



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 353 OF 2015**  
*(Before Hon. Lady Justice Maureen Onyango)*  
**PHILIP KEBENEY RUTTOH.....CLAIMANT**  
**VERSUS**  
**EMROK TEA FACTORY (EPZ) LIMITED.....RESPONDENT**  
**JUDGEMENT**

By memorandum of claim dated 23<sup>rd</sup> September 2015, the claimant avers that he was unfairly terminated by the respondent. He prays for the following remedies –

a) A declaration that the termination process as carried out by the respondent is unlawful and that he was not terminated as required by law.

b)- Two months' pay in lieu notice

10,377 x 2 months----- Kshs.35,000

c)- Leave dues of 2 years

Basic salary x 2----- Kshs.70,000

d)- House allowance of entire period

15% of basic x months worked

15% of 35,000 x 25 months----- Kshs.131,250

e)- Compensation for unfair termination

Gross pay x 12 months----- Kshs.483,000

**TOTAL CLAIM   Kshs.719,250**

f)-- Costs and interests

g)- Any other relief the court may deem fit to grant.

The respondent filed a response to the memorandum of claimant denying the allegations therein.

At the hearing of the case, the claimant testified on his behalf while the respondent called one witness PAUL KUTO, the Assistant Factory Manager.

**Claimant's Case**

The claimant testified that he was employed by the respondent on 1<sup>st</sup> March 2013 as Assistant Factory Manager and worked until 19<sup>th</sup> May 2015. On that day, he reported to work as usual. He was called to the office of General Manager instructed to write handing over notes to his Junior then handed a letter of termination.

The claimant testified that he was in charge of people collecting tea especially clerks. His last salary was Shs.35,000 and he was not housed or paid house allowance or any other allowance. He testified that he was not given notice before termination or an opportunity to defend himself.

The claimant testified that he collected and signed for his terminal dues but later realised that he was not paid his full dues. He filed suit after the respondent failed to respond to a demand letter from his advocates. He prayed for payment of leave, compensation for unfair termination and house allowance. He also prayed for costs of the suit.

Under cross-examination, the claimant testified that the reasons for termination given in the letter of termination is that he failed to dismiss one of his junior clerks and insubordination. He testified that one of the clerks working under him was subjected to a disciplinary hearing and a recommendation was made that Clerk be issued with a last warning, which the claimant did. He denied failing to comply with instructions of the company. He testified that he signed the clearance form because he was in a hurry but later realised he was not paid house allowance.

### **Respondent's Case**

Paul Kuto testified that the reason for termination of the claimant's employment was gross misconduct and failure to discharge his duties according to company procedure. He testified that the claimant was in charge of a team tasked to deliver tealeaves at 75% good leaf but the leaf delivered was of poor quality and affected the price. The company suffered credit loss as a result.

Kuto testified that on one occasion a Clerk, Jacob Rotich admitted bringing poor quality leaf and also overloaded tea bags, which affected the quality. Kuto testified that the respondent decided to terminate the employment contract of the claimant when he failed to improve over a long period even after being given time to improve.

He testified that the claimant was housed and took all his annual leave. He was paid full terminal dues by cheque and signed a discharge.

Under cross-examination, Kuto testified that the claimant did not appear before any disciplinary committee and was not issued with any warning or show cause letter.

### **Submissions**

Both parties reiterated the evidence in their written submissions.

### **Determination**

I have carefully considered the pleadings, the evidence adduced in court and the submissions filed by the parties. The issues for determination are whether the claimant's employment was unfairly terminated and if he is entitled to the prayers sought.

### **Unfair Termination**

Sections 41, 43 and 45 of the Employment Act provide for fair termination. In a nutshell, the employee ought to be given an opportunity to respond to the charges against him (Section 41) and the employer must prove the grounds for termination (Section 43). Should either of the two not be complied with, the termination would be unfair (Section 45).

In the present case, the respondent's witness admitted that the claimant was not subjected to any disciplinary hearing and was never issued with a warning or show cause letter. The claimant himself testified that on the material date he reported to the office as usual, was summoned to the office of the General Manager, instructed to prepare handing over notes to his Junior, then issued with the letter of termination.

The letter of termination is reproduced below –

*"Mr. Philip Kebeney Ruto*

*19.05.2015*

*Emrok Tea Factory (Epz) Ltd*

*Box 47 – 30301*

*Nandi-Hills*

*Dear Sir,*

**RE: TERMINATION OF SERVICES**

*I hereby write to inform you that your services have been terminated with effect from 19<sup>th</sup> May 2015 due to insubordination.*

*Please arrange to hand over as instructed and organize to surrender any company property under your possession before collecting your dues, which shall be communicated in due course.*

*We sincerely thank you for serving the company for the last two (2) years. We wish you all the very best in your future endeavours.*

*Yours Faithfully,*

*Koech C. Wilson*

*General Manager*

*For Emrok Tea Factory (Epz) Ltd*

*CC Managing Director*

*Visiting Agent”*

The letter accuses the claimant of insubordination of does not state what constitute the insubordination. It does not even make reference to the claimant having been aware of what acts he was accused of to constitute the insubordination.

The wording of both Sections 41 and 43 of the Employment Act are couched in mandatory terms and failure to comply with either automatically constitutes unfair termination. I therefore find the termination of the claimant’s services unfair in terms of Section 45 (2) which provides that –

**A termination of employment by an employer is unfair if the employer fails to prove?**

- (a) that the reason for the termination is valid;**
- (b) that the reason for the termination is a fair reason?**
  - (i) related to the employees conduct, capacity or compatibility; or**
  - (ii) based on the operational requirements of the employer; and**
- (c) that the employment was terminated in accordance with fair procedure.**

### **Remedies**

Having found the termination of the claimant’s employment unfair, he is entitled to notice or pay in lieu thereof. I therefore award him one months’ salary in lieu of notice in the sum of Kshs.35,000/=.

The claimant prayed for annual leave for the two years he worked for the respondent. The respondent however avers that the claimant took leave and has produced leave forms to that effect. The leave forms are for 24 days annual leave for 2014 and paternity leave of 5 days only. For the 2 years, 2 months that the claimant worked, he was entitled to 52 days annual leave and 10 days paternity leave. Having taken only 5 days paternity leave and 24 days annual leave, the claimant had a leave balance of 33 days translating to Kshs.38,500 which I award him.

The claimant further prayed for house allowance for the entire period he was in employment at the rate of 15% of basic salary. The respondent avers that the claimant was housed but the claimant testified that he was not. No evidence was adduced by the respondent to prove that the claimant was housed. In the list of documents filed by the respondent dated 26<sup>th</sup> January 2016, copies of tax deduction cards have been produced which do not reflect any non-cash benefits. The claim for value of quarters is entered as 0.00 meaning the claimant was not issued with staff quarters. There is therefore no proof that the claimant was housed. For this reason I award him house allowance at shs.136,500/= being 15% of basic pay for 2 years and 2 months (26 months) worked by the claimant.

Having been unfairly terminated and taking into account all factors of the case especially the length of service and the manner in which the claimant was terminated, I award him 3 months’ salary as compensation in the sum of Kshs.105,000/=.

### **Conclusion**

In conclusion, I declare that the claimant contract was unfairly terminated by the respondent and enter judgment for the claimant against the respondent in the **total sum of Kshs.315,000/=**. The respondent shall also pay claimant’s costs of the suit.

The decretal sum shall attract interest at court rates from date of judgment.

**DATED AND SIGNED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF APRIL 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF MAY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**