



**REPUBLIC OF KENYA**

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

**CAUSE NO 246 OF 2013**

**STEPHEN WARUI MARANGA.....CLAIMANT**

**VS**

**DEL MONTE KENYA LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 4<sup>th</sup> February 2013 and filed in court on 22<sup>nd</sup> February 2013, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Statement of Response on 5<sup>th</sup> June 2013.

2. The matter came up for hearing before me on 19<sup>th</sup> November 2018 during the Nairobi Station Service Week. The Claimant testified on his own behalf and the Respondent called its Security Officer, Stephen Nyamoti Thomas.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 1<sup>st</sup> March 2000 as a Plantation Supervisor. At the time of leaving employment, he held the position of Foreman in the Spray Department and earned a monthly salary of Kshs. 70,370.85.

4. The Claimant further states that his employment was unlawfully and unfairly terminated on 8<sup>th</sup> November 2011 under false and malicious claims. He seeks the following:

- a) A declaration that the termination of his employment was unlawful;
- b) Reinstatement or in the alternative payment of all his salary arrears, service pay and terminal benefits from 8<sup>th</sup> November 2011;
- c) Costs plus interest.

**The Respondent's Case**

5. In its Statement of Response dated 5<sup>th</sup> June 2013 and filed in court on even date, the Respondent denies that the Claimant's employment was unlawfully and unfairly terminated under false and malicious claims.

6. The Respondent states that the Claimant was lawfully terminated from employment due to gross misconduct in the course of duty, by negligence leading to loss of the Respondent's property.

7. The Respondent further avers that the Claimant was given due notification and a hearing before his services were terminated, in accordance with the provisions of Section 41(1) of the Employment Act, 2007.

8. The Respondent adds that the Claimant's dues were tabulated as hereunder:

- a) Unpaid salary for 8 days in November 2011.....Kshs. 13,918.54
- b) Transport allowance for 8 days.....1,333.33

c) House allowance for 8 days.....	3,513.60
d) Payment in lieu of notice (45 days).....	78,291.81
e) Leave for 22 days.....	54,658.12
Less lump sum tax.....	(45,394.62)
Balance due.....	106,320.00

9. The Claimant however refused to collect the said dues.

**Findings and Determination**

10. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant’s employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

**The Termination**

11. The Claimant’s employment was terminated by letter dated 8<sup>th</sup> November 2011, stating as follows:

“Dear Sir,

**SUB: TERMINATION OF SERVICE**

*In September and October 2011 during the course of investigations over theft of company fertilizer, we came across information indicating that on several instances you were informed of the goings on related to theft of company property under your care. However, you did not take action leading to further losses. Subsequently, you were issued with show cause notice letter on 01.11.2011 for this offence.*

*From your written reply and further explanations during a disciplinary hearing meeting convened on 07.11.2011 to hear your case, your account did not suffice to absolve you from the offence of negligence of duty. This led to loss of company property under your care.*

*Consequently, this is to inform you that you have been terminated from the employment of this company effective 8<sup>th</sup> November 2011 for negligence of duty.*

*Upon termination, you will be paid all the days worked up to 08-11-2011, prorata leave due and pension as per RBA rules.*

*Please note that it is a requirement of the company that an employee must clear before final dues are paid.*

*Yours faithfully,*

**DEL MONTE KENYA LIMITED**

(Signed)

**Margaret G. Akun**

**HUMAN RESOURCES MANAGER.**”

12. From this letter, it is evident that the reason for termination of the Claimant’s employment was negligence of duty.

13. Section 47(5) of the Employment Act, 2007 provides that:

***(5) 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.***

14. As far as the employer’s duty is concerned, Section 43 of the Employment Act places the burden to establish a valid reason that would cause a reasonable employer to terminate employment. This was affirmed by the Court of Appeal in **International Planned Parenthood Federation v Pamela EbotArreyEffiom [2016] eKLR.**

15. In his testimony before the Court, the Claimant admitted that fertilizer belonging to the Respondent indeed got lost but added that at the time of loss, he was not on duty. He therefore did not make any report of the loss because he did not consider it his responsibility.

16. At the material time, the Claimant occupied the position of Foreman in the Spray Department. This was a fairly senior managerial position and the Claimant ought to have reported the loss of fertilizer, irrespective of whether it occurred during his shift or not. Having failed to do so, the Court finds and holds that the Claimant abdicated his duty to his employer and there was therefore a valid reason to terminate his employment as required under Section 43 of the Employment Act.

17. Regarding the disciplinary procedure employed in the Claimant's case I have this to say; the Claimant was issued with a show cause letter on 1<sup>st</sup> November 2011 to which he responded on 2<sup>nd</sup> November 2011. Subsequently, the Claimant attended a disciplinary hearing on 7<sup>th</sup> November 2011. The Claimant told the Court that he was not afforded a fair hearing because the person who informed the Respondent's Head of Security about the theft was not availed at the disciplinary hearing for questioning. It would appear that this was the only issue the Claimant raised regarding the disciplinary procedure.

18. The Claimant himself admitted that theft of fertilizer had indeed occurred. It is important at this stage to point out that the Claimant was accused of negligence of duty not theft. The disciplinary proceedings were not to prove the charge of theft but negligence of duty. Moreover, the Claimant admitted that he did not report the theft. The Court did not therefore find any prejudice suffered by the Claimant by the absence of the informer.

19. Consequently, the Court finds and holds that the Claimant was availed due disciplinary process as required under Section 41 of the Employment Act.

20. Flowing from the foregoing findings, the Claimant's claim for unlawful and unfair termination fails and is dismissed.

21. In the end, the Claimant is only entitled to his terminal dues in the sum of Kshs. 106,320.00 as admitted by the Respondent in its Statement of Response.

22. Each party will bear their own costs.

23. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Kamau h/b Mr. Ngige for the Claimant

Ms. Mukondo h/b Mr. Uvyu for the Respondent