



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 6 OF 2012**

***(Before D. K. N. Marete)***

**LOICE ANYANGO.....CLAIMANT**

**VERSUS**

**JAMES FINLAY (K) LTD.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of An Amended Memorandum of Claim dated 6th April, 2017. It does not disclose an issue in dispute on its face.

The respondent in a Reply to Memorandum of Claim dated 20th June, 2018 denies the claim and prays that this be dismissed with costs.

The claimant's case is that at all material times, she was a permanent employee of the respondent bearing employment P/No.31149.

Her further case is that on 26th September, 2013, she was unlawfully and unprocedurally dismissed from employment occasioning loss and damage. She was denied a fair hearing and seeks reinstatement without loss of benefits. This is illustrated as follows;

*6. As a result of the unlawful and unprocedural termination from her employment by the Respondent the claimant was forcefully evicted from her residence whereby her items were destroyed and some lost thereby suffering loss and damage.*

It is her other case that she was not involved in any form of gross misconduct or breach of her contractual obligation to warrant the summary dismissal. This is more so bearing in mind that despite her diligent service, she was not given a warning of a proper opportunity to express herself to the respondent.

She prays as follows;

*a. A declaration that the Respondent's dismissal of the claimant from her employment was unfair and unlawful hence null and void.*

*b. The Respondent to pay the claimant loss of remuneration calculated at the rate of the claim of the claimant's remuneration of Kshs.10,379/= per month to be paid between September 2013 until the date of reinstatement of employment.*

c. *Special damages foresaid.*

**IN THE ALTERNATIVE**

d. *Outstanding salary for the month of September 2013 to date.*

e. *3 months Salary in lieu of Notice.*

f. *Maximum compensation of 12 months salary for wrongful/unfair dismissal.*

g. *Costs of this claim together with interest at court rates of (c), (d) and (e) above.*

h. *Any further relief that this Honorable Court may deem fit and just to grant.*

The respondent's case is a denial of the claim. It is her case that dismissal was occasioned by the claimant's use of abusive language against one of the respondent's Group Managers. This was raised in her show cause letter dated 23<sup>rd</sup> September, 2013 and responded vide the claimants letter of the same date. This was considered and a decision made after disciplinary proceedings in the presence of the claimant and her shop steward representative.

7. *In further reply to the Claimant's allegations set out in paragraphs 4 & 5, the Respondent avers that the Claimant attended the said disciplinary hearing chaired by the Respondent on 25<sup>th</sup> September, 2017 in the company of two union representatives (Shop stewards) from the Kenya Plantation and Agricultural Workers Union (KPAWU) and in effect conceded the accusations leveled against her by requesting that she be relieved of her duties. The Respondent having considered her representation decided terminate her services on 26<sup>th</sup> September, 2013, decision that was duly communicated to her vide the letter dated 26<sup>th</sup> September, 2013 (See item 1 in the claimant's List of Documents dated 27<sup>th</sup> January, 2017). Annexed hereto and marked, "JFK 3" are copies of the minutes of the said disciplinary hearing.*

8. *The Respondent further states that notwithstanding the fact that the Claimant was being dismissed for an act amounting to gross misconduct; upon her request, the Respondent gratuitously paid her the following terminal dues:*

- a) *Wages earned;*
- b) *Pro-rata Leave;*
- c) *Travelling allowance (one way);*
- d) *Two month's pay in lieu of notice; and*
- e) *Gratuity*

*In line with the provisions Collective Bargaining Agreement (CBA) for the period between 1<sup>st</sup> January 2012 and 31<sup>st</sup> December, 2013 between the Claimant's Union and the Respondent. Annexed hereto and marked, "JKF 4" is a copy of the said CBA.*

9. *The Respondent further states that the Claimant's union later contested the foregoing and requested for a further hearing vide the letter dated 15<sup>th</sup> October, 2013 which request was acceded to and a further hearing held on 5<sup>th</sup> November, 2017 when the parties failed to reach an agreement and/or compromise over the termination of the Claimant. The union subsequently notified to the Minister of Labour on 7<sup>th</sup> November, 2013 of the existing trade dispute between the Claimant and the Respondent. Annexed hereto and marked, "JKF 5" are copies of the union's letters dated*

15/10/13 and 07/11/2013, evidencing as much.

10. *The Respondent denies the Claimant's allegations set out in paragraph 6 of the Memorandum of Claim regarding alleged loss of items and avers that the Claimant picked all her belongings on 12<sup>th</sup> April, 2015 and left them at the house of her former colleague one Mary Atieno Adera at Mix Village of Chemasingi Estate.*

11. *The Respondent denies the contents of paragraph 7 & 8 of the Memorandum of Claim and avers that the Grievant's dismissal was fair, reasonable and justifiable since:*

*a) The Grievant used abusive and/or insulting language against a senior member of the Respondent's management on 19/09/2013 allegations which were duly put forth to her on 23<sup>rd</sup> September, 2013. See annexure "JKF 1", being a copy of the notice to show cause dated 23<sup>rd</sup> September, 2013, evidencing as much.*

*b) The Claimant in her response dated 24<sup>th</sup> September, 2013 did not address and/or controvert the allegations she faced hence the call for a disciplinary hearing. See Annexure marked, "JFK 2"*

*c) The Claimant was afforded a fair hearing on 25<sup>th</sup> September, 2013 in the presence of her witnesses (shop-stewards) when she opted not to defend herself and instead requested to be relieve of her duties. See Annexure marked, "JFK 3" is a copy of the minutes of the said disciplinary hearing.*

*d) The Claimant was promptly informed of the decision taken to terminate her services with reasons thereof. See item no. 1 to the Claimant's Memorandum of Claim. See item 1 in the claimant's List of Documents dated 27<sup>th</sup> January, 2017)*

The matter came to court variously until the 5th of June, 2018 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the claim is statutorily time barred?
2. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the claim is statutorily time barred. This matter was tried and a ruling made on 17th October, 2017. It does not require any further consideration by court. It is spent and *res judicata*.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. This is the dispute and bone of contention by the parties.

The claimant in her written submissions dated 8th June, 2018 submits and presents her case as follows;

*The claimant was an employee of the respondent employment P/NO.31149. There was an election meeting of the union held on 19/9/2013 where the claimant was asked to speak on behalf of Chemasingi estate. The claimant went ahead and aired her views together with grievances concerning the workers and in particularly affecting women. The claimant then stated in question form "sijui ni shetani gani ameingia chamasingi, watu wanazimia kila saa" She then asked the*

*branch secretary to help them out in terms of the grievances she had aired. During the meeting the manager was absent. The branch secretary and organizing secretary responded by saying that they would talk to COTU to help them.*

The claimant further submits a case of unlawful termination of employment that was in contravention of the provisions of section 45 (1) (2) and (3) of the Employment Act, 2007 as follows;

*45.(1) No employee shall terminate the employment of an employee unfairly.*

*(2) A termination of employment by an employer is unfair if the employer fails to prove-*

*(i) that the reason for the termination is valid;*

*(ii) that the reason for the termination is a fair reason-*

*related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and*

*(c) that the employment was terminated in accordance with fair procedure*

*(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

It is her case that her termination of employment was unlawful for the following reasons;

- She was not given a fair hearing before being terminated.*
- She was not given a notice prior to her termination.*
- There was no legal basis for having her terminated.*
- The claimant has never been paid any wages, prorata leave, travel one way, two months' notice nor gratuity as stated in her termination letter to date.*

The claimant seeks to buttress her case by relying on the authority of **Kenya Union of Commercial Food & Allied Workers Versus North Farmers Sacco Ltd, cause no. 74 of 2013** where the court observed as follows;

*“Whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. These apply in a case for termination as well as in a case that warrant summary dismissal. The section states;*

*41. (1).Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

She further relied on the celebrated authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where Mbaru, J. observed thus;

*Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the*

*presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.*

*Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.*

*Summary dismissal on the other hand is largely at the instance of an employer. The standard applicable therefore are of a higher nature as this process is prone to abuse as the employer is in a more superior position than an employee. Summary dismissal can take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term. However, even in cases of serious breach of a contract as under section 44(3) or on committing acts as outlined under section 44(4) of an employee being absent from work, being intoxicated, negligence, abusive, failure to obey lawful orders, criminal arrest or charges, suspect in a criminal case, all these serious acts, such an employee is subject to be treated as under section 41 of the Employment Act with regard to being accorded a hearing.”*

The respondent in her written submissions dated 7th June, 2018 submits that the claimant’s dismissal was a consequence of her use of foul/abusive language against one of her group managers. She was issued with a notice to show cause dated 23rd September, 2016. This was ultimately answered and the claimant taken through disciplinary proceedings in which she was found culpable and dismissed from employment. Despite the dismissal, she was gratuitously paid the following terminal dues;

- a) Wages earned;*
- b) Pro-rata Leave;*
- c) Travelling allowance (one way);*
- d) Two months’ pay in lieu of notice; and*
- e) Gratuity*

She therefore denies a case of unlawful termination of employment and superimposes this by a reliance on section 44 (4) (d) of the Employment Act, 2007 which provides as follows;

*(d) an employee uses abusive or insulting language, or behaves in a manner insulting; to his employer or to a person placed in authority over him by his employer;*

*(i) The Claimant used abusive and/or insulting language against a senior member of the Respondent’s management on 19/09/2013 allegations which were duly put forth to her on 23<sup>rd</sup> September, 2013.*

*(ii) The Claimant in her response dated 24<sup>th</sup> September, 2013 did not address and/or controvert the allegations she faced hence the call for a disciplinary hearing.*

(iii) *The Claimant was afforded a fair hearing on 25<sup>th</sup> September, 2013 in the presence of her witnesses (shop-stewards) when she opted not to defend herself and instead requested to be relieved of her duties.*

(iv) *The Claimant was promptly informed of the decision taken to terminate her services with reasons thereof. See item no. 1 to the Claimant's Memorandum of Claim.*

Overall, the respondent's case falters for the following reasons;

- There is no suspension or show cause letter to the claimant.
- There is no letter of invitation to disciplinary hearing for the claimant.
- There is no evidence of charges or accusations against the claimant.
- There is no letter display of the claimant's letter of response to the show cause letter, if at all.
- There is no outright admission of liability or guilt by the claimant.
- The disciplinary proceedings exhibited in annexure JKF 3 are not succinct. They do not display a clear expression of the deliberations of the disciplinary committee. These are muddled up and not an expression of an open and fair hearing of the case against the claimant.

This court agrees with the findings of court in the authority of **Joseph Wambugu Kimenchi vs Attorney General [2013]eKLR** where the court observed as follows;

*"...strict rules of evidence and procedure would not apply to internal disciplinary process...in disciplinary proceedings all the management needs is some preponderance of probability that the accusations leveled might have occurred."*

I would however add that disciplinary proceedings should be clear and come out clear in the intent and purpose. Anybody looking at these proceedings should come out convinced that the employer undertook a process that was simple and comprehensible to the employee and other participants. This does not come out in the circumstances of this case.

Another conspicuously missing link in the respondent's case is the evidence of payment of the claimant on termination. Despite a plea to this extent in the defence and written submissions, the respondent does not annex any document in support of this allegation. This weakens her case in the circumstances. On a summation of all this lapses, her case fails *in toto*.

The claimant's case overwhelms that of the respondent. This is worsened by the fact that the respondent leaves many gaps in a demonstration of a case of lawful termination of employment. On a balance of probability and preponderance of evidence, a case of unlawful termination of employment ensues and I find as such. This answers the 2nd issue for consideration.

The 3rd issue for consideration is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

- i. One (1) months salary in lieu of notice.....Kshs.10,379.00
  - ii. Eight (8) months salary as compensation for unlawful termination of employment  
Kshs.10,379.00 x 8 months.....=Kshs.83,032.00
- Total of claim.....Kshs.93,411.00

iii. The costs of the claim shall be borne by the respondent.

Delivered, dated and signed this 20<sup>th</sup> day of June 2018.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Koech instructed by Bett & Company Advocates for the respondent
2. Miss Sitati instructed by E.M. Orina & Company Advocates for the claimant