



**REPUBLIC OF KENYA**

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

**CAUSE NO. 393 OF 2011**

*(Before Hon. Justice Mathews N. Nduma)*

**MR. FRANCIS MWONGELA KANG'ETHE.....CLAIMANT**

**VERSUS**

**M/S TUNDA FARM (KINANDUBA).....1<sup>ST</sup> RESPONDENT**

**M/S MONSANTO (K) LIMITED.....2<sup>ND</sup> RESPONDENT**

**MR. KINYUA M'MBINJIWE (M/D).....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

1. The Claimant filed this suit by a memorandum of Claim dated 9<sup>th</sup> March, 2011 on 17<sup>th</sup> March, 2011. The Claimant seeks 12 months compensation for unlawful termination of employment from the 1<sup>st</sup> to 3<sup>rd</sup> Respondents and payment of terminal benefits to wit:-

(a) Salary for the period the Claimant has been out of employment.

(b) Kshs.50,000 refund of hospital bill incurred at Nanyuki District Hospital

(c) Notice pay; accrued leave; overtime; rest days and public holidays worked; risk allowance; severance pay and house allowance.

2. The Claimant states that he was employed verbally as a gardener under the 2<sup>nd</sup> Respondent at Nairobi on 1<sup>st</sup> January, 2000 up to 1<sup>st</sup> February, 2005 when he was transferred to the 1<sup>st</sup> Respondent in Meru. That 3<sup>rd</sup> Respondent is the Director/Owner of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. That cumulatively the Claimant states he worked for the 1<sup>st</sup> Respondent for a period of 5 years and with the 2<sup>nd</sup> Respondent for a period of 5 years.

3. That on 1<sup>st</sup> February, 2005 the Claimant adds that he was verbally transferred from the 2<sup>nd</sup> Respondent to work as a farm supervisor at Kinanduba area where he was in charge of Tunda Farm for the last five (5) years.

4. That in addition to being a supervisor, he would plant bananas, trees and do pest monitoring, harvesting and quality control. In addition the Claimant collected rent the 3<sup>rd</sup> Respondent's houses.

5. That on 29<sup>th</sup> May, 2010 he was attacked by thugs at the farm. They beat him up until he was unconscious. He was taken to Nanyuki District Hospital by good Samaritans where he stayed for two days.

6. That the 3<sup>rd</sup> Respondent did not visit him in hospital nor pay his hospital bill in the sum of Kshs.50,000.

7. That the incident was reported to Timau police station under OB No.OB22/29/2010.

8. That the Respondents declined to take the Claimant back to work despite efforts to meet the 3<sup>rd</sup> Respondent on the matter. The 3<sup>rd</sup> Respondent also failed to pay terminal dues to the Claimant. The matter was reported to the Ministry of Labour but was not resolved hence the suit.

9. The Claimant testified under oath in support of the particulars of claim and relied on the documents annexed to the Memorandum of Claim. The Claimant also relies on final submissions filed.

10. The Claimant prays to be awarded accordingly.

### **Response**

11. The 3<sup>rd</sup> Respondent filed a Memorandum of Response in which he admitted his description as the Managing Director/Owner of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

12. The Respondent denied that the employment of the Claimant was terminated averring that the Claimant absconded work after he was injured by a panga he was carrying trying to chase away neighbours cattle which had trespassed to Tunda Farm owned by the father of the 3<sup>rd</sup> Respondent Mr. Minyua M'mbinjiwe.

13. The 3<sup>rd</sup> Respondent purports to have sent money vide mpesa to the Claimant's wife to pay the hospital bill.

14. The 3<sup>rd</sup> Respondent made allegations in the statement of defence that the Claimant took away his Kshs.30,000 water pump and Kshs.15,000 collected as rent.

15. 2<sup>nd</sup> Respondent admitted he was the employer of the Claimant between the years 2008 to 2009 in lower Kabete No.5 askari Lane when he had workers renovating the house.

16. The 3<sup>rd</sup> Respondent denies the claim in its entirety and prays it be dismissed with costs.

### **Determination**

17. The issues for determination are:-

(a) Whether the Claimant was employed by the Respondents as claimed or at all.

(b) Whether the Claimant is entitled to the reliefs sought in the Claim.

### **Issue (a)**

18. The Respondents did not call any witness to rebut the claim set out by the Claimant in the Memroandum of Claim and in his sworn oral testimony. The Claimant was not cross examined either.

19. That notwithstanding the Claimant has the onus of proving his case on a balance of probabilities in terms of sections 107 and 108 of the Evidence Act Cap 80 Laws of Kenya as read with sections 41, 43, 45 and 47 of the Employment Act, 2007.

20. The court is satisfied that the 3<sup>rd</sup> Respondent was the Director/Owner of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and that the Claimant worked for the three (3) Respondents for a cumulative period of 10 years. The Claimant earned a monthly salary of Kshs.7,500.

21. Appendix 1 to the claim is a letter written by the 3<sup>rd</sup> Respondent dated 7<sup>th</sup> July, 2007, certifying that the Claimant had worked for him for the last 7 years where he faithfully and effectively worked as a supervisor on 3<sup>rd</sup> Respondent's banana farm comprising 60 acres. 3<sup>rd</sup> Respondent also acknowledged in the letter that the Claimant also supervised horticulture vegetable production. The 3<sup>rd</sup> Respondent admits writing this certificate of service for the Claimant to help him get alternative work.

22. The 3<sup>rd</sup> Respondent states in the letter that the Claimant left his employment because he had ceased growing bananas in Tunda Farm the 1<sup>st</sup> Respondent, which the 3<sup>rd</sup> Respondent states is not a limited liability company.

23. The Claimant also produced Medical Examination Report dated 29<sup>th</sup> May, 2010 in which is alleged the Claimant was assaulted and injured by another person.

24. The document corroborates the uncontroverted evidence by the Claimant that he was injured in the course of employment and that the 3<sup>rd</sup> Respondent refused to take him back to work upon his return.

25. The Claimant did not produce the hospital receipt to prove payment of hospital bill in the sum of Kshs.50,000. This being a special damage claim must be specifically proved. The claimant has failed in that respect.

26. However, the answer to the 1<sup>st</sup> issue is in the affirmative that the Claimant was an employee of the 3<sup>rd</sup> Respondent who was the owner of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

### **Issue (b)**

27. As to whether the Claimants employment was unlawfully terminated, the Claimant has produced a letter which shows that he stopped working when the 3<sup>rd</sup> Respondent ceased the operations of the 1<sup>st</sup> Respondent. There is no evidence to prove that the termination of the

employment of the Claimant was for invalid reason or that the 3<sup>rd</sup> Respondent did not follow a fair procedure in terminating the employment of the Claimant. The Claimant has failed to prove on a balance of probabilities that he was unlawfully and unfairly terminated from employment.

28. With regard to other terminal benefits sought by the Claimant against the Respondents, the court makes the following findings:-

**Notice**

29. The Claimant was entitled and was not paid in lieu of one month notice and is awarded Kshs.7,500 in respect thereof.

**Gratuity**

30. The Claimant was entitled to payment of severance pay/service gratuity for the period of 10 years served calculated at 15 days salary for each completed year of service. The court awards him Kshs.37,500 in this respect.

**Leave Pay**

31. The Respondent did not refute the testimony by the Claimant that he was not granted leave for the period he served the Respondents. However the court grants him payment in lieu of leave for the last 3 years of service in the sum of Kshs.22,500. The rest of the claim is time barred.

**Overtime, Rest Days, Public Holidays**

32. The Claimant did not sufficiently prove claims in respect of overtime not paid during normal days or during public holidays and rest days. The claim is dismissed for want of proof.

**Risk Allowance**

33. This claim was not substantiated and is dismissed for lack of merit.

34. In the final analysis Judgment is entered in favour of Claimant as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent jointly and severally as follows:-

(a) Kshs.7,500 in lieu of Notice.

(b) Kshs.37,500 severance/service gratuity.

(c) Kshs.22,500 in lieu of 3 years leave.

Total Kshs.67,500

(d) Interest at court rates from date of filing suit till payment in full.

(e) Costs of the suit.

**Dated and Signed in Kisumu this 20<sup>th</sup> day of December, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 4<sup>th</sup> day of February, 2019**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Mageto for Claimant

Mr. Ochieng Opiyo for Respondent

Daniel Ngumbi – Court Clerk