



**REPUBLIC OF KENYA**

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

**CAUSE NO.682 OF 2013**

**BERNARD MARITA.....CLAIMANT**

**- VERSUS -**

**CHARM FLOWERS LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> November, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 14.05.2013 through Njogu, Omwanza & Nyasimi Advocates. The claimant prayed for judgment against the respondent for:

- a) Outstanding wages due to underpayment for the entire period of employment as particularised in the memorandum of claim.
- b) Salary for August 2012 as particularised.
- c) 3 months notice pay.
- d) Damages for wrongful and unfair termination under sections 49 and 50 of the Employment Act, 2007.
- e) Punitive damages.
- f) Certificate of service.
- g) Costs of the suit.

The memorandum of response was filed on 18.06.2013 through Annie W. Thoronjo & Company Advocates. The respondent prayed that the claimant's suit should be dismissed with costs.

The respondent employed the claimant as a general worker from 31.12.2009 to 02.11.2012. At termination the claimant was paid a gross of Kshs. 6, 111.00 and a basic pay of 5, 588.00.

The **1<sup>st</sup> issue** for determination is whether the dismissal of the claimant by the respondent was unfair. The claimant testified that on 02.11.2012 he was assigned duty to make a drainage system outside a green house. He testified that he did not complete the job. He was told to complete the job the following day to facilitate the payment for the day. He was dissatisfied and his supervisor concluded that he was big-headed. He was summoned and he was given a termination letter. The Court finds that the claimant in his testimony admitted that he did not complete the assigned work. The respondent's evidence was that when he was asked to finish the job he walked away suggesting he was disregarding the valid and lawful instructions to finish the job – he was summoned and terminated. The reason for termination is found to have been valid under section 43 of the Employment Act, 2007. In view of that undisputed reason as at the time of termination, the Court returns that a notice and a hearing under section 41 of the Employment Act, 2007 would be superfluous. Even if the respondent failed to fully comply with the provisions of section 41 of the Act, the Court returns that the claimant fully contributed to the termination by his own misconduct and he would be undeserving of any compensation in terms of section 49 of the Act. The Court returns that the termination was not unfair in the circumstances.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to remedies as prayed for. The Court makes findings as follows:

- a) The termination has been found not to have been unfair and the claimant is not entitled to the declaration and compensation under section 49 of the Act as prayed for.

- b) The claimant was paid monthly wages as per the collective agreement and the alleged underpayment was not established.
- c) As the termination was not unfair, the claimant is undeserving of the pay in lieu of notice.
- d) The claimant is entitled to a certificate of service per section 51 of the Act.

In conclusion judgment is hereby entered with orders:

- a) The respondent to deliver a certificate of service in 7 days.
- b) Each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 30<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**