



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 231 OF 2015

JULIUS MACHARIA MWANGI.....CLAIMANT

VERSUS

MATANGA INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent and averred in his amended statement of claim that he was retained as a farm manager for Kirimara Coffee Farm which is owned by the Respondent from June 1996 till April 2010 under a contract with Standard Chartered Estate Management Limited which later changed its name to Tropical Farm Management (K) Limited when he retired and was paid all his dues. He averred that after his retirement Tropical Farm Management (K) Limited for a number of reasons decided to terminate the farm management contract with the Respondent in May 2010. He averred that sometimes in June 2010 the Respondent through its director Rose Mimano approached the Claimant and engaged him offering to retain him as a farm manager under a direct contract with the Respondent in King'ong'o, Gameraock area of Nyeri County due to his exceptional management skills. The Claimant averred that he was retained on a 3 year contract commencing 1st July 2010 and expiring on 30th June 2013 earning a gross salary of Kshs. 115,000/- plus mileage allowance of Kshs. 35,000/-. He averred that thereafter on 1st July 2013 he executed a contract for a further 3 years with a gross monthly salary of Kshs. 118,000/- plus mileage allowance of Kshs. 35,000/-. He averred that he was ready and willing to continue to serve the Respondent as such manager until the completion of the said employment contract. The Claimant averred that he was issued a notice dated 7th December 2015 inviting him to a disciplinary meeting scheduled for 10th December 2015. He wrote back on 9th December 2015 seeking for more details and time to prepare and defend. He averred that on 10th December 2015 the Respondent issued a letter of suspension on allegations of misconduct and ordered the Claimant to vacate the company manager's house with immediate effect. He was by the same letter invited to a disciplinary hearing on 17th December 2015. He averred that he was issued with a letter on 11th December 2015 inviting him to a disciplinary meeting on 15th December 2015. He averred there was hardly any time to prepare. The Claimant averred that the suspension was contrary to the Constitution, the Employment Act, due process, the rules of natural justice and therefore illegal, null and void. The Claimant averred that he suffered loss and damage which he particularised. He averred that he was dismissed through a letter dated 16th December 2015 signed by the Respondent's director. He averred the dismissal was unfair and malicious reason wherefore he sought gratuity of Kshs. 34,787.50, pay in lieu of leave days not taken (3 months) – Kshs. 417,450/-, crop bonus for 2011, 2012 and 2013 – Kshs. 247,200/-, salary for days worked in December 2015 – Kshs. 92,604/- gratuity for 2013 – Kshs. 46,300/-, leave for years 2013, 2014, and 2015 – Kshs. 555,600/-; pay in lieu of notice – Kshs. 555,600/-, service pay for 5 years completed under contract – Kshs. 463,000/-, salary increment withheld for July, August, September, October and November 2015 – Kshs. 84,185.50 as well as damages for the breach of the Claimant's constitutional rights, general damages for the unlawful termination equivalent to 12 month's salary and costs of the suit. He averred that on the early morning of 17th December 2015 whilst he was not in the house allocated to him by the company and without notice the quarters were demolished including his personal belongings and documents destroyed. The Claimant averred that this malicious scheme was organised under the conspiracy of the director Rose Mimano under the pretext the house was very old. He averred that if there was need to destroy the house it should have been conducted in a humane manner without destroying his personal belongings and property.

2. The Respondent in its defence averred that the Claimant was hired under 2 successive contracts for 3 years each commencing on 1st July 2010. It averred that prior to that he was employed by Tropical Management (K) Limited. The Respondent averred that his farm management skills however turned out to be poor and injurious to the welfare of the company. The Respondent averred that the coffee business had been declining for a number of years while the Claimant was engaged as farm manager but thought it was due to wider macro factors rather than the performance levels of the Claimant. The Respondent averred that it engaged an agronomist on or about 27th November 2015 to visit the farm and advise on the best agricultural practices. The Respondent averred that the agronomist prepared a report dated 27th November 2015 which observed that there were various instances of gross mismanagement which included *inter alia* poor record keeping, misallocation of labour, and poor supervision which led to inefficiency, poor field management – no structured pruning system, application of fertilizer was neglected yet there was fertilizer in the store and picking was neglected leading to poor harvests. The Respondent averred that the Claimant had breached his obligation to manage the farm in a manner that promoted the business interests of the Respondent. It averred that the Claimant had been leaving duty without permission and that he was generally unavailable when needed and it observed that private and confidential information of the company had been disclosed which had brought down the fall of the company. The Respondent averred that upon summoning the Claimant to a disciplinary meeting the Claimant sought through his advocate for clarification and more time to prepare

for the meeting, and that thereafter the Claimant took away 2 cows and a heifer from the farm on 9th December 2015 without permission from the managing director. The Respondent averred that the Claimant also switched off the security lights on the night of 9th December 2015 thereby exposing the farm to the risk of vandalism and theft. The Respondent averred that vide a letter dated 10th December 2015 the Claimant was suspended and the disciplinary meeting postponed to 17th December 2015 to accommodate the Claimant's request. The Respondent averred that on 10th December 2015 the Claimant called a staff meeting and informed the staff that his salary had been withheld and he was about to be dismissed and that if the company dismissed him there would be no one to protect the farmers and their salaries would also be withheld. The Respondent averred that in response to this it informed him vide a letter dated 11th December 2015 that the meeting that had been slated for 17th December 2015 had been brought forward to 15th December 2015. The Respondent averred that it duly convened the meeting on 15th December 2015 and the Claimant did not show up and that the Claimant did not communicate his intention not to attend the meeting nor were reasons for his failure to attend the meeting given. The Respondent as a result made a decision to terminate the Claimant's service and communicated the decision vide a letter dated 16th December 2015. The Respondent averred that the letter was delivered on 16th December 2015 and that unbeknownst to the Respondent the Claimant had gone and obtained an *ex parte* injunction barring the Respondent from carrying out the disciplinary hearing and from evicting the Claimant from the company house. The Respondent averred that the orders were served on 17th December 2015. It denied that the termination was done retrospectively or that the Claimant was entitled to the remedies sought in his claim. The Respondent denied breaching the Employment Act or the Constitution of Kenya and averred that the dismissal of the Claimant was substantially and procedurally fair. The Respondent urged the dismissal of the claim. By way of counterclaim, the Respondent averred that it conducted an audit into the financial records between 22nd March 2013 and 21st March 2015 and the audit revealed various discrepancies which were suspicious and amounted to fraud on the part of the Claimant. The Respondent averred that large payments were made through cheques as standard business practice but the audit revealed the Claimant made large payments through the petty cash system such as the purchase of 594 bags of fertilizer on 20th May 2014 in cash where 2 cheques were made out and money withdrawn and introduced to the petty cash system and later applied in payment of the cash to Innovators Point Limited for the supply of the fertiliser. The Respondent averred that the cheque stubs did not tally with the sums on the actual cheques. The Respondent averred that unbeknown to it the Claimant had never submitted his details for payroll alongside the other workers and would instead authorise his payment of salary to himself through the petty cash account. The Respondent gave details of the payments from March 2013 to March 2015 which gave a variance of Kshs. 2,042,715/- in 2013 and Kshs. 1,002,929/- in 2014. The Respondent averred that the Claimant paid himself an extra 3,045,644/- as salary and an extra Kshs. 201,600/- for a house servant through the petty cash system. The Respondent averred that the Claimant defrauded it of Kshs. 4,865,009/- which the Claimant claimed from the Claimant.

3. The Claimant filed a reply to defence and defence to counterclaim. He averred that the report by the consultant offered no proof of poor record keeping, mismanagement of labour or poor field management. He averred that the errors on the report were negligible and capable of being fully explained but which explanation was never sought by the Respondent. The Claimant denied any inefficiency in the management of the farm or any absenteeism as he was always available when sought. In his defence to the counterclaim, the Claimant averred that despite being manager of the Respondent he was never aware of any audit conducted internally or externally by the Respondent. He denied the particulars of fraud and averred that any funds withdrawn by the Claimant were always used within the farm. He averred that the sums for his salary were incorrectly reflected and that the July 2013 to June 2014 salary was Kshs. 1,836,780/- and that the salary for June 2014 to June 2015 was Kshs. 2,020,452/-. He averred that the figures in the counterclaim were fabricated. The Claimant averred that there was no obligation to avail any information on the mode of payment of his personal servant as averred in the counterclaim. The Claimant averred that the payments made to the school were not suspicious and that they were made with the full knowledge of the Respondent as the school had been founded by the late Mr. Julius Mimano who until his death was a director of the Respondent. The Claimant averred the payments were made on behalf of the workers who had young children in need of tutors and school materials and denied that these funds were used by the Claimant for his own means. The Claimant averred he was not liable to the Respondent for the sum of Kshs. 4,865,009/- and prayed the defence and counterclaim be struck out with costs and judgment entered as prayed for in the memorandum of claim.

4. The Claimant and his witnesses who were Harisson Irungu Chege a security guard, Lucy Wangui Wamutitu a store keeper and Ian Mbutia Mimano a son of the director of the Respondent Rose Mimano. The Respondent called Rose Mimano a director, Sylvester Kyeni an agronomist and consultant, Veronica Wangari Wachuka a worker at the Respondent and Joseph Mbuki Kamau an accountant who worked for KRA previously. The Claimant testified that he was suspended on allegations that he had taken 2 cows and a heifer on 9th December 2015. He stated that the cows were his and he had got permission from the director to rear them in the farm. He testified that no report was made to the police in regards to the cows. He stated that he never absented himself from work as he had gotten permission from the director to attend court and testify in Succession Cause No. 417 of 2005 whose parties were the company's directors on 13th and 14th October 2015 and that those are the only days that he was absent from work but with permission. He testified that he never kept poor records and that he never gave information to strangers about the company as this were fresh allegations against him after his advocate went to court seeking an injunction against the disciplinary action and eviction from the company's residential house, which orders were granted and served on the respondent. He also stated that he was never informed of the consultants visit and that he did not see the consultant or verify the consultant's report and records. He testified that he was still living in the company's residential house when the Respondent hired goons to demolish the house without issuing him prior notice. He stated that he received the information of demolition from a worker on the night of 7th January 2016 who informed him that the house would be demolished on 8th January 2016. He testified that he together with his family moved out of the house and made a report at the Nyeri Police station and the house was demolished on the 8th January 2016. He testified that his property was destroyed as he did not manage to remove the items before demolition. He stated that the manager and the demolishers were arrested and arraigned in court in Cr. Case No. 244 of 2016 which is ongoing. He testified that the total loss he suffered according to the valuation done by Epcon Ltd was Kshs. 2,101,110/-. He stated that he never received a letter accusing him of fraud and that he had not been given limits on petty cash purchases. He stated that he never received double salary. He testified that the agreement he signed provided for a house servant that will be paid by the Respondent. He agreed to have paid a coach to train the children, bought books for the children and paid tuition for them as this was authorized by the Respondent manager and was also catered for to encourage good labour relations and welfare of farm workers. He stated that the cheques were signed by the Respondent who authorized payment as well. He testified that initially he was paid via a cheque but the system changed to payment by a petty cash. He denied being paid salary twice. He confirmed that he was issued with a suspension letter which also invited him to a disciplinary meeting, but he did not attend because the letter did not give him time to prepare. He stated that he engaged his lawyer who sought for more time and that he did not receive a termination letter but received the information of termination from his lawyer. He testified that the farm was not underperforming due to incompetence but rather due to non-supply of farm inputs from the director, delayed salaries to workers which lowered their morale, lack of irrigation which led to the production of light coffee instead of the required heavy coffee, less tractors that could not manage to carry out fungicide sprays as required, lack of coffee drying materials and lack of enough fertilizer leading to less production. He maintained that he never received any complaints or warnings on

performance during the subsistence of his contract. He stated that he did not engage in any gross misconduct and that the Respondent failed to follow the procedure of termination in his contract as he did not receive a 90 days' notice. The Claimant's witness Lucy Wangari who used to work as a store keeper at the Respondent's company adopted her statement and testified that after harvest in October she did not have pesticide and fertilizer to give and she opted to work in the factory in November. She stated that the Claimant did not inform her the reason for his dismissal and that he only told them that he was unwell and had issues with G4S in the beginning of the month. The witness testified that the director Mrs. Mimano called for a meeting and informed them that she was dismissing Julius because of his relationship between him and Ian Mimano and that the Claimant was interfering with her family. Mr. Ian Mbuthia Mimano testified for the Claimant and adopted his statement as evidence and stated that he is one of the Directors of the Respondent and denied being aware of his removal as director. He testified that he was not consulted when the Claimant was dismissed. He stated that the Claimant was a witness in Succession Cause No. 417 of 2005 and by virtue of him being a director, he gave the Claimant permission to attend court and that is why the Claimant was absent.

5. The Respondent's 1st witness Rose Mimano who is the Respondent's managing Director adopted her statement as evidence before court and produced documents in support of her case. She testified that the Claimant, according to the consultant's report, performed poorly and was an absentee at work, gave information to outsiders and stole two cows and that the theft was reported. She testified that these were the reasons for dismissal. She however confirmed that she was in Court with the Claimant on one of the days that they appeared in court but she was not aware that he had been given permission by Ian Mimano as she is the one who normally gives permission. She stated she did not give the Claimant 90 days' notice but she invited him to a meeting but he did not attend. She maintained that she had already terminated him at the time she received the court orders. The 2nd witness for the Respondent was Mr. Sylvester Kyeni an agronomist and consultant. He relied on his statement as evidence before court and produced the report dated 27th September 2015. He testified that he knew the Claimant as the Claimant had trained him when he was employed in 1996 at Kirimara and when he left in 2012 he was the Claimant's group manager. He stated that the Claimant was present when he visited the farm as he is the one who gave him information about production, took him around and showed him the store. The witness stated that he was hired to do the work in November 2015 and he indicated in his report that the Respondent would take a year to turn around. He stated it has turned around and its making profits. The final witness for the Respondent was Mr. Joseph Mbuki Kamau who testified that he was a tax consultant but not a member of ICPAK. He stated that he was asked to look at the books of the farm but he was not appointed as an auditor and his work was to look at the expenditure and not to draw a profit and loss account. He confirmed he did not do any balance sheet or any work on charges. He testified that at the time he did the report the farm manager was no longer at work. He confirmed that there was an earlier audit that was done by external auditors Kimani & Associates but he did not consult them. He stated that the signatory to cheques was the Managing Director. He however stated that the operation of the farm was different as the farm manager would get a cheque, have it deposited in an account where he was a signatory and he could not state the exact expenses to the Court. In re-examination he stated that he was allowed to carry out an audit by virtue of his training.

6. The Claimant filed submissions and postulated that the issues for determination were in the questions formulated in argument of his case which were:-

- i. Whether the suspension on 10th December 2015 and subsequent termination on 15th was unfair and unlawful.
- ii. Whether the Claimant is entitled to damages of one year for unfair/ unlawful termination.
- iii. Whether the Claimant is entitled to special damages and whether his constitutional rights were breached.
- iv. Whether the Respondent is entitled to damages as demanded in the counter-claim.

The Claimant submitted that his suspension was drastic, unfair and unlawful causing him to suffer loss and damage because he was not afforded enough time to prepare his defence and appear for hearing since he received the letter inviting him to a disciplinary meeting on 12th December 2015 which was not only on a Saturday but also a public holiday leaving him with only one day to prepare as the meeting was to take place on 15th December 2015. The Claimant submitted that the suspension was unfair and illegal since there was no provision for it in his contract of employment either expressly or by inference. The Claimant submitted that the rules of natural justice would require that he be accorded an opportunity to defend himself and such opportunity was not given. He relied on the case of **Paul Mwaura Mbugua v Kagwe Tea Factory Ltd & Another [2012] eKLR** and submitted that suspensions are called so that investigations can be conducted and thereafter be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations. He submitted that from his testimony and letter of suspension, there were no investigations to be conducted since the allegations of misconduct had been determined and concluded thus the suspension was unfair and unlawful. The Claimant submitted that the Respondent had received court orders on the same date that he was to attend the disciplinary meeting barring the Respondent from proceeding with the meeting. However, the Respondent proceeded without the Claimant's attendance and summarily terminated him from employment. The Claimant submitted that Sections 41 and 43(1) of the Employment Act require the employer to give reasons for termination in every case and allow the employee time to respond. He submitted that the employer acted on undisclosed reasons without giving him the opportunity to be heard and respond to them hence making the termination unfair. The Claimant relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Ltd [2014] eKLR** where the court held that reasons for termination must be given prior to and not after termination. The Claimant submitted that the period from invitation to disciplinary meeting on 7th December 2015 to dismissal on 15th December 2015 was about one week and it was grossly insufficient for one to prepare and defend himself against such a weighty matter. The Claimant submitted that such short notice is tantamount to not according one a hearing at all. Reliance was placed on the case of **David Wanjau Muhoro v Ol Pejeta Ranching Ltd [2014] eKLR** where the court espoused 3 principles that entail a fair hearing to include the right to sufficient time to prepare, the right to fully understand the charges, and the right to documentation. The Claimant submitted that he was never given sufficient time to prepare, the allegations were vague and ambiguous, he was never given any documentation the Respondent intended to rely on, especially the audit report. Consequently, the Claimant submitted, he was not accorded a fair hearing in line with Section 43(2) of the Employment Act. The Claimant submitted that despite Section 44 of the Employment Act requiring the employer to terminate the employment of an employee without notice or with less notice than that to which the employee is entitled, such employee must be given an opportunity to be heard and defend himself before a disciplinary panel. The Claimant submitted that he was absent only for two days but with a lawful cause as provided for under Section 44(4) (a) of the Employment Act. He submitted that he had been permitted to be away by one of the directors who confirmed the same in court as he was a witness in Cause No. 417 of 2005 where the two directors were parties. On the issue on disclosure of confidential information, the Claimant submitted that the specific confidential information that he allegedly disclosed and the sources he disclosed to were never availed in Court. As to whether he is entitled to damages of one year for unfair/unlawful termination, the Claimant submitted that his evidence proved

that the Respondent had no justifiable reasons to terminate the contract of employment. He submitted that there is sufficient evidence that personal issues between the directors had a direct influence on the unfair termination of his contract. He therefore prayed that he be awarded the maximum damages as provided for by Section 49(1)(c) of the Employment Act instead of reinstatement. The Claimant submitted that he is an elderly man who expected to retire in the Respondent's employment and unfortunately the drastic termination left him without an income, a home, personal households and valuables, ill-health and legal costs. He submitted that the Respondent did not prove the allegation of fraud against him because the Respondent's witness Rose Mimano confirmed that there were no fraud allegations in the letters inviting the Claimant for a disciplinary meeting, letter for suspension and the letter for termination of the Claimant. As to whether the Claimant is entitled to special damages and whether his constitutional rights were breached, he submitted that upon his unfair termination, the Respondent owes him dues to a tune of Kshs. 4,597,837/- a fact that was not denied by the Respondent's director in her testimony. He submitted that he was never paid bonuses, salary in lieu of notice, salary in lieu of leave days not taken and gratuity as provided for by the provisions of his employment contract. He cited the case of **David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] eKLR** and submitted that special damages in employment cases need not be proved as in the case of civil matters as the majority of the records in an employment matters lie with the employer. The Claimant submitted that the Respondent simply offered denials in their defence but did not provide the requisite records that are in its preserve as the employer. The Claimant submitted that he had produced evidence and exhibits prescribing his entitlements to the special damages and the Respondent's director did not refute that it owed those obligations during hearing. He submitted that he had been living in the Respondent's premises for over 15 years and had purchased numerous items over time as opposed to the Respondent's allegations that it provided all the house hold goods together with the premises. The Claimant submitted that the demolition of the premises was carried out inhumanely and in a clandestine manner without issuing him notice which violated his rights and more specifically Articles 28, 31 and 41 of the Constitution which provided for the right to human dignity, the right to privacy and the right to fair labour practices respectively. As to whether the Respondent is entitled to damages as demanded in the counter-claim, the Claimant submitted that the alleged audit report that revealed he had misappropriated the Respondents' business leading to fraud was neither filed by the Respondent nor was it done by a qualified auditor. The Claimant submitted that the said report did not follow the required international auditing standards and practice, the auditing was not authorized by all the directors, there was an auditor already in place who had not ceased from acting for the farm hence the so-called auditor's appointment was null and void since it contravened Section 719(1) of the Companies Act 2015 which provides that an auditor of a private company cannot take office until any previous auditor ceases to hold office. He submitted that the said report therefore cannot be termed as an audit report. The Claimant submitted that the downfall of the farm was not as a result of poor management but as a result of lack and/or late delivery of farm inputs. The Claimant maintained that all the transactions were authorized by the director and he therefore cannot be said to have misappropriated any funds. The Claimant submitted that he had proved that his employment was unfairly terminated while the Respondent had failed to prove that it terminated the contract fairly and lawfully and also it failed to prove its counterclaim. He prayed that his claim be granted and the Respondents' defence and counterclaim be dismissed with costs.

7. The Respondent submitted that indeed the Employment Act does not make provision for suspension and placing reliance on the case of **Chemweno Kiptui v Kenya Pipeline Company Ltd [2014] eKLR**, the Respondent submitted that it had reasonable grounds to suspend the Claimant as set out in the suspension letter and that the suspension was fair in the circumstances. The Respondent submitted that from the evidence adduced, it had a substantive ground to dismiss the Claimant because according to the consultant's report he failed to use his best endeavours to manage the farm in a manner that was efficient and satisfactory to it as provided for in clause 7 of his employment contract. The Respondent submitted that the Claimant failed to answer questions put to him in the consultant's report when asked to show cause, in his pleadings or at trial. It submitted that questions such as failure to keep records, poor supervision and poor field operations were merely denied. The Respondent submitted that Section 44(c) of the Employment Act entitled it to summarily dismiss the Claimant if he carelessly or improperly performs any work which from its nature was his duty to perform under his contract. The Respondent submitted that the Claimant had absconded duty which amounted to gross-misconduct in terms of Section 44(4)(a). The Respondent submitted that the Claimant had argued that he had permission to be absent for the two days he was not on duty but he failed to present himself to offer an explanation of his absence when he was required to do so by a notice to show cause letters dated 7th December 2015 and 11th December 2015 that were issued to him. The Respondent submitted that all the above mentioned grounds constitute proper reasons for summary dismissal as provided for by Section 45 of the Employment Act. The Respondent submitted that it satisfied the procedural fairness in Section 41 of the Employment Act as it outlined to the Claimant in the language he understands the reasons for which it was considering termination as was communicated to the Claimant through the two disciplinary notices and the suspension letter which the Claimant acknowledged to have received. The Respondent submitted that the Claimant was given an opportunity to defend himself but he opted not to present himself without communicating to the Respondent on his intention not to attend the disciplinary hearing. The Respondent submitted that given the danger of the industrial unrest posed by the continued presence of the Claimant, the 4 days that the Claimant was given to prepare his defence was sufficient. The Respondent supported this argument by citing the case of **Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another [2015] eKLR** where it was held "*what is adequate or reasonable time depends on the circumstances of each case*". The Respondent submitted that the allegations that Mrs. Mimano dismissed the Claimant because he testified against her in a separate succession cause are aspersions on her character. The Respondent submitted that Section 49(1)(c) limits the amount payable as compensation to the equivalent of a number of months wages or salary not exceeding 12 months based on the employee's gross monthly salary. It submitted that in the unlikely event the Court finds that the Claimant was unfairly dismissed, he should be awarded a maximum of Kshs. 708,000/- which was the gross monthly salary for the remaining 6 months of his contract. It relied on the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** where the court held that the employment relationship is not a commercial relationship, but a special relationship which must be insulated from the greed associated with profit-making motives, inherent in commercial contracts and proceeded to award the total salary for the remainder of 10 months of the claimant's contract as compensation for unfair termination. The Respondent submitted that the Claimant was not entitled to Kshs. 2,101,110/- as compensation for demolition of the company's house. The Respondent submitted that its witness indicated that the Claimant had already vacated the premises by the time it was brought down and no evidence was adduced to show the items that were allegedly damaged and neither did the valuers testify as to the alleged damage on the household items. Similarly, the listed items produced was a replica of the items that had been provided by the Respondent as shown by its inventory hence the claim for Kshs. 2,101,110/- was not proved hence lacks merit. The Respondent submitted that the claim for service pay for Kshs. 555,600/- is without basis as it was not a term of the contract. The claim on leave days should be for the last year of work being 30 days at a sum of Kshs. 168,300/- because the Claimant resided in the company house that was in the farm and he as such he opted never to go on leave. The Respondent submitted that the Claimant had failed to claim for unpaid leave on expiry of the first contract and he is deemed to have forfeited those leave days making the present claim an afterthought. The Respondent submitted that the claim on crop bonus for Kshs. 247,200/- is also not sustainable as the Claimant was not entitled to bonus as the crop performance had been poor over the years and moreover, there was no evidence of the tonnage of coffee that supported the claim. The Respondent submitted that the Claimant had also paid himself through the petty cash voucher system salary in excess of Kshs. 3,045,644/- and therefore the claim for salary increment lacks basis. The Respondent submitted that the consultants audit report revealed various discrepancies which were described as misappropriation. The Respondent submitted that the report showed that the Claimant had made large payments through a petty cash system which was suspicious, he had cash

sale receipt for Kshs. 1,593,000/- which appeared to be a one off supplier which according to the Respondents' witness was highly unlikely that a supplier would accept such a huge amount in cash, he also used to draw irregular amounts of cash and in many cases he paid himself double salary a month. The Respondent submitted that the Claimant was at pains to explain the difference between the amount of the cheques counterfoil and the petty cash vouchers and the excuse that the particulars could not fit the counterfoil is evidence of misappropriation. The Respondent submitted that the consultant testified that the work he carried out was a forensic audit which had a different objective from an audit for purposes of presenting a company's annual financial report. The Respondent submitted that the Claimant did not call any expert evidence to rebut the consultant's evidence and the Respondent thus prayed that the counterclaim of Kshs. 4,865,009/- be allowed in its entirety.

8. The foregoing pleadings, documentary and oral evidence as well as submissions reveal that the Claimant was dismissed in a callous manner contrary to the requirements in law. Section 41 provides that before an employee is terminated by an employer for poor performance, the employer shall give the employee an opportunity to be heard. In this case there was such a hurry to get rid of the manager that thugs were procured to force him out and once he got wind of the intended harm to his person he left the premises only for the house he resided in to be destroyed. That was a primitive way to terminate the contract of employment unfit for any enterprise. The poor crop yields the Claimant was blamed for were largely attributable to poor appreciation of the business as displayed by the Respondent's director Ruth Mimano. The fact that the Respondent failed to follow the law in the termination means there was merit in the Claimant's claim in regard to his termination on 15th December 2015 without due process. He is therefore entitled to Kshs. 417,450/- being pay in lieu of leave days not taken, salary for days worked in December 2015 amounting to Kshs. 92,604/- as well as maximum compensation for the unlawful termination- Kshs. 1,800,000/- as well as costs of the suit. He was unable to prove any entitlement to crop bonus for the years of service or gratuity for his service. He also failed to prove he was entitled to any additional payments for the previous contracts with the Respondent. The Respondent failed to prove it was entitled to the sums in the counterclaim. Being the keeper of records as employer in terms of Section 74 of the Employment Act it woefully failed to back its claims against the Claimant. There was no indication as to why the audit alleged to have been conducted was not a financial audit and why it was never revealed to the Claimant before his dismissal. There was no indication of the alleged fraud or misappropriation in the letters issued to the Claimant prior to his suspension and dismissal. In the final analysis I enter judgment for the Claimant against the Respondent for:

- i. Kshs. 417,450/- being pay in lieu of leave days not taken,
- ii. Kshs. 92,604/- being salary for 15 days worked in December 2015
- iii. Kshs. 1,800,000/- being maximum compensation for the unlawful termination
- iv. costs of the suit
- v. interest on the sums in i), ii) and iii) above at court rates from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 25th day of November 2019

Nzioki wa Makau

JUDGE