



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1331 OF 2012

ANTHONY KIOKO MUIACLAIMANT

VERSUS

EAST AFRICAN GROWERS LTDRESPONDENT

JUDGMENT

The Claimant herein Anthony Kioko Muia filed this claim against the Respondent East African Growers Ltd seeking the following orders:-

- a. A declaration that the Claimant's services were terminated by the Respondent unfairly and unlawfully;
- b. Payment of Claimant's dues of Kshs. 94,070/-
- c. 12 months' salary as compensation for unlawful termination in the sum of Kshs. 105,120/-
- d. Costs of the Claim plus interest.

The Respondent was served but did not file a defence. The Respondent however filed a Memorandum of Appearance through Omwoyo Momanyi Gichuki & Company Advocates.

The hearing date was taken ex-parte after the Respondent failed to attend Court for fixing of hearing date. The Respondent was served with hearing notice on 15th January 2014 and the copy filed in Court clearly shows the stamp of the said firm as acknowledgment of service.

The Case came up for hearing on 25th March 2014. Mr. Makokha instructed by Mulanya & Maondo Advocates appeared for the Claimant while there was no appearance for Respondent. After satisfying myself that there was proper service I allowed the case to proceed ex-parte.

The Claimant testified that he was employed by the Respondent in November 2004 but could not recall the actual date. He was not given a letter of appointment but was issued a work identity card which he used to access and exit the place of work. He was employed as a packer. He worked from 10.00 am to 10.00 pm. Occasionally he worked up to midnight. He worked for 6 days a week and took an off day either on Thursday or Sunday. He was paid Shs. 365 per day.

On 30th October 2010 when he reported to work he was informed by the Supervisor that there was no

work. He went back home and reported back to work two days later when he was sent to the Human Resource Office. The Office told him there was no work for him although other workers continued with their work. He was not given any reason for stopping his service. He was not involved in an disciplinary case. He was not paid any terminal benefits. He never took annual leave while in employment. He was not a member of NSSF.

He urged the court to order the Respondent to pay him as Claimed in the Memorandum of Claim.

I have considered the contents of the Memorandum of Claim and the written submissions filed on behalf of the Claimant. There having been no defence filed the only issues I have to consider are whether the Claimant has proved his case on a balance of probabilities and if he is entitled to the prayers sought.

Having worked continuously from November 2004 to 30th October 2010 the Claimant's services which were casual in nature were converted by operation of law to monthly contract of service as provided in Section 37 of the Employment Act. The Claimant was therefore entitled to be terminated according to the procedure set out in Section 41 of the Employment Act which requires an employer to explain to an employee the reasons for which the employer intends to terminate his employment. The employee must be given an opportunity to defend himself and to be represented by a union official or be accompanied by a fellow employee.

This was not done in the case of the Claimant. According to Section 45 of the Act, this amounted to an unfair termination of Employment and I find accordingly.

The Claimant has prayed for several reliefs. I now consider each of the reliefs:-

i. Notice

Having been terminated without notice, the Claimant is entitled to one month's salary in lieu of notice as provided in Section 49 (1) (a) of the Act. The Claimant was earning Shs. 365/- a day. For 28 days' notice provided for in Section 35(1) (c) as read together with Section 36 of the Act, the Claimant is entitled to Shs. 10,220/- which I award him.

ii. Leave for 6 years.

Having not taken annual leave from November 2004 to 30th October 2010 the Claimant is entitled to pay in lieu of annual leave of 6 years. At 21 days per year, he is entitled to (21 x 6 x 365) Kshs. 45,990 which I hereby award him.

iii. Service Pay

The Claimant testified that he was not a member of NSSF. He is therefore entitled to service pay as provided in Section 35(5) and 35(6) of Employment Act as read with Section 36.

I award him service pay at 15 days per year worked for the 6 years worked at Kshs. 32,850.

iv. Compensation

The Claimant is entitled to compensation as provided under Section 49 (1) (c) having been unfairly terminated.

Taking into account his length of service, the fact that he worked under casual terms for 6 years and the manner in which he was terminated, I award the Claimant 6 month's salary as compensation for unfair termination at Shs. 65,700.

v. Costs

The Respondent shall pay the Claimant's cost for this case.

vi. Interest

The Claimant will be entitled to interest at court rates from the date of judgment.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Maondo for Claimant

No appearance for Respondent