



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 232 OF 2013

(Before Hon. Lady Justice Hellen Wasilwa on 28.1.2014)

KENYA PLANTATIONS & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

HELLENA FARM LTD.....RESPONDENT

JUDGMENT

The claimants Kenya Plantations and Agricultural Workers Union filed their Memo of Claim on behalf of their member Benson Mboya Alwany on 14/8/2013. The respondents were duly served but failed to file any appearance/reply to memo. They were also served with a hearing date and also failed to attend court. The matter therefore proceeded for Formal Proof.

The issue in this case relates to the unfair termination of services of Benson Mboya Alwany. The grievant's case is that he was an employee of the Respondent since 1990. He used to take care of cattle and other farm work. He worked there until 13th December 2011 when he was unfairly terminated by the son of the owner of the respondent's farm one Omondi. This Omondi just ordered him to leave and gave him no reason. He also gave him a termination letter, APP BA 1. At the time of dismissal he was earning Kshs 3000/= per Month. The grievant reported to his Union who reported to the labour office. The respondent was summoned by the labour officer for a conciliation meeting and he failed to turn up on several occasions. The union then decided to file this case against the respondent. The grievant prays that this court orders that he be paid his terminal dues. He annexed communication from the labour office to the Union and respondent as exhibits. He seeks to be paid one Month pay in lieu of notice, underpayment of wages, severance pay, housing allowance, annual leave pay and gratuity.

Having heard the evidence of the grievant and after considering his documentary evidence, I find that the grievant has established unfairness on the part of the Respondent who terminated him for no apparent reason. He was neither given notice nor any reasons for the termination. This was in Contravention of Section 43(1) and (2) of the Employment Act 2007 which states that :-

“1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

This also contravened Section 41(1) of Employment Act 2007 in that he was not given any hearing before being terminated. Section 41(1) and (2) of Employment Act 2004 states as follows:-

“ 1. Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

Section 36 of Employment Act expects a Party terminating the contract to pay the other Party remuneration which would have been earned by the other party or paid by him as the case may be in respect of the notice period required. This the grievant was also denied.

The grievant asked court to pay him moneys he was underpaid during the period he worked. He only however exhibited legal Notice No 63 of 2011 showing the minimum payments w.e.f 1st May 2011. The grievant was dismissed in December 2011. It is therefore apparent that since he was being paid 3000/= that time instead of the minimum 6792 for unskilled employee, he was underpaid by 3792 for the 8 Months of 2011 which translates to 29,796.

He also sought to be paid house allowance but this is not tenable as in his evidence he told court that he was being housed in the company house from which he was ordered to leave within 24 hours on 13.12.2011.

He has not shown that he applied for and was denied leave in 2011, but given that he was terminated at the end of the year in December 2011, his leave was due and he is therefore entitled to it.

I therefore find for grievant and enter Judgment for him as follows:-

- 1. 1 Month pay in lieu of notice = 6792/=**
- 2. Underpayment of wages from May 2011 to December 2011**

= 6792 – 3000 = 3792 x 7 = 29,796/=

- 3. Leave for 2011 = 6792/=**

- 4. Severance pay calculated at 15 days salary for each year**

= 21years X 3396 = 71,316/=

- 5. 12 months salary as damages for unlawful termination of salary = 12 X 6,792/= 81,504/=**

TOTALS = 196,200/=

The respondents will also meet costs of this suit.

HELLEN WASILWA

JUDGE

28/1/2014

Appearance

Claimant present

C/c- Wamache