



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO.60 OF 2019**

**GEORGE OKOTH OKELLO.....CLAIMANT**

**VERSUS**

**AFRICA BLOOMS LIMITED.....1<sup>ST</sup> RESPONDENT**

**SOJANMI SPRINGFIELDS LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed a Memorandum of Claim dated 16<sup>th</sup> August, 2019, on the 9<sup>th</sup> September, 2019 through the firm of Wachira Wanjiru and company advocates claiming discrimination and unfair termination and to be compensated for the unfair termination.
2. The summary of the claimant's case is that he was employed by the 1<sup>st</sup> Respondent sometimes in April, 2011 and worked till 11<sup>th</sup> April, 2014 when he was terminated without cause. He then appealed the decision of the 1<sup>st</sup> Respondent which appeal was heard in his favour and he was reinstated to work.
3. Within the same month of April, 2014, the claimant received a new letter of Appointment dated 1<sup>st</sup> April, 2014 from the 2<sup>nd</sup> Respondent, a sister company of the 1<sup>st</sup> Respondent to work as a plant protection manager.
4. Part of the claimant's duties were to come up with spray programme at the farm and having it implemented in the greenhouses he was in charge of and to come up with expected production of crops.
5. On 1<sup>st</sup> December, 2018 the claimant received a notice to show cause requiring him to explain why his performance was deteriorating.
6. The claimant alleged that the general manager had accused him of operating greenhouse number B9 improperly when there was no complaint made by the customers, neither were there any anomalies noted by the import and export inspector.
7. That earlier on, on 30<sup>th</sup> November, 2018, while the supervisors were on training the general manager visited Green House B9 and lamented that the flowers were not picked in a proper manner and threatened to fire all general workers. He then ordered the supervisors to be recalled from training. While at it the general manager hauled abusive words at the claimant calling the claimant and demanded that the claimant resigns or his services will be terminated.
8. On 2<sup>nd</sup> December, 2018 the claimant wrote a letter to the 2<sup>nd</sup> Respondent's manager explaining his predicaments with Adalonia Greenhouse. he stated that he had inherited the greenhouse which was highly infested with pests and corrective measure were underway. Nevertheless, the claimant received a second warning letter on 3.12.2018 informing him that his response in the letter of 2.12.2018 was not satisfactory.
9. On 4<sup>th</sup> December, 2018 the claimant wrote another letter to the Human Resource manager informing him that crops in Adalonia greenhouse had been highly affected by thrips and the best crops can only be harvested in January, 2019.
10. On 15<sup>th</sup> December, 2018 the claimant received summons from Human Resource managers requiring him to explain the contents of the complaint letter dated 1.12.2018 from the farm manager and the claimant gave an explanation backed up with evidence that there was improved production as per the production sheets from the green houses.
11. After the meeting with the human resource manager the claimant was served with the letter of termination on account of poor performance.

12. That the termination alleged that the claimant performance had deteriorated and his area of management was reduced from operating green houses in 10 acres to operating green houses in 1 acre when the claimant was fired while still operating green house in 11 acres. He contends that the Farm manager and the general manager worked in cahoots to have his services terminated.

13. At the time of termination, the claimant was earning a salary of Kshs. 120,000, being Kshs. 115,000 basic salary and Kshs. 5,000 House allowance.

14. The claimant avers that he was discriminated against by the Respondent in that he was employed with skills and expertise in crop production and was tasked with training other junior managers such as Mr. Gopi of Indian descent who had zero experience in that field however the salary of Mr. Gopi was increased to Kshs. 150,000 while his remained at Kshs.120,000.

15. He stated that he was treated differently from his counterparts of Indian descent for example that he was denied membership to a medical scheme and also that his counterparts of Indian descent were assigned vehicles while he was forced to hike the staff bus that left at 5am and pay for his own transport from the firm in the evening as the staff bus left the farm at 4pm leaving him behind as he had to work for longer hours.

16. It is also stated that when the Respondent had meetings with employees, all employees of African descent were not allowed to occupy any seat as they were all reserved for the Indian employees, thus humiliating them when most of them including the claimant were senior in age and rank.

17. The claimant also took issue with the fact that the other crop manager Mr. Gopi received salary of Kshs. 150,000 when he received Kshs 120,000 while both were performing similar duties.

18. The claimant house allowance was not 15% of the basic salary but only Kshs. 5,000 without any justification.

19. The claimant also averred that Mr. Gopi was assigned the position of production manager and tasked with issuance of sprays for the green house and when the claimant sought for sprays for the green houses he was managing the same were not released, to him which sabotaged his work.

20. The claimant therefore prays for judgment against the Respondent for the following reliefs; -

**1) THAT this Honourable Court declare that the services of the Claimant were unfairly terminated.**

**2) THAT this Honourable Court declare that the Claimant was discriminated against.**

**3) THAT this Honourable Court order the Respondents to pay the Claimant; -**

**a) Outstanding house allowance amounting to Kshs. 466,629.**

**b) Service pay for 3 years worked at Kshs. 345,000.**

**c) 12 months' compensation for unfair termination at Kshs. 1,440,000.**

**d) General damages for racial discrimination at Kshs. 10,000,000.**

**4) THAT the Respondents do issue the Claimant with a Certificate of Service as is required under Section 51 of the Employment Act.**

**5) THAT the Respondents be ordered to bear the costs of this suit with interest thereon.**

21. The Respondent Entered Appearance on the 18<sup>th</sup> October, 2019 and filed a response to the claim on the 14<sup>th</sup> November, 2019 denying the averments in the claim and in particular stated that the claimant was indeed employed by the 1<sup>st</sup> Respondent and terminated on 11<sup>th</sup> April, 2014 after following due procedure and paying the claimant all his terminal dues as evidenced in the payslips of 16<sup>th</sup> April, 2014. The claimant was further issued with a certificate of service in accordance with the law.

22. The 1<sup>st</sup> Respondent stated that after consideration the claimant was re-engaged by it and subsequently interviewed for a position in the 2<sup>nd</sup> Respondent company and offered the job of production manager as per the employment contract dated 1<sup>st</sup> April, 2014.

23. The Respondent avers that they are not a sister company as alleged by the claimant rather that the management of the 1<sup>st</sup> Respondent was changed sometimes in 2014 when some of the directors in the 2<sup>nd</sup> Respondent acquired shares in the company.

24. It stated that the claimant until 2016 performed his duties exemplary informing the increment of his salary.

25. That later on the management noted that cultural activities and pest were not properly controlled and despite several warnings to the claimant no efforts were taken toward improving the situation. While on the other hand the Respondent was incurring losses.

26. The Respondent stated that due to KEPHIS restrictions most of the products could not be exported as they were heavily affected by pests and even some of the flowers were intercepted by the Dutch Kephis Organization due to poor pest management.

27. It was also stated that the claimant's section of production was reduced due to poor performance.

28. The Respondent also avers that all employees can be issued with summons when there is an issue to be ironed out and it's the duty of the Employer to exercise disciplinary control over its employees.

29. The Respondent then contended that the claimant was terminated after undergoing disciplinary hearing due to poor performance, therefore the termination was fair in the circumstances.

30. The Respondent denied ever discriminating against the claimant or any other employee and stated that all employees were paid in accordance with the tasks performed and the job group they were in. Also that all employees were under NHIF Scheme and AAR Insurance policy.

31. The Respondent stated that upon termination the claimant's dues were calculated and paid to him and a certificate of service was issued upon him.

32. With regard to the claim against the 1<sup>st</sup> Respondent the respondent contends that the same is caught up by the doctrine of laches and is incapable of being granted.

### **Hearing.**

33. This cause proceeded for hearing on the 21<sup>st</sup> October, 2021 where the claimant testified as CW-1 and adopted his witness statement dated 16.8.2018 together with list of documents filed on even date.

34. Upon cross examination, CW-1 testified that the claim against the 1<sup>st</sup> Respondent was as a result of the termination of April, 2014. He testified that there was a meeting conducted on the 15<sup>th</sup> December, 2018 where he attended with another employee, one Humphrey Ekuru however the said employee was called out and left while the meeting was underway. The witness also testified that upon termination he was paid the 15 days worked in December and notice pay. He then stated that his NSSF and NHIF deduction were remitted.

35. With regard to the medical cover issued, the claimant testified that he was given a medical cover from AAR however that it was not on the same status as the Indian employees. He also confirmed that the respondent provided transport to and from the company however which he never utilized. Finally he stated that production had dropped from 890 to 600.

36. The Respondent called one witness, Douglas Gitau, the Human Resource manager for the 2<sup>nd</sup> Respondent as RW-1.who equally adopted his witness statement dated 12.11.2019 together with the list of documents filed on even date.

37. On cross examination, the witness testified that the claimant was terminated for poor performance since his area of operation had deteriorated. He also stated that the claimant had been placed on performance appraisal in the year 2017.

38. Upon further cross examination he stated that the claimant was summoned for a disciplinary hearing scheduled for 15.12.2018 which was attended by two member of the disciplinary committees, him together with another member called Rhoda, though, the general manager did not attend. He then stated that the claimant's dues were calculated and paid to him.

### **Claimant's Submissions.**

39. The Claimant submitted from the onset that the respondents are sister company as they are both group of companies under the XFLORA group. It was also argued that after the claimant was terminated by the 1<sup>st</sup> Respondent he was reinstated and taken up by the 2<sup>nd</sup> Respondent who backdated the letter of appointment to 1<sup>st</sup> April, 2014 demonstrating that indeed the companies are related.

40. On whether the claimant was unfairly terminated, it was submitted that the claimant was summoned by the Human Resource manager to explain some issue with regard to the contents of an email of 1.12.2018. It was argued that there was no prior notice issued to him to attend the meeting or prepare therefore the meeting of 15.12.2018 was not a disciplinary hearing in the strict sense and the termination generally was not done procedural therefore the Court ought to deem it as unfair. In this he cited the case of **Kenfreight (EA) Limited V Benson K Nguti [2016] ektr.**

41. It was further submitted that since the claimant was terminated on the basis of poor performance the employer was mandated under section 41 of the Employment Act to notify the employee of the poor performance and the intention to terminate employment. Ostensibly, for poor performance to qualify as a ground for terminating the services of the employee, it must be demonstrated that there are measures put in place to measure performance by the employer which measures were used to determine the performance of the employee thereof. In this they cited the case of **Jane samba Mukal V Ol Tukai Lodge limited [2013] ektr.**

42. Accordingly, it was submitted that the 2<sup>nd</sup> Respondent did not conduct any performance appraisals as proof the said poor performance.

43. The claimant maintained that he was discriminated upon from the salary he received under the same job group with his Indian counterpart, to the cadre of AAR insurance given to him and generally how the management treatment them at work. He argued

discrimination against employees is an outlawed practice as per section 5(2)(3)(4)(6) of the ILO Convention number 111, discrimination(employment and occupation) convention, 1958 which Kenya is a signatory.

44. He then buttressed its argument by citing the case of **Janine Buss V Gems Cambridge international school limited [2016] eKLR**.

45. The Claimant then submitted that he has proved his case on a balance of probability and urged this Court to allow the claim as prayed.

#### **Respondents' Submissions.**

46. The Respondent submitted from the onset that the claim as against the 1<sup>st</sup> Respondent is time barred the cause of action having arisen in the year 2014. It was argued that limitation of action under section 90 of the Employment Act requires that employment claim ought to be lodged within 3 years after the cause of action and therefore the claim against the 1<sup>st</sup> Respondent ought to have been lodged by April, 2017. The respondent then supported their argument by citing the case of **Matthew Kamanu Mwaura V permanent secretary office of the President provincial administration & 2 others [2018] eKLR**.

47. With regard to the argument that the respondents herein are sister company, the Respondent denied the same and submitted that even if they were then they are separate entities capable of suing and being sued as in **Salmon V salmon and co limited (1897) AC** and one company cannot be punished for the wrongs of the other company.

48. On whether the claimant was unfairly terminated, it was submitted that the claimant was terminated for a valid reason being poor performance and then he was subjected to disciplinary hearing as evidence by the minutes produced in the Claimants list of document therefore the termination process passed the substantive and procedural fairness test.

49. The respondent then cited the case of **Judicial Service Commission V Gladys Boss Sholei and another [2014] eKLR** and argued that the respondent was justified in dismissing the claimant from his employment as his poor performance caused huge loses on the Respondent.

50. On whether the claimant was discriminated upon, it was submitted that there was no evidence by the claimant tabled before the Court in support of the allegation thereof. It was argued that section 107 and 108 of the Evidence requires that he who alleged must prove. It was further argued that the allegation that the claimant was not given the same medical scheme as the Indian employee was not backed up with any evidence. Also that the allegation that the claimant earned 120,000 while Mr. Gopi earned 150,000 was also not supported with any evidence in terms of payslips or otherwise.

51. With regard to reliefs sought, it was submitted that the claimant is not entitled to the claim. On house allowance it was submitted that the claimant was paid on different remuneration from the time he joined the 2<sup>nd</sup> Respondent which salary increased therefore the allegation that he was Paid Kshs. 5,000 as house allowance is not founded. Further that the claimant has not produced his latest payslip to affirm the allegation therein.

52. The claim for service pay, according to the respondent, must equally fall for the reason that the claimant was a member of NSSF whose statutory deduction was remitted when due and to award service pay when the claimant NSSF was remitted monthly would amount to double compensation. In this they cited the case of **Kenya Railways Cooperation V Gideon K Mutinda and 2 other [2018] eKLR**.

53. The Respondent then submitted that the claimant has failed to prove his claim of discrimination and unfair termination therefore the claim ought to be dismissed with costs.

54. I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

**1. Whether there were valid reasons to warrant dismissal of the claimant.**

**2. Whether the claimant was subjected to due process.**

**3. What remedies the claimant is entitled to in the circumstances.**

#### **1 & 2 REASON AND FAIR HEARING**

55. The claimant was terminated vide a letter dated 15/12/2018 which indicated that he was terminated with effect from 20<sup>th</sup> December, 2018 due to poor performance.

56. The claimant has averred that his performance was above per. The claimant contends that he performed well on the even date he was given summons by the HR Manager requiring him to explain contents of a letter dated 1/12/2018 from the Farm Manager.

57. The letter in question asked the claimant to show cause why disciplinary action should not be taken against him due to his deteriorating performance leading to loss to the company. He was given 72 hours to respond.

58. The complaint from the Farm Manager was dated 1/12/2018 at 11.16am. The claimant responded on 2/12/2018 indicating that he had inherited a greenhouse with many issues but was on a recovery path.

59. On 3/12/2018 he was issued with a 2<sup>nd</sup> warning and advised to take corrective measures as soon as possible.

60. On 15/12/2018, a meeting was held in regard to the claimant's performance.

61. The meeting resolved that all stake holders should hold a meeting for decision making and that disciplinary action should be taken against the claimant.

62. There is no indication that any disciplinary hearing proceeded. There is no letter summoning the claimant to any disciplinary hearing.

63. However on 15<sup>th</sup> December 2018, same day the claimant was issued with a termination letter.

64. From the chronology of these events, there was no disciplinary hearing conducted to ascertain and verify reasons leading to his termination.

65. The claimant was not given an opportunity to be heard as envisaged under Section 41 of the Employment Act 2007 which states as follows:-

***"41. Notification and hearing before termination on grounds of misconduct***

***(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".***

66. It is my finding that the respondents have not established the validity of reasons leading to the claimant's termination as per Section 43 of Employment Act 2007 which states as follows:-

***"43. Proof of reason for termination***

***(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".***

67. My finding is that the claimant's termination was unfair and unjustified as per Section 45(2) of the Employment Act 2007 which states as follows:-

***"45. (1).....***

***(2) A termination of employment is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure".***

**3. REMEDIES**

68. Having established that the claimant was unfairly terminated, I award the claimant the following remedies;

**1. House allowance not paid from February, 2017 to December 2018**

**= 15% of basic pay being 115,600/= less 5,000/= he was earning**

**= 12,250 x 23 = 281,750/=**

2. Compensation for unfair termination equivalent to (1) month salary due to the unfairness meted against the claimant

= 115,000 x 10

= 1,150,000/=

GRAND TOTAL = 1,431,750/=

Less statutory deductions

3. The claimant be issued with a Certificate of Service.

4. The 2<sup>nd</sup> Respondent to pay the decretal sum and costs of this suit.

5. Claim against 1<sup>st</sup> Respondent dismissed.

DATED AT NAKURU THIS ..... DAY OF ..... 2022

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

AND DELIVERED ON THIS 21<sup>ST</sup> DAY OF JANUARY, 2022

by

HON. JUSTICE D. NDERITU

JUDGE

In the presence of: