

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 249 OF 2017

CALMERITA KATHOMI NJUE.....CLAIMANT

VERSUS

BATIAN FLOWERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the unprocedural, unfair and unlawful termination of the Claimant's services and failure to pay her terminal benefits other dues. It was averred that the Claimant was employed on 1st July 1998 as a rose attendant at the Respondent's farm earning Kshs. 5,200/- a month and her contract was terminated on 15th December 2016 due to alleged insubordination. At the time she was earning Kshs. 10,342/- a month and her appeal was never heard. She averred that she was never suspended from employment and placed on ½ salary prior to her termination as required by the CBA pending investigation. She was not given a reason for termination nor was she represented by a fellow employee as a shop steward as required under Section 41(1) of the Employment Act. She appealed her dismissal on 16th December 2016 but her appeal was never heard and the Respondent did not comply with the provisions of the CBA requiring the matter to be referred to the Chief Industrial Labour Relations Officer who could appoint a conciliator to hear the dispute. The matter was referred to the Labour officer who adjourned the hearing due to the presence of the suspended branch secretary of the union. She averred that the complainant never attended the disciplinary hearing and that the Claimant and the complainant had a previous dispute in 2013. No certificate of service was issued to the Claimant and it was averred that she was dismissed unfairly and without adherence to justice and equity. She claimed 15 days worked up to 16th December 2016 – Kshs. 5,171.38, unpaid house allowance up to 16th December 2016 – Kshs. 1,900/-, transport allowances Kshs. 750/-, leave earned but not taken Kshs. 10,342.75, holiday earned but not taken Kshs. 689.52, 2 months notice Kshs. 20,685/-, CBA arrears between 1st August 2015 and 1st October 2016 Kshs. 16,913/-, overtime worked over lunch break but not paid Kshs. 218,688/-, 2 hours per week Kshs. 110,160/-, gratuity @23 days for each year worked Kshs. 134,800/-, general damages for unfair termination Kshs. 124,113/- making a grand total of Kshs. 647,213/- less statutory deductions of Kshs. 93,682/- leaving a balance of Kshs. 553,531/-. The Claimant thus sought this sum, a certificate of service and immediate reinstatement of the Claimant plus costs of the claim and interest.

2. The Respondent filed a memorandum of reply in which it averred that the Claimant was employed on 1st July 1998 and that during the disciplinary hearing was represented by the chief shop steward Samson Ntogwikua and an employee representative Peter Migwi. It was averred that the Claimant wrote a letter appealing and she was granted a hearing on 10th January 2017 as communicated by letter of 19th December 2016. The Respondent averred that conciliation meetings were held at the County Labour Office and that on 1st February 2017 it was agreed that the dispute should be settled by payment of Kshs. 75,98/- to the Claimant and a cheque was written by the Respondent which was forwarded to the County Labour Officer for transmission to the Claimant. The Respondent averred that the Claimant was paid for her services and given time off and leave days. The Respondent sought the dismissal of the Claimant's suit with costs.

3. The Claimant testified that she had an altercation with the general manager while she was working at the farm picking flowers. She stated that the general manager had a pair of scissors and he pointed at her and stated that she had reported him to the Union. He called the HR to the greenhouse and the HR advised that she was embarrassing. She was called for disciplinary hearing on 14th December 2016 stated that it was oral and no show cause letter was issued neither was she represented at the disciplinary hearing. She received a dismissal letter and the Respondent did not explain why she had been dismissed. She appealed and the appeal was not heard. She was not paid terminal benefits and she did not get the certificate of service. She testified that she did not pick the shop steward who was from Nelion Farm. She stated that she went to the Labour Office and that she did not receive the cheque left at the Labour Office and that she was not involved in the settlement. She thus sought for the award per her memorandum of claim.

4. In cross-examination she testified that she was a member of the Kenya Planters & Agricultural Workers Union and that she was not a member currently. She stated she would have been a member had she continued working for the Respondent. She confirmed that the case was reported to the Union and the general manager was warned not to harass her. She stated that lunch was 40 minutes so the Respondent took her 20 minutes. She testified that she attended the disciplinary meeting and Peter Migwi was in attendance as was the chief shop steward. She stated that she did not speak rudely to the general manager and that she did not know that there is a cheque left at the Labour Office as she was not informed of a settlement with the Union.

5. In re-examination she testified that she went to the branch secretary in January 2017 and that she did not take the matter to the union and when the union offices were opened on 3rd January she went to the union. She confirmed that the general manager was not at the disciplinary meeting.

6. The Respondent called Nancy Njeri Ndai who stated that she was a human resources officer at the Respondent. She testified that the Claimant was at her work place and the general manager in his routine went and found that the employees were not following instructions while harvesting flowers. The Claimant was told to harvest flowers and she replied that she wouldn't listen to the general manager and he could give instructions to her. She testified that the Respondent conducted a hearing and the Claimant was represented at the hearing. She

stated that the Claimant's issue was settled with the union and she was to be paid Kshs. 75,798/- per the agreement reached and the money was to be deposited at the Labour Office by cheque which was done.

7. In cross examination she testified that the Claimant disobeyed orders on the material day and that the Claimant was given a letter to explain. She confirmed that she had not produced this letter. She stated that the Claimant was represented by a shop steward Samson Ntojoro and that the general manager did not appear at the disciplinary meeting. She stated that she chaired the disciplinary hearing and she also had been called to the greenhouse that day. She testified that she stated at the meeting that the Claimant was in total insubordination which cannot be tolerated. She testified that she explained to the Claimant the decision that had been reached and the Claimant was given the letter of termination the next day. She stated that the appeal was heard on 1st February 2017 and that the Claimant had a copy of the same. The outcome was communicated to the branch of the Union. She testified that there was an agreement at the Labour Office, a certificate of service was issued and the appeal was to be heard in 5 days.

8. In re-exam she testified that the Claimant did not deny the allegations against her and she was present at the agreement meeting. She stated that the appeal was heard and it was procedural not to allow the general manager to attend the disciplinary meeting. That marked the end of the oral testimony and parties were to file submissions.

9. The Claimant did file her submissions and in them submitted that the issues for determination were whether the termination was unfair and unlawful and whether she was entitled to the reliefs sought. She submitted that the dismissal was on account of insubordination. The Claimant submitted that the general manager who was allegedly insulted did not attend the disciplinary hearing. It was submitted that the Claimant was not issued with a show cause notice but was instead made to attend a hurriedly convened meeting by people who had made up their minds. She submitted that the Respondent had failed to prove that there was justification and equity by failing to issue a show cause notice, give a valid reason for termination and failing to hear and determine the Claimant's appeal, issue a certificate of service or comply with the provisions of Section 41(1) of Employment Act and the provisions of the CBA. The Claimant submitted that the Respondent did not demonstrate that it had complied with the requirements set out under Section 41 and that the Respondent did not have internal disciplinary rules. It was submitted no rules were mentioned hence no valid reason for termination could arise as a result. It was submitted that the Claimant was never heard on appeal and no decision was arrived at. It was submitted that it matters not what offence the employee is accused of. If the employee is not heard the termination is *ipso facto* unfair. The Claimant submitted that she had made out a case of unfair and unlawful termination. She thus sought the grant of the prayers in her memorandum of claim. The unreported decision of **Duncan Mbarire v Nairobi Aviation College Limited Kericho ELRC cause No. 259 of 2015** per Njagi Marete J. was attached. In that case the Claimant was entitled to relief for the termination of his employment being one month's salary in lieu of notice, 6 months compensation and pending wages. The claim was undefended.

10. The Respondent submitted that the Claimant failed to follow instructions and that she was guilty of insubordination which amounted to gross misconduct attracting the termination. The Respondent submitted that the Claimant was a union member and the Respondent engaged with the Union and settled the matter and the cheque in settlement was given to the Labour Office for transmission to her. It was submitted on the strength of the unreported case of **Damaris Wangari Kuria & Another v Homage Services Store Ltd & Another Nyeri ELRC cause No. 99 of 2017 as consolidated with cause No. 101 of 2017** that the claim before the court was an abuse of the court process. The Respondent submitted that the court should find that the matter was well resolved under the Labour Relations Act between the trade union and the employer and this was binding on the employee. The Respondent submitted that the disciplinary hearing undertaken was in full compliance with the law and that it was not a requirement that the general manager attend the disciplinary hearing. It was submitted that the Claimant ought to have known the outcome of the disciplinary process and that she had the option of appealing which she did and the matter resolved at the Labour Office. The Respondent submitted that the Claimant's suit be dismissed with costs.

11. The suit is plainly put an abuse of the court process. The Claimant was a union member and upon dismissal sought interposition of the Labour Office. The dispute was resolved at the Labour Office and she therefore cannot cherry pick what to take or not take from the disciplinary process and the resolution of the dispute in the mechanism she sought. She had no business filing the suit. The disciplinary process she faced complies with Section 41(1) of the Employment Act. It would seem the Respondent accorded the Claimant the requisite procedural fairness as expected of an employer who is contemplating a dismissal for misconduct. There is no requirement in the Act that the accuser/complainant must be in attendance at the disciplinary meeting/hearing. The Claimant was rude and insubordinated her general manager. She was dismissed for good cause and the Respondent satisfied the requirement of Section 43 and 45 of the Employment Act. The suit is dismissed and each party is to bear their own costs. The Claimant is to be given a fresh cheque for the sum of Kshs. 75,789/- to replace the earlier one which went stale.

It is so ordered.

Dated and delivered at Nyeri this 28th day of September 2018

Nzioki wa Makau

JUDGE