section 35(5) and (6) of the Employment Act, 2007, and barring a contractual agreement, the Claimant would not be entitled to service pay (the Claimant did not suggest that the service pay he sought was the same as gratuity provided for in clause 36 of the collective bargaining agreement).

Compensation

36. The Claimant sought the maximum 12 months compensation pursuant to section 49(1)(c) of the Employment Act, 2007.
37. The award is discretionary and the factors the Court should consider have been outlined in section 49(4) of the Employment Act, 2007.
38. Considering the length of service, the Court would award the Claimant the maximum 12 months gross wages equivalent as compensation (the Respondent did not interrogate the amount as pleaded).
39. Before concluding, the Court must observe that the respective counsels took a casual approach in the prosecution of their client's cases.

Conclusion and orders

40. The Court finds and holds that the Claimant did not desert work but had his services terminated unfairly and awards him and orders the Respondent to pay him
- a. 2 months wages in lieu of notice Kshs 20,755/-
- b. 12 months gross wages compensation Kshs 124,530/-

TOTAL

Kshs 145,285/-

41. Costs do not follow the event in the Employment and Labour Relations Court.
42. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 27th day of November 2015.

Radido Stephen

Judge

Appearances

For Claimant
Advocates

Mr. Chepkwony/Ms. Kerubo instructed by Chepkwony & Co.

For Respondent

Ms. Alwala/Mr. Bett instructed by Kibichiy & Co. Advocates

Court Assistant

Nixon