



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

**AT NAIROBI**

**CAUSE NO. 378 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**DAVID JOSEPH WANYONYI .....CLAIMANT**

*VERSUS*

**KENYA NUT COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

By a memorandum of claim dated 8<sup>th</sup> March 2012 and filed on even date, the claimant avers that the respondent unlawfully and/or wrongfully dismissed him from employment and failed to pay his terminal benefits and damages. He prays for the following remedies –

1. That the court do examine the reasons and merit of termination of the grievant's termination and find that the termination was unlawful.
2. That the court do find that the Respondent's action of continued withholding, failing, refusal and or neglecting to pay the claimant his rightful terminal benefits and other unpaid dues unlawful and untenable.
3. That the Respondent has been in breach of the Employment Act Chapter 226 Laws of Kenya and other relevant labour laws.
4. That the Respondent is under obligation to pay the grievant his unpaid over-time dues earned but not paid, wages and salaries earned but not paid, leave days earned but not given and/or paid for.
5. That the Respondent pay the Applicant his salaries earned but not paid, leave, travelling allowance, unpaid off days but not paid, and leave days earned but not given and/or paid for.
6. That as a result, the court do order that the Respondent to pay the claimant all his terminal benefits and other unpaid dues computed as hereunder:

a. Three months' salary in lieu of notice at Kshs.45,000/= per month      Kshs.135,000

b. 34 days off (Sundays and holidays)

34 days x 45,000

26

Kshs.58,846

c. Leave Travelling Allowance

2009/10 (2 x 2,000)

Kshs.4,000

d. Leave days not taken (2009/2010/2011)

e. 58 days x 45,000

Kshs.100,384.61

26 days

f. Loss for failing to contribute to the retirement benefits scheme

Due to failure to be confirmed

45,000/= x  $\frac{12}{100}$  x 30 months

Kshs.162,000

g. Unpaid days in February 2011

7 days x 45,000/=

Kshs.12,115.38

26

**TOTAL    KSHS. 472,345.99**

h. Damages for wrongful termination

i. Costs of this claim

j. Interest on a, b, c, d, e, and f above at court rates

k. Any other relief the court may deem just and fit to give.

The respondent filed an unsigned and undated response to the claim on 6<sup>th</sup> March 2012 denying the averments in the memorandum of claim. The respondent states that the dismissal of the claimant from employment was done pursuant to the laid down procedure and in accordance with the respective contracts of employment between the claimant and the respondent. The respondent further states that the claimant is not entitled to any of the remedies sought. The respondent pleads that the summary dismissal was based on gross misconduct.

Vide a reply to response to claim dated 19<sup>th</sup> November 2012 and filed on 20<sup>th</sup> November 2012 the claimant joins issues with the respondent and reiterates the averments in the memorandum of claim.

The claimant's evidence was taken on 17<sup>th</sup> March 2014. After several adjournments, the respondent closed its case on 20<sup>th</sup> February 2018 without presenting any witness. The parties thereafter filed and exchanged written submissions.

### **Claimant's Evidence**

The claimant testified that he was employed by the respondent which is engaged in farming business in June 2008 as Assistant Farm Manager at a salary of Kshs.40,000 per month. He was issued with a letter of appointment dated 10<sup>th</sup> June 2008 (appendix A) of claimant's documents. Upon appointment he was based in Juja. After two months he was moved to Thika where he worked for ten months before he was transferred to the respondent's Kiboko Farm as Assistant Manager.

On 4<sup>th</sup> March 2011 while on annual leave the claimant was called and told to report back to work. Upon reporting back he found a new Manager who directed him to report to the Head Office on 7<sup>th</sup> March 2011 where he was handed a letter of summary dismissal dated 4<sup>th</sup> March 2011.

At the time of dismissal he was earning Kshs.45,000. He produced a payslip for November 2010 reflecting a salary of Kshs.45,000. (Exhibit 1 produced in court).

The claimant testified that it was alleged in the letter of summary dismissal that he misused the company assets, did not take instructions and allocated company tractor to cultivate his land, which was 5 by 2 meters. He testified that the Farm Manager is the one who was responsible for allocation of tractors.

The claimant testified that he had no previous warning letters. He never took leave except the last one and worked Saturdays and Sundays but was not paid overtime. He prayed for the court to grant orders as prayed in the claim.

Although Ms. Omoto, the respondent's counsel was present in court, she opted not to cross-examine the claimant.

### **Determination**

I have considered the evidence on record, the pleadings and the documents produced.

It is not in dispute that the claimant was employed as a Farm Manager and his last salary was Kshs.45,000. This is confirmed by his letter of appointment and payslip for the month of November 2010.

According to Section 41 of the Employment Act for termination of employment to be fair the employer must give the employee a hearing. The claimant's evidence that he was recalled from leave and handed a letter of summary dismissal is not controverted. In the defence the respondent admits issuing the letter of dismissal but states it complied with the provisions of the Employment Act. The respondent however failed to submit evidence to back up its averments in the defence.

In the absence of evidence to the contrary, the claimant's testimony remains uncontroverted.

Section 43 of the Employment Act provides that an employer must prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to be unfair.

Section 47(5) further provides that –

***“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”***

I find that the respondent failed to discharge its burden to prove the reasons for summary dismissal with the result that the dismissal was unfair both procedurally and substantively. I therefore declare the summary dismissal of the claimant by the respondent unfair.

### **Remedies**

The claimant having been unfairly terminated is entitled to notice. He prayed for three months' notice. His letter of appointment does not provide for the same with the result that he can only be granted statutory notice at one month's salary.

The claimant further prayed for work done on Saturdays and Sundays. His letter of appointment provides that his working hours include work on Saturdays. He did not submit evidence to prove that he worked overtime on Sundays. The prayer for overtime is thus declined as it was not proved.

The claimant further prayed for leave travelling allowance. He did not prove that he was entitled to the same. His letter of appointment states –

*“Where leave travelling allowance is payable, the same will be paid when you are proceeding on annual leave.”*

The claimant did not provide any evidence that he was eligible for leave travelling allowance. He did not as much as mention the same in his evidence. The prayer is thus declined as it has not been proved.

The claimant prayed for leave days not taken in 2009, 2010, 2011 at 58 days. Section 74 (1)(f) and Section 10(4) (i) both provide that the employer must keep records of annual leave entitlement including days taken and days due such that the entitlement is capable of being precisely calculated at the time of termination of employment. The respondent herein did not submit any proof of the same. Under Section 10(7), the burden of proof shifts to the employer where the employer fails to submit such records.

I therefore find that the respondent has failed to discharge its burden of proof and find that the claimant is entitled to 58 days annual leave. This calculated on the basis of the claimant's salary of Kshs.45,000 per month works out at Kshs.100,384.60 which I award him.

The claimant's prayer for loss for failing to contribute to the retirement benefits scheme due to failure to be confirmed is not supported by any evidence and is not provided for in law. The same is rejected.

Having been issued with the letter of summary dismissal on 7<sup>th</sup> March 2011, the claimant is entitled to salary up to date of receipt of the letter being 7 days' salary at Kshs.12,115.40 which I award him.

On the prayer for damages for wrongful termination, claimant is under Section 49(1)(c) entitled to compensation. Taking into account the manner in which the claimant lost his employment, the length of service and all the factors set out in Section 49(4) that are relevant to his case, I award the claimant 5 months' salary as compensation in the sum of Kshs.225,000.

The claimant shall have the costs of the claim and interest shall accrue at court rates until payment in full.

### **Orders**

In conclusion I make the following orders –

1. I declare the summary dismissal of the claimant unlawful and unfair.
2. I enter judgment for the claimant against the respondent as follows –

(i) Notice

Kshs.45,000

(ii) Annual leave	Kshs.100,384.60
(iii) 7 days worked	KShs.12,115.40
(v) Compensation	<u>Kshs.225,000</u>

**TOTAL** **KSHS.382,500.00**

3. Costs

4. Interest

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 2018**

**MAUREEN ONYANGO**

**JUDGE**