



**REPUBLIC OF KENYA**

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

**CAUSE NO. 61 OF 2017**

**NICOLA ROMANO.....CLAIMANT**

**VERSUS**

**MASTERMIND TOBACCO (K) LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 19<sup>th</sup> October, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 07.03.2017 through Kariuki & Kanyika Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the respondent's dismissal of the claimant from his employment was unlawful, unfair and hence null and void.
- b. A declaration that the claimant's termination was in violation of his constitutional rights not to be discriminated against as set out in Article 27(5) of the Constitution of Kenya and the right to fair labour practices as set out in Article 41 of the Constitution of Kenya.
- c. The respondent be ordered to pay the claimant Kshs.330,000.00 in lieu of termination notice; Kshs.165,000.00 unpaid salary for March 2014; compensation for unfair termination Kshs.3,960,000.00 being 12 months' salaries; and making a total of Kshs.4,455,000.00.
- d. An award of general damages to the claimant for violation of his constitutional right not to be discriminated against as set out in Article 27(5) of the Constitution of Kenya and the right to fair labour practices as set out in Article 41 of the Constitution of Kenya.
- e. An order that the respondent issues the claimant with a certificate of service.
- f. Interest at court rates on (c) and (d) above from the date of filing the suit.
- g. Costs of the suit.
- h. Such other or further relief as the Honourable Court may deem just to grant.

The respondent filed the memorandum of response on 26.04.2017 through Ataka Kimori & Okoth Advocates and prayed that the suit be dismissed with costs.

The parties are in agreement that in November 2011, the claimant was employed by the respondent at a

monthly salary of Kshs.330, 000.00 (as at the time of termination). The claimant was employed in the position of Agronomist.

The **1<sup>st</sup> issue** for determination is whether the termination of the claimant's employment was unlawful or unfair. The claimant is an Italian national with wide experience and technical expertise in growing and marketing fresh produce with over 20 years of experience. The parties had arrangements that they conclude an employment contract. For that purpose, the respondent applied for a work permit by the letter dated 25.10.2011 and in line with requirements of section 53 (1) (m) of the Kenya Citizenship and Immigration Act No. 12 of 2011 that requires a person who is not a citizen of Kenya to obtain a work permit prior to engaging in employment, occupation, trade, business, or profession, whether or not for profit or reward.

The respondent's request was for a work permit in favour of the claimant for a period of 2 years. On 27.10.2011 the Principal Immigration Officer replied that the application was receiving attention. An entry permit was subsequently issued on 29.12.2011 in favour of the claimant for purpose of employment or business as a technical support manager with the respondent for a period of 2 years. The claimant was thereby permitted to serve the respondent and he diligently embarked in the service as agreed.

The work permit was expiring on 28.12.2013. The respondent applied on 26.11.2013 for renewal of the claimant's work permit. The Director of Immigration Services replied on 28.11.2013 that the application had been received and it was receiving attention.

The claimant testified that in December 2013 he asked the respondent's human resource manager about the renewal of the permit and the manager had replied that the progress on renewal was good.

The claimant's knee was injured on 28.01.2014. In February 2014 he was on sick leave though he would sometimes report on duty for crucial needs.

By an email dated 10.03.2014, the respondent's human resource manager informed the claimant that the respondent was in receipt of the claimant's hospital documents dated 07.02.2014 and 05.03.2014 respectively and the claimant had to report at the office urgently. At the meeting the human resource manager asked the claimant about work in the field and the claimant replied that due to the knee injury, the claimant was not able to work in the field, for the time being. Thereafter, the claimant testified that the manager conveyed to him that the respondent's managing director had decided to terminate the claimant's employment. The claimant explained about his way to recovery and that he would be fully recovered to work in the field after 2 months. The claimant testified that he asked for unpaid sick leave during the 2 months of recovery. The claimant further testified that the human resource manager promised to forward the request to the managing director. A few days later, the claimant received a termination letter.

The respondent addressed to the claimant a termination letter dated 13.03.2014 as follows:

**“Dear Sir**

**REF: EXPIRY OF WORK PERMIT**

**Further to our discussion this morning, we wish to inform you that your work permit R-No.1663746 expired on 28<sup>th</sup> December 2013. Please note that management has no intention of renewing your work permit.**

**In this regard, please make arrangements to leave the country with immediate effect. Subsequently you are required to hand over all the company property in your possession including the company vehicle to Operations Manager Greenlands Agro – Producers to facilitate your clearance. Please note that your last day of employment shall be Thursday 13<sup>th</sup> March, 2014.**

**By a copy of this letter the Director of Immigration Services is advised to close your file and**

**release Mastermind Tobacco (K) Ltd from any obligation.**

**Yours sincerely**

**MASTERMIND TOBACCO (K) LTD**

**Signed J.K. KIRIMANIA**

**HUMAN RESOURCES MANAGER**

The claimant's case was that it was strange that the renewal of the work permit had not been concluded and that the real reason for termination of his employment was due to the injury and the predicament he faced requiring at least two months of full recovery.

The respondent has pleaded at paragraphs 10 and 11 of the response that after 28.11.2013 acknowledgment by the Director of Immigration Services that the application for renewal of the claimant's work permit was receiving attention, the Director never made further communication and 90 days lapsed without the renewal being communicated. The respondent's further case is that between 05.12.2013 and mid March 2014 the respondent continued to make ex gratia payments to the claimant in anticipation that the claimant's work permit would be renewed. Thus at paragraph 14 of the response, the respondent's case is stated thus, **"14. In the circumstances, contrary to the claimant's deleterious contention in paragraph 6 of the Statement of Claim, the claimant's employment at the Respondent expired by effluxion of time; and such expiry of employment contract could not, by whatever stretch of imagination constitute "dismissal" as claimed by the claimant;"**

The respondent's further case is that the continued contract of service between the parties was dependent upon the claimant's continued possession of a valid work permit in Kenya and when the work permit was not renewed the contract of service was automatically discharged.

The respondent further denies that the claimant's ill health related to the knee injury led to the dismissal because, the respondent knew about the injury long before commencing the process of renewing the permit on 26.11.2013.

The court has considered the material on record and the parties' respective submissions. The court finds that the respondent's reason for terminating the claimant's employment was that the respondent's management had no intention of renewing the claimant's work permit as per the termination letter on record. The court further returns that that reason was not genuine or valid as envisaged in section 43 of the Employment Act, 2007 because, by the respondent's own action seeking renewal of the licence by application dated 26.11.2013, the reason for termination was clearly inconsistent. It is shortly (3 days) after receiving the claimant's request for 2 months' unpaid sick leave that the termination letter followed. The court has considered the flow of events and returns that the claimant was entitled to consider that the ensuing ill health must have inspired and led to the respondent's inclination not to successfully conclude renewal of the work permit and the eventual termination upon the ground the court has found to have been invalid. Indeed, the renewal process never concluded and the court returns that the claimant had a valid and genuine grievance about seeking unpaid sick leave but which was not addressed at all. The court has considered the respondent's conflicting accounts such as that the work permit was not renewed whereas there was no conclusion of that renewal process; that the contract lapsed by effluxion of time yet there was no clear fixed term tenure; that the respondent's management desired not to renew work permit yet an application in that regard had been made; and the allegation that long before the application for renewal of work permit the claimant already had an knee injury whereas the application was on 26.11.2013 and the injury was said to have been on 28.01.2014. The court returns that such inconsistencies when rounded together show that the reason for termination was invalid or not genuine and the court returns that the termination was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007.

While making that finding the court has considered that the need for a work permit was a statutory

provision whose satisfaction was necessary towards legitimate implementation of the contract of service but in absence of express contractual provision making lack of the permit as frustrating the contract, the absence of the permit by itself, did not bar the parties from pursuing their respective rights and obligations under the contract of employment, one way or the other.

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

a. The court finds that the claimant is entitled to the declaration that the respondent's dismissal of the claimant from his employment was unlawful and unfair.

b. The claimant prayed for the declaration that the claimant's termination was in violation of his constitutional rights not to be discriminated against as set out in Article 27(5) of the Constitution of Kenya and the right to fair labour practices as set out in Article 41 of the Constitution of Kenya. As the court has found that the termination was unlawful and unfair, the court further finds that Article 41 of the Constitution was thereby violated. The claimant has submitted that the ground for his dismissal was his health status and was therefore subjected to discrimination under Article 27 (4) and (5). However, the court has found that the invalid reason leading to the claimant's termination was that the respondent's management did not intend to renew the claimant's work permit. The prayer and allegations about discrimination will therefore fail.

c. The claimant prayed that the respondent be ordered to pay the claimant **Kshs.330,000.00** in lieu of termination notice and the court returns that the claimant is entitled as there was no notice as per section 35 of the Employment Act, 2007 issued by the respondent prior to the termination. The court returns that the claimant is entitled to **Kshs.165, 000.00** being unpaid salary for March 2014 - the employment having been terminated in mid March 2014. The claimant prays for compensation for unfair termination Kshs.3, 960,000.00 being 12 months' salaries; and making a total of Kshs.4, 455,000.00. The court has considered that the claimant had served for only slightly over two years; the mitigating factor that the respondent had continued to pay him despite the knee injury in January 2014 when the claimant could not attend to the field duties; the mitigating factor that though the permit had been applied for, the claimant could not continue in employment without the issuance of such permit; and the fact that parties appear to have been in arrangement to continue in the contract of employment, and, the claimant wished to remain in employment and did not contribute to his termination. The court has also considered the claimant's right to a sick leave under section 30 of the Employment Act, 2007 and his request and willingness to take 2 months' unpaid sick leave. Taking the factors enumerated into consideration, the claimant is awarded 4 months' salaries for the unfair termination under section 49(1) (c) of the Act making **Kshs. 1, 320, 000.00**.

d. The court returns that in the circumstances of this case, the award of compensation for the unfair termination is sufficient for the unfair termination in contravention of Article 41 of the Constitution as the two claims overlapped.

e. The court returns that the claimant is entitled to an order that the respondent issues the claimant with a certificate of service.

In conclusion judgment is hereby entered in favour of the claimant against the respondent for:

a. The declaration that the respondent's dismissal of the claimant from his employment was unlawful and unfair.

b. The declaration that the claimant's termination was in violation of his constitutional right to fair labour practices as set out in Article 41 of the Constitution of Kenya.

c. The respondent to deliver to the claimant a certificate of service by 01.12.2017.

d. The respondent to pay the claimant a sum of **Kshs.1, 815, 000.00** by 31.12.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

e. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Thursday, 19<sup>th</sup> October, 2017**.

**BYRAM ONGAYA**

**JUDGE**