



**REPUBLIC OF KENYA**

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

**CAUSE NO.100 OF 2017**

**CONSOLIDATED WITH**

**Cause No.101 of 2017**

**Cause No.102 of 2017**

**Cause No.103 of 2017**

**JOHN OTIENO UYOMA ..... CLAIMANT**

**SAMSON MANGA MATIKO.....CLAIMANT**

**ANDREW MONG'ARE NYAKANGO..... CLAIMANT**

**JULIUS N. MAKORI.....CLAIMANT**

**VERSUS**

**CHEMARTIN TEA CO. LTD.....RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The court given mandate to consolidate suits under Rule 23 of the Employment and Labour Relations Court (Procedure) Rules, 2016 where there is some common question of facts raised by the parties and where it is the practical and appropriate to proceed with the issues raised in the different suits simultaneously. In this regard, the following suits;

**Cause No. 100 of 2017 by John Otieno;**

**Cause No.101 of 2017 by Samson Manga Matiko;**

**Cause No.102 of 2017 by Andrew Mong'are nyakango; and**

**Cause No.103 of 2017 by Julius N. Makori.**

2. Are all filed against one respondent and former employer of the claimants, Chemartim Tea Co. Ltd. The facts of termination of employment in all the suits arose from the same cause of action, the alleged strike and summary dismissal of the claimants. All the claimants were issued with a letter of termination dated 19<sup>th</sup> May, 2017.

3. These suits ought to have been filed in the same cause. A consolidation for judgement is the practical and appropriate action by the court in addressing all the suits.

4. The claimants filed the Memorandums of Claim on 20<sup>th</sup> June, 2017 and summonses were served upon the respondent on 3<sup>rd</sup> July, 2017 but there is no appearance or a defence to the claim filed. Service is confirmed in the Affidavit of Service by Pella Amugune Tsisaga filed on 23<sup>rd</sup> August, 2017. The claimant and hi advocates attended court on 30<sup>h</sup> October, 2017 and on 22<sup>nd</sup> November, 2017 where directions to proceed by way of formal proof were issued.

5. The claim is that the claimants were employed by the respondent as general workers at the tea estate. On 19<sup>th</sup> May, 2017 while the claimants were at work, they were summoned by the Estate manager to the office whereupon they were verbally suspended from employment. The suspension was escalated to summary dismissal vide letter dated 22<sup>nd</sup> May, 2017. There was no notice or an opportunity to be heard on any matter before the wrongful termination of employment. Such was contrary to the law.

6. The claim is also that during employment, the claimants were underpaid at KShs.11, 000.00 per month and therefore makes claims for salaries due for April and May, 2017; underpayments leave allowances, and three (3) months' notice pay.

7. Each claimant testified in support of the claims. Upon employment, the claimants were issued with a work identity card and would be paid his dues based on the season yield and got a pay statement after every two (2) weeks. Following several months without a salary, several employees went to the respondent's office to seek payment. The respondent said it was a case of illegal strike but it was agreed that employees should resume work and not be victimised. However after the employees went back to work the respondent's manager called the claimants together and all the five (5) were issued letters of summary dismissal. There was no notice or valid reasons for such summary action. The demand for payment related to unpaid wages for three (3) months and justified.

8. The claimant also filed written submissions. Most parts of these written submissions are not legible as done in faint printer. The case law authorities are well done and I make reference herein.

### **Determination**

9. Section 44 of the Employment Act, 2007 allows an employer to summarily dismiss an employee with short notice or with pay or without notice or pay. However where such has to occur, the employer must demonstrate the circumstances leading to summary dismissal without notice or with less notice or without notice or pay. However, even in a serious case of gross misconduct, section 41(2) of the Act requires the employer to hear and consider any presentations which the employee may have in meeting the procedural requirements of the law. See **George Onyango Akuti versus G4S Security Services Kenya Ltd [2013] eKLR**.

10. where in a given case the employer is not able to abide the provisions of section 41(2) of the Employment Act, 2007 pursuant to section 43 read with section 45(2)(a) and (b) the burden rests on the employer to prove reasons for the termination of employment and demonstrate that such reason(s) were valid and fair. In **Milton Machama Musena versus Mars Security Guards Limited, Cause No.1566 of 2013** the court held;

*Section 44(3) and (4) read with section 41(2) of the Employment Act, 2007 requires that where an employee has grossly misconducted himself by being absent from work or failing to undertake duties as directed, a notice must issue and the employee given a fair chance to a hearing before summary dismissal. Where the employer is unable to issue the requisite notices, the exceptional circumstances making it impossible to abide the provisions of the law must be demonstrated by the employer.*

11. By letter dated 19<sup>th</sup> May, 2017 the respondent terminated the employment of the claimant in the following terms;

#### Termination of service under gross misconduct

*You are hereby informed that following the unlawful strike of employees on 18/5/2017 which extended to 19/5/2017 your services at the Estate has been stopped forthwith.*

*The reason for dismissal is that you organised and incited the workers leading to their stoppage of work.*

*In the event the Estate has lost considerable revenue and also failed to meet the Greenleaf target to be supplied to the factory for two days*

*For this reason you will be paid your terminal dues under gross misconduct clause of Chapter 24 section (b) and (c) and your services are stopped as per Clause of Chapter 25 Section (g) of the CBA between KPAWU and Chemartin Tea Company*

12. The essence of the claimants' case is therefore captured in the letter of the respondent terminating employment. Without a defence or any evidence from the respondent to challenge the claimants made, the only material available to the court is this record.

13. From the letter of termination, the reason given for summary dismissal of the claimants is that there was an unlawful strike of employees on 18<sup>th</sup> and 19<sup>th</sup> May, 2017 and it was alleged the claimants organised and incited the working leading to stoppage of work. These are serious allegations facing the claimants but without a defence to show how the same was arrived at if at all there was an unlawful strike and such action was incited by the claimants, the resulting summary dismissal of employment comes into question.

14. Section 43 of the Employment Act, 2007 provides 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.*

15. In addressing the question of prove of reasons and the legal requirements under section 43 of the Employment Act, 2007 the Court of Appeal in the case of **International Planned Parenthood Federation versus Pamela Ebot Arrey Effiom [2016] eKLR** held that;

**Section 43** of the Employment Act deals with proof of reason for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of **section 45**. The reason for termination of contract is the matter 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.

16. The decision above put into perspective findings made in the case of **Kenfreight (E.A.) Limited versus Benson K.Nguti [2016] eKLR** that;

*The Employment Act [2007], for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.*

17. In this case, in the letter dismissing the claimants from employment there is the referenced CBA between the union KPAWU and the respondent company is a key material denied of this court in view of no defence being filed. The effect is that the termination of employment is not justified in law or under any written policy, practice of record(s) of the respondent.

18. Without any challenge to the claims made, the facts addressed taken as they stand. Without participation in these proceedings, the respondent denied the court crucial material which may not exists as to different facts leading to a fair process towards the action of summary dismissal.

19. In the circumstances, I find the summary dismissal of the claimant failed to meet procedural and substantive justice as required under section 45(4) (b) of the Employment Act, 2007. There was unfair termination of employment.

20. The failure to enter appearance or file any defence despite summons being served cannot be visited upon the claimant I urging his case. Justice and equity must be served.

21. Upon the finding that there summary dismissal was unfair, compensation is due. A gross pay for 10 months is hereby appropriate. Kshs.110, 000.00 is awarded.

22. On the same finding, where summary dismissal was unprocedural, notice pay is due under the provisions of section 35 of the Employment Act, 2007. One months' notice is payable at Kshs.11, 000.00.

23. On the Claim for underpaid salary, as noted above parts of the written submissions are not legible. From the evidence, the claimant did not address this aspect of his claim save to cite the Wage Regulations applicable to general workers.

24. The claimant is represented by an advocate and these are matters which, even in the absence of a defence or attendance by the respondent should have been well addressed. Claimed amounts to be assessed are not articulated in terms of time of employment, the various Wage Guideline over the years and this makes it ear impossible for the court to address and quantify what is due. Such is declined.

25. On the claim for unpaid leave allowance, though the letter of summary dismissal has cited the application of the CBA between KPAWU and the respondent, the basis for claiming the leave allowance and the amounts is not set out. Section 28 of the Employment address the taking and payment for any annual leave due. For any payable leave allowances, such must be agreed upon in a written contract or in the CBA. This being a claim based on a right not covered under the Employment Act, 2007 outside of taking annual leave, the claim for leave allowance is not justified. Such is declined.

26. On the claim for unpaid salary, such relates to April and May, 2017 and invariably led to the termination of employment. Where such salary was due and owing, the reasons for summary dismissal put into account, such salary owes. The claimant is awarded Kshs.11,000.00 for April, 2017 salary and for the 19 days worked in May, 2017 an amount of Kshs.6,970.00 all being Kshs.17,970.00.

**Accordingly, judgement is hereby entered for the claimants against the respondent in the following terms;**

**(a) The summary dismissal of the claimant was unfair;**

**(b) Notice pay awarded at Kshs.11,000.00;**

**(c) Unpaid salaries kshs.17,970.00;**

**(d) Compensation Kshs.110,000.00;**

**(e) Costs of the suit.**

**Orders above to apply in all the consolidated files;**

**CAUSE NO.100 OF 2017**

**Cause No.101 of 2017**

**Cause No.102 of 2017**

**Cause No.103 of 2017**

**Delivered in open court at Eldoret this 28<sup>th</sup> day of May, 2018.**

**M. MBARU JUDGE**

In the presence of:

Court Assistants: Robert and Martin

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