



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 506 OF 2014**

**RICHARD NDEMO.....CLAIMANT**

**- VERSUS -**

**VETERINARY & AGRONOMIC EAST AFRICA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> June, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 28.03.2014 through Nchogu, Omwanza & Nyasimi Advocates. The claimant prayed for judgment against the respondent for:

- a) Salary for December 2013 Kshs.60,000.00.
- b) One month pay in lieu of notice Kshs.60,000.00.
- c) Damages for wrongful dismissal Kshs.60, 000.00 x 12 Kshs.720, 000.00.
- d) Accrued annual leave  $1.92 \times 4 \times 60,000.00 / 30$  Kshs.15, 360.00.
- e) Interest on (a) to (d) above from the date the same became due until payment in full.
- f) Certificate of service.
- g) Costs of the suit.

The respondent's amended memorandum of claim was filed on 27.10.2017 through Muriu, Mungai & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs to the respondent and judgment entered on the counterclaim for:

- a) Payment of Kshs. 104, 666.00 being amount on failure by the claimant to account for proceeds of sales.
- b) Costs of the counterclaim.
- c) Interest on (a) above.
- d) Any other relief that the Honourable Court may deem fit and just to grant.

The claimant filed the reply to amended memorandum of response and counterclaim on 26.07.2016. The claimant prayed that the counterclaim be dismissed with costs.

There is no dispute that the parties were in a contract of service. The respondent employed the claimant to the position of Company Agronomist by the letter dated 13.09.2013 and effective 02.09.2013. The claimant was to serve on probation for 3 months and confirmation would be upon satisfactory performance during probation period. The claimant was paid Kshs. 60, 000.00 per month. The claimant was dismissed from employment by the letter dated 30.12.2013 on account of failure to remit cash for the company for goods collected and delivered to customers on cash on delivery terms on various dates in December 2013. The letter stated that despite many reminders the

claimant had failed to surrender the cash to the company and the failure amounted to gross misconduct against his employment. He was therefore summarily dismissed from employment with immediate effect He was to handover and the Company would communicate to him the next course of action.

The **1<sup>st</sup> issue** for determination is whether the termination was unfair. The probationary service was supposed to lapse on 02.12.2013. Termination was on 30.12.2013. The respondent suggested that the probationary term had been extended and as at termination the claimant still served on probation so that the termination amounted to termination of a probationary service so that as was held by Mbaru J in **Elijah Ochieng Achochi –Versus- National Police Service Commission and 2 Others [2013]eKLR**, section 42 of the Employment Act, 2007 ousts the provisions of section 41 of the Act whereby a notice and a hearing does not apply to probationary contracts.

However in the present case the Court finds that the claimant was summarily dismissed and the respondent, as per the letter of summary dismissal, did not state that it was a termination of the probationary service. The minutes of alleged extension of probation period were exhibited but there was no letter conveying the same to the claimant. Further the respondent does not plead that the probationary service had been extended and invoking provisions on probationary service is found to have been misconceived. The Court finds that the letter on summary dismissal was conclusive on the reasons for termination and it was not a termination of a probationary service. The Court therefore finds that the provisions of the Act on summary dismissal applied.

Was the summary dismissal unfair? The claimant testified that he was authorised to supply seeds to farmers on credit. He supplied some seeds to two farmers valued at Kshs. 104, 666.00. He delivered the seeds to the farmers but the respondent failed to provide him a motor vehicle to go and collect the cash payments from the farmers. Two weeks lapsed and the transport he needed was not provided. His supervisor one Francis Kimisa summoned him and they discussed the issue and the supervisor insisted that the claimant pays the Kshs. 104, 666.00. The claimant further testified that on 26.12.2013 he received the letter of summary dismissal dated 30.12.2013. The claimant, in cross-examination, testified thus, **“I say we agreed 104, 666.00 was owing and it would be deducted from my salary. I did not reply to the summary dismissal letter. I did not understand reasons for dismissal. I did not refuse to remit the cash to the respondent.”**

The respondent’s witness (RW) was one Francis Kimisa, the respondent’s Managing Director. RW testified that for seeds valued at Kshs. 104, 666.00 the claimant was invoiced because the farmers were unknown and were not on the listed farmers who enjoyed credit supplies with the respondent. The order subject of the two invoices was exhibited in the respondent’s evidence and they were for Kshs.93, 090.00 and Kshs.11, 576.00 making the counterclaim of Kshs. 104, 666.00.

RW confirmed that a meeting was held and the claimant was warned for the failure to remit the Kshs. 104, 666.00 and it was agreed that the claimant was to account for the money not later than 21.12.2013 as per the minutes of the meeting of 14.12.2013 and warning letter of 23.12.2013.

The Court finds that as per RW’s evidence, the claimant was to refund the Kshs. 104, 666.00 and further as at 21.12.2013 the claimant had already agreed to refund – and the Court returns that by agreeing to refund he had thereby accounted as was decided by the respondent. The Court finds that on the issue of Kshs. 104, 666.00, the respondent had already imposed punishment by way of a warning and the surcharge. The power to discipline the claimant on that account was therefore exhausted. The Court returns that it was double jeopardy to impose the summary dismissal on account of the same reason as was done by the letter of summary dismissal dated 30.01.2013. The summary dismissal therefore lacked a valid reason as envisaged in section 43 of the Employment Act, 2007 and the Court further finds that it was unprocedural as no notice was served as per section 41 of the Act.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to remedies as prayed for. The Court has considered that the termination was effective 30.12.2013 and the claimant is awarded **Kshs.60, 000.00** for December salary as prayed for. The claimant is further awarded a month’s pay in lieu of notice **Kshs. 60, 000.00**. The court finds that the claimant had served for only 4 months and the annual leave had not accrued under section 28 of the Act and the prayer on leave will fail. The claimant prays for 12 months for wrongful termination. The Court has considered that the claimant had served for only 4 months. Balancing justice and in view of his admitted failure to remit the amount counterclaimed, the Court returns that the probationary period would be liable to extension and termination. The claimant is entitled to a certificate of service under section 51 of the Act.

To answer the **3<sup>rd</sup> issue** for determination the Court returns that the respondent has established the counterclaim of Kshs. 104, 666.00 which will be set off from the amount due to the claimant being Kshs. 120, 000.00 so that the amount due to the claimant is **Kshs.15, 334.00**.

The Court has considered the parties’ margins of success and each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the parties for:

- a) The declaration that the summary dismissal was wrongful, unfair or unlawful.
- b) The respondent to deliver to the claimant a certificate of service and to pay the claimant a sum of Kshs. 15, 334.00 by 01.07.2019 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- c) Each party to bear own costs of the suit inclusive the counterclaim.

**Signed, dated and delivered in court at Nairobi this Friday 21<sup>st</sup> June, 2019.**

**BYRAM ONGAYA**

**JUDGE**