



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO.450 OF 2016**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**CHARLES KIBE KIMOTHO.....CLAIMANT**

**VERSUS**

**BY GRACE FARM FEEDS LIMITED.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant has brought this claim by way of a memorandum of claim dated 16<sup>th</sup> March, 2016. The respondent put a response on 27<sup>th</sup> April 2016.

**CLAIMANT'S CASE**

2. In his evidence the claimant states that he was employed by the Respondent as an accounts clerk in June, 2010 and his salary was Kshs.15,000/=. He says he and his salary was raised to Kshs.31,129/=.

3. He says that on 18<sup>th</sup> February 2015 without any notice or warning the Respondent discriminately and with ill intentions levelled some malicious allegations against him of theft.

4. He says he was sent home and the matter was reported to Mombasa Road Police Post.

He says investigations were conducted and police did not find any wrong doing against him but instead blamed the Respondent's relatives and friends.

The Claimant says the allegations against him were a cover to protect the Respondent's relatives and friends.

5. The Claimant says he was unlawfully discriminated against and furthermore he was not paid his terminal dues.

He says that his fellow colleagues who had been accused with him, who were Respondent's relatives continued to work for the Respondent. He still finds he was discriminated against and his constitutional rights were infringed against him.

6. He says he has suffered and has even been depressed.

The prayers by the Claimant from the Honorable court are as follows:-

- (a) A declaration that the termination of the Claimant's employment by the Respondent was discriminatory, illegal, unjustified and unlawful and was contrary to the law.
- (b) Six (6) years' service pay at one month salary for each year worked at his salary of (Kshs.31,129 x6) Kshs.186,774/=.
- (c) Reasonable 3 months' notice (Kshs.31,129 x 3) Kshs.93,387/=.

- (d) Unpaid salary for the month of February, 2015 of Kshs.31,129/=.
- (e) Unpaid leave for 6 years worked (30 days x 6 years x Kshs.1,037.63) = Kshs.186,774/=.
- (f) General damages for discriminatory, unfair, unlawful and unwarranted termination.
- (g) Damages for delay of payment of both leave pay for the six (6) years and February, 2015 salary.
- (h) Interest on (b) (c) (d), (e)(f) and (g) above.
- (i) Costs of the suit.

### **RESPONDENT'S CASE**

7. The Respondent states that they made a formal complaint of theft and police investigated the matter.

They were going to charge the Claimant but he opted to resign. The Claimant was to be charged with other employees.

8. He says that the Claimant pleaded with the Respondent to withdraw the charges and on compassionate grounds the Respondent agreed to withdraw the complaint.

The Claimant paid for the legal charges of preparing the agreement dated 27<sup>th</sup> October, 2015.

9. In that agreement it was stated that the Claimant's employment was terminated on his own instance. It was further stated that in the course of his employment the company lost Kshs.900,000/=. The Claimant was to be arraigned in Makadara Law Courts and pleaded with the Respondent's to drop the Criminal proceedings and in return he would waive any liabilities from the Respondent. The agreement dated 27<sup>th</sup> October, 2015 signed by both the Respondent Company Directors and the Claimant provided as much.

He further undertook not to institute any claim against the Respondent and as a result the respondent withdraw the charges against him.

### **ISSUES FOR DETERMINATION**

- 10. (a) Did the Respondent terminate the Claimant's employment or he left employment on his own decision?
- (b) Is he entitled to any reliefs?

### **DETERMINATION**

11. The situation here is where Claimant was accused of having committed a Criminal offence of theft. He was apparently to be charged with the offence of stealing. The court was informed by the Respondent that the Claimant together with other employees begged the Respondent to drop the charges. In return they undertook in writing not to follow or claim anything from the Respondent.

He wrote an agreement dated 27<sup>th</sup> October, 2015 and was witnessed by an advocate. The Respondent said the Claimant was the one who even paid for the legal fees to the advocate who prepared the agreement.

12. He at the same time wrote a statement dated 8<sup>th</sup> October, 2015 where he admitted he was to be charged in court but talked with Respondent and agreed to withdraw the suit. In return he wrote that he had no intention of pursuing the matter or claim anything. He said he agreed with the withdrawal and was not threatened or intimidated.

Thereafter he signed the agreement dated 27<sup>th</sup> October, 2015 where he admitted his employment was terminated on his own instance.

13. He agreed that he would not institute any claim against the Respondent and confirmed he fully discharged the company from any liability.

14. It is very telling that the Claimant during cross examination denied he signed the said agreement.

Obviously he was aware the said agreement was produced as an exhibit and was filed as part of Respondent's documents from 8<sup>th</sup> October, 2021.

If the same was forged he should have reported to the police. Forgery is a felony and it would be wrong to fail to report such serious offence to the police for further investigations.

15. The upshot of this is that the Claimant is blatantly lying under oath that he is not the one who wrote the said statement of 8<sup>th</sup> October, 2015 and the agreement dated 27<sup>th</sup> October, 2015. If he did not write that agreement that is so crucial to his case he should have reported the

matter to the police.

16. My conclusion therefore is that the Claimant willingly, knowingly and voluntarily wrote a statement and an agreement where he confirmed he left the employment voluntarily and also discharged the Respondent from any liability. It is dishonest then to still come to court and claim he was wrongfully dismissed from employment and expect the court to award him damages. That the court will not assist a dishonesty by any of the parties who willingly make a consensual agreement and then plan to break it wittingly.

17. In the case of **COASTAL BOTTLERS LIMITED VS KIMANTHI MITHIKA CAUSE NO.34 OF 2015** the Respondent had acknowledged receiving the amount indicated on the settlement agreement as full and final payment of his dues. He had indicated in the said agreement that he had no further claim against the appellants.

It followed therefore that the Respondent's suit could not be entertained by Employment and Labour Relations Court. The Court of Appeal Judges observed.

*“The execution of a discharge voucher we agree with the learned Judge constituted complete contract. Even if payment by it was less than the total loss sum, the appellant accepted because he wanted payment quickly and execution of the voucher was free of misrepresentation fraud or other”.*

All the Employment and Labour Relations Court was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of **SIR CHARLES NEWBOLD IN DAMONDAR JIHABHAI & COMPANY LIMITED AND ANOTHER VS EUSTANCE SISAL ESTATES LIMITED (1967) E.A 153** that “the function of courts is to enforce and give effect to the intention of the parties as expressed in their agreements.

18. Similarly in this case I am convinced that the Claimant by his statement and agreement voluntarily and willingly left his employment with the Respondent in exchange for withdrawal of Criminal charges against him.

He also undertook not to claim for anything from the Respondent.

He waived his rights to make any claims in relation to his relationship with the Respondent.

In the case of **MOSES GICHUHI VS NJUCA CONSOLIDATED COMPANY LIMITED CAUSE NO.205 OF 2017 Judge Nzioki Wa Makau** it was held that a contract can only be violated on the grounds of coercion, mistake or fraud, duress, misrepresentation, undue influence and illegality.

19. I have considered all the facts and evidence from all the respective parties even though I did not get their written submissions despite being offered ample opportunity to do so. The deadline for Claimant to file submissions was 8<sup>th</sup> November, 2021 and Respondent was 25<sup>th</sup> November, 2021. The same which are dated 10<sup>th</sup> January, 2022 and 11<sup>th</sup> February, 2022 respectively were only finally retrieved after I had already written my judgement. Regrettably I was not able to consider the submissions. The advocates must adhere to timeliness as courts cannot be held at ransom waiting for submissions which are filed way out of timeliness agreed.

All in all I am convinced the Claimant made an agreement on his own choice and left his employment to escape being charged in court. He waived his right to file a suit against the Claimant. There is no evidence whatever of any of the following to prove that the Claimant was forced to sign the agreement and the statement in any way.

20. In view of my reasoning hereof, I find that the Claimant has failed to prove a case of unlawful and illegal and discriminatory termination of employment and dismisses his suit accordingly.

I will give the claimant a waiver and having considered he had worked for the respondent for a good period I will not ask him to pay costs. Each party will bear their costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH DAY OF MARCH, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**