



**REPUBLIC OF KENYA**

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

**CAUSE NO. 241 OF 2016**

**KENNETH MWITA.....CLAIMANT**

**VERSUS**

**PIMBI LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 24<sup>th</sup> November, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 03.11.2016 through Nderi & Kiingati Company Advocates. The claimant prayed for judgment against the respondent for:

- a) 12 months compensation for unfair termination Kshs. 143, 400.00.
- b) 4 months' pay in lieu of leave.
- c) Overtime for one hour for 6 days for 4 years Kshs.71, 699.99.
- d) Total Kshs. 262, 900.99.

The response to the claim was filed on 06.12.2016 through Joan W.G. Ndorongo & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

There is no dispute that the respondent employed the claimant as a gardener by the letter dated 02.12.2012. The letter set out the claimant's duties in detail and concluded thus, **"From time to time, you might also be asked / expected to work in other departments as required by management."**

The respondent addressed to the claimant a warning letter dated 20.08.2016. The letter stated that at 4pm on 19.08.2016 there was no water in the taps at the lodge and all work at the laundry had ceased. The respondent's director had been away the whole day and had, on that evening, walked to the water tank, and, found the claimant returning from the direction of the water tank. The letter further stated that it was the claimant's responsibility to check and report on water levels in the header tank and advise accordingly when one Joel Kirui was not available. The letter stated that the said Kirui had been absent for 2 days due to a muscular strain in his back and during which time the claimant had been negligent in his duties namely, monitoring the level and inflow of water; and reporting the same to both the logistics department at Lewa Wildlife Conservancy, and the office. By reason of the stated claimant's negligence, the letter stated that the claimant had demonstrated lack of care both at his work as a gardener and other members of staff impacted by his negligence. The letter stated that the respondent could not tolerate the claimant's further negligence in his duties and he was required to sign acknowledging receipt of the warning letter.

The claimant declined to sign the warning letter on the grounds that he was not aware that the said Joel Kirui had been sick and therefore absent from duty for the 2 days in question. The claimant's case was that the fact of the absence of the said Kirui was brought to his attention on the evening of 19.08.2016 by the manager and at the time the water taps had already run dry. Thus, he had declined to sign the warning letter because he was not culpable in negligence as had been stated in the warning letter.

Subsequently, the respondent decided to issue the letter dated 29.08.2016 addressed to the claimant thus,

**“Dear Kenneth**

**You were issued a warning letter on the 20<sup>th</sup> August 2016, which to date you have not signed.**

**Whilst you have verbally admitted fault and said sorry, you are not really willing to take responsibility of the job you have been given, nor are you willing to demonstrate the commitment to excellence the company requires.**

**Refusing to sign the warning letter amounts to insubordination and so we are summarily dismissing you on this basis.**

**Please return all company items to the office and please find a summary of all dues owed to you attached to this letter.**

**Yours faithfully,**

**Signed**

**Sophie Macfarlane**

**Director, Pimbi Ltd”**

The respondent further issued the certificate of service dated 29.08.2016 confirming that the claimant had worked with the respondent from 02.12.2012 to 29.08.2016 as a gardener and as at separation the claimant was paid Kshs. 11, 950.00 per month.

The **1<sup>st</sup> issue** for determination is whether the claimant's dismissal from employment was unfair. The claimant's case is that the reason for termination was unfair because he was not informed about Kirui's absence for the 2 days and therefore he was not aware of the extra or added assignment of monitoring the water levels in the header tank. The claimant's testimony was that around 19.08.2016 the said Kirui whose main duty was to be in charge of water including monitoring water levels in the header tank was sick and the said Kirui handed over to one Richard who was in charge of water. Further, there occurred a problem with the water levels and the boss came shouting at the claimant and demanding that the claimant signs the warning letter but which the claimant testified that he declined to comply because he was not culpable as alleged in the warning letter. The claimant denied that the said Kirui had handed over to him to step in on his behalf for the 2 days Kirui was unwell.

The respondent's witness No. 1 (RW1) was the said Joel Kirui. He testified that on 17.08.2016 he was unwell and he informed the claimant about the ill-health on that date at about 8.00am. He further testified that he told the claimant to step in as he handed to the claimant the day's duty. He further testified that on 18.08.2016 he was scolded by the manager about the dry taps and that was about 10.00am. He rushed to the tank and the claimant was questioned about the water on 18.08.2016 and scolded by the director. RW1 also confirmed that no manager or director had assigned RW1's duties to the claimant but the director had asked RW1 to handover to the claimant because RW1 was sick. RW1 testified that Richard had been a new employee and it was the claimant who could step in when RW1 was absent and that was the usual arrangement.

Respondent's witness No.2 (RW2) was the director one Sophie Macfarlane. RW2 stated that the main

reason why the claimant was dismissed was because he had refused to sign the warning letter and despite having been given considerable time to think about it.

The court has considered the evidence on record. The court returns that there is no reason to doubt that the claimant and the said Joel Kirui served as each other's relievers. On the 2 days in issue, there is no reason to doubt RW1's evidence that he had asked the claimant to step in while he was on sick off. The court has reviewed the evidence and it is clear that the warning letter the claimant had refused to sign had been the 3<sup>rd</sup> and last warning at the material time. Taking into account the claimant's unclean record of service, it is understood why the claimant must have feared to sign that last warning letter. Accordingly, the court returns that as at the time of the termination, the respondent has established that there was a valid reason to terminate the contract of service, namely, refusal by the claimant to obey lawful director's instruction to sign a valid warning letter. The reason for termination was valid as envisaged in section 43 of the Employment Act, 2007. The court has also considered the discussions between the parties and the escalation of the disciplinary matter through staff meetings and allowance of time for the claimant to think about his refusal to acknowledge the warning letter and to meditate about the clearly communicated consequence of such refusal. Accordingly, the court returns that the termination was in accordance with a fair procedure as envisaged in section 45(2) (c) of the Act – and the court returns that the claimant, taking all the evidence into account, was clearly accorded a notice and a hearing as per section 41 of the Act.

To answer the 1<sup>st</sup> issue for determination the court returns that the termination of the claimant's employment by the respondent was not unfair.

To answer the 2<sup>nd</sup> issue for determination, the court returns that the parties agreed upon 8 working hours and the working hours were to be flexible. RW 1 confirmed that they worked from 8.00am to 12 noon then lunch time ran up to 2.00pm to resume work up to 4.00pm. The claimant established no grievance about the working hours prior to the termination and throughout his employment. In such circumstances, the court returns that there was no agreement on overtime and the claimant did not work overtime. The prayer for overtime pay will therefore fail.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the claimant's suit with costs.

**Signed, dated and delivered in court at Nyeri this Friday, 24<sup>th</sup> November, 2017.**

**BYRAM ONGAYA**

**JUDGE**