



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

**CAUSE NO 1093 OF 2015**

**EZEKIEL KEBONDO MUHINDI.....CLAIMANT**

**VERSUS**

**LEGATO CITY AND COUNTY GETAWAYS.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 24<sup>th</sup> June 2015 the Claimant filed a Memorandum of Claim seeking relief for unlawful termination of employment. The Respondent was duly served but did not file any response. The matter therefore proceeded as an undefended claim.

2. When the Claimant appeared before me on 9<sup>th</sup> February 2017 he had filed written submissions on the basis of which he asked the Court to render judgment.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a gardener/guard from 1<sup>st</sup> May 2007. He adds that from November 2014, he had a strained working relationship with the manager who on several occasions issued contradictory instructions to him. The Claimant complained to the Respondent’s officials but nothing was done to resolve the conflict.

4. On 19<sup>th</sup> December 2014, the Claimant’s employment was terminated. He states that the termination was unlawful and unfair. He therefore claims the following:

- a) A declaration that the termination of his employment was unlawful and unfair
- b) Salary for 19 days worked in December 2014.....Kshs. 8,133.20
- c) Service pay for 9 years.....59,715.00
- d) Unpaid leave for 9 years.....83,601.00
- e) 12 months’ salary in compensation.....159,240.00
- f) Costs plus interest

**Findings and Determination**

5. There are two issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

6. The Claimant was dismissed by letter dated 6<sup>th</sup> December 2014 stating as follows:

*"To: Mr. Ezekiel Muhindi*

**SUBJECT: DISMISSAL OF (SIC) EMPLOYMENT AS GARDENER AT JAMES GICHURU RD 157**

*With immediate effect from 19<sup>th</sup> December 2014 Reasons for dismissal:*

- 1. Neglect of duties which has led to considerable loss of capital to business*
- 2. Insubordination and refusal to accept correction from employees representative*
- 3. Loitering in absence of senior staff management*
- 4. Not keeping regular working hours as stipulated in his agreement of employment.*

*These accusations amount to gross misconduct.*

*From the above date of dismissal (sic). You are expected to stay away from Legato premises. Failure to comply will be regarded as trespass.*

*Yours faithfully*

*(Signed)*

*Eva Oduor*

*Managing Director*

*Legato City and Country Getaways"*

7. According to this letter the Claimant was accused of a number of wrongs ranging from neglect of duty to insubordination. However, the Court noted that no particulars of the offences were provided. More significantly, there was no evidence that these charges were ever put to the Claimant for his response.

8. In the written submissions filed on behalf of the Claimant on 7<sup>th</sup> December 2016, reference was made to the decision in *Nicholas Muasya Kyula v FarmChem Limited [2012] eKLR* where the Court stated as follows:

***"It is not enough for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."***

9. From this decision which I fully agree with, accusations against an employee are not enough to justify disciplinary action. Internal inquiries must be made before action is taken against the employee. The

dismissal letter issued to the Claimant confirms that the Claimant was dismissed on account of accusations amounting to gross misconduct.

10. There was however no evidence of any internal inquiries beyond the accusations and the Court therefore reached the conclusion that the Respondent failed to establish a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act, 2007. Additionally, the Claimant was not subjected to the mandatory disciplinary process set out under Section 41 of the Act.

### **Remedies**

11. In light of the foregoing the Court finds the Claimant's dismissal substantively and procedurally unfair and awards him ten (10) months' salary in compensation. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct prior to the dismissal.

12. In the absence of leave records to counter the Claimant's claim for leave pay, the claim succeeds and is allowed.

13. From the Claimant's pay slip for December 2014 which he himself filed in Court, he was paid his salary for December 2014 plus Kshs. 12,500 in notice pay. The claim for salary for December 2014 is therefore without basis and is dismissed. I will however allow the shortfall in notice pay being Kshs. 770. The Claimant was a member of the National Social Security Fund (NSSF) and is therefore not entitled to service pay.

14. Finally I enter judgment in favour of the Claimant in the following the following terms:

- a) 10 month's salary in compensation.....Kshs. 132,700
- b) Notice pay shortfall.....770
- c) Leave pay for 7 years & 6 months ( $13,270/30 \times 21 \times 7 + 13,270/30 \times 1.75 \times 6$ ).....67,662
- Total.....201,132**

15. This amount will attract interest at court rates from the date of judgment until payment in full.

16. The Claimant will have the costs of this case.

17. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Elkington for the Claimant

No appearance for the Respondent