



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1610 OF 2012**

(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> November 2017)

**BERNARD KARIUKI GATUMU .....CLAIMANT**

**VERSUS**

**EVEREST ENTERPRISES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Memorandum of Claim on 12<sup>th</sup> September 2012 through the firm of M/S Macharia Nderitu & Company Advocates. It was the Claimant’s case that he was employed by the Respondent on 1.12.2001 as per his letter of appointment (Appendix A).

2. He was employed as an Agronomist and was subsequently promoted on 1.12.2009 to a Senior Out-grower Manager. He avers that he performed his duties diligently and even had an enhanced salary from 25,000/= to 140,000/= per month. It is his claim that he was never reprimanded or disciplined during his entire period of employment.

3. He stated that on or about the 27<sup>th</sup> February 2012, the Respondent wrote him a letter purporting to terminate his employment. The letter indicated that the Respondent wished to terminate his services within 3 months with effect from the date of the letter (21.2.2012) and therefore his last working day would be 20.2.2012. the letter stated as follows:-

“-----

*However, following today’s closed door discussion between yourself, the Chief Executive, the HR Manager and the Finance Manager, the company is willing to release you immediately. The remaining days of the notice period will be treated as garden leave during which you will continue receiving remuneration but cease performing duties as outlined in your contractual agreement. It is mutually understood that during this period and thereafter, you shall exercise restraint and adhere strictly to the principles of professionalism related to intellectual property, trade secrets and confidential information as you have always committed yourself to uphold. The aim is to ensure that your reputation and that of the company is not compromised or out in jeopardy whatsoever-----“.*

4. He received yet another letter dated 27<sup>th</sup> February 2012 which the Respondent made a clarification stating that the reasons for the termination were that the Claimant had advised against planting at Kinondo Farm and failure to provide advice on availability of raw materials.

5. The Claimant avers that his termination was unjustified and unfair for reasons that he was terminated just a month after his transfer and that the Respondent refused to take in his expert advice.
6. The Claimant views his termination as redundancy and prays for payment of severance pay at the rate of 1 month for each year worked, damages for unfair termination, 20 days unpaid salary, leave enactment and transport refund of Kshs.27,000/= all totaling 2,524,419.33/=.
7. The Respondent filed their Memorandum of Defence on 30/5/2013 through the firm of Namisi & Company Advocates. The Respondent admit employing the claimant as averred but state that he worked diligently in the period preceding 2009 but his performance and conduct changed in 2010 and that this was brought to his attention on several occasions.
8. That the poor performance resulted in loss of a key customer (Exhibit EEL 1) and failure to deliver raw materials for export as promised (Exhibit EEL 2).
9. The Respondent held a crisis meeting with Claimant on 19<sup>th</sup> August 2011 and 26<sup>th</sup> August 2011 (Exhibit EEL 3) wherein the Claimant admitted failure in his department. That despite the remedial steps undertaken by the Respondent, there were still notable variances in the projections and actual supply of fine beans and other raw material (Exhibit EEL 4).
10. That the relationship between the Claimant and other workers started being wanting (Exhibit EEL 5) and he started using abusive language in his correspondence.
11. The Respondent admit terminating the Claimant's employment but deny that the same was wrongful or unlawful or constituted constructive redundancy at all. They aver that the same was carried out in strict adherence to the Laws of Kenya.
12. They aver that they exercised this right under the contract to terminate the contract when it became evident that the Claimant was unable to effectively and properly discharge the duties of an Out Grower Manager.
13. The Respondent deny being liable to pay Claimant as pleaded. They want the claim dismissed with costs.
14. The parties herein have also filed their submissions. This Court has considered submissions of both parties. The issues for determination are as follows:

***1. Whether there were valid reasons to terminate the services of the Claimant.***

***2. Whether due process was followed before Claimant's termination.***

***3. What remedies are available in the circumstances?***

15. On issue No. 1 above, the reasons given for Claimant's termination are given in the letter dated 27<sup>th</sup> February 2012 wherein the Respondent state that the reasons the Claimant had advised against planting on 2<sup>nd</sup> February 2012 which advice was detrimental to their agreed contractual agreements with their esteemed customers.

16. The Respondent therefore felt that the Claimant could not represent its interest with such an advice in mind. Another reason was that he failed consistently to provide the required advice on raw materials availability as per agreed programs. That the advice given by Claimant led to huge losses.

17. Under Section 43 of Employment Act:

***“(1) In any claim arising out of termination of a contract, the employer shall be required to***

*prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

18. Reasons for termination must be tangible, reasons which touch on misconduct or poor performance. In the case of the Claimant, he was employed as an Agronomist. From his employment letter and from time to time transferred to other capacities. In 2009 November he was promoted to senior out grower manager. The letter of appointment indicated that in this capacity, he was to perform all duties assigned to him by his supervisor (Head of Agriculture) and all other duties prescribed in his job description. The Respondent has not pointed out the duties that were assigned to the Claimant and which he failed to do.

19. The last appointment came on 2012 27<sup>th</sup> January where he was transferred to be Farm Manager in Kinondo Farm. A month later in February 2012, the Claimant was terminated for failing to consistently provide the required advice on raw materials and also for advising against planting. Indeed within that 1 month, the Respondent have not pointed out the detriment caused by advise given by the Claimant even for advising against planting.

20. They aver that he also failed to advice on raw materials. There is also no evidence adduced that he did not given this advice. The time within which complaints were leveled against the Claimant could not be felt within 1 month. He indicated in his evidence that when he was transferred on 14.1.2012 he took 2 weeks leave. After reporting, he was given a termination letter.

21. There is no evidence that his performance was poor. With this background, it is my finding that the reasons given for termination were never really put to test within the short period and in 1 month, it was not possible to assess Claimant as a poor performer. It is therefore my finding that the Respondent did not have valid reasons to terminate the claimant herein as claimed.

22. On the issue No. 2, the Claimant avers that he was not given an opportunity to defend himself before the termination.

23. Section 41 of the Employment Act 2007 states as follows:

**“(1).Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) .Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.**

24. This provision sets out the nature of a disciplinary hearing that is envisaged before termination. The Claimant has stated that this never happened. Indeed there is no letter inviting Claimant to any disciplinary hearing.

25. There are indeed no minutes of any such hearing. It is therefore my finding that the claimant was not accorded a fair hearing before termination.

26. Section 45(2) of Employment Act 2007 states as follows:-

**2. A termination of employment by an employer is unfair if the employer fails to prove:**

**a. that the reason for the termination is valid;**

**b. that the reason for the termination is a fair reason:-**

**i. related to the employee's conduct, capacity or compatibility; or**

**ii. based on the operational requirements of the employer; and**

**c. that the employment was terminated in accordance with fair procedure.**

27. It is therefore my finding that in the absence of valid reason and in absence of a fair hearing before termination, the Claimant's termination was unfair and unjustified and I declare it so.

28. On remedies amiable, the Respondent have submitted that the Claimant's salary was 40,000/=. The Respondent did not produce evidence of this assertion.

29. The Claimant avers that his salary was 140,000/= at termination. In Appendix E produced by the Claimant, there is an indication that Claimant was promoted and salary increased to gross 120,000/=. In the letter of 27<sup>th</sup> January 2012 transferring him as Farm Manager it is indicated that the terms of service remained the same.

30. In absence of any other evidence, I will take Claimant's salary to be 120,000/= at the time. Based on this figure, I award Claimant damages for unfair termination totaling:-

**1. 12 months =  $12 \times 120,000 = 1,440,000/=$ .**

**2. I also award him unpaid salary for 20 days =  $20/30 \times 120,000 = 80,000/=$ .**

**Total 1,520,000/=**

***less statutory deductions***

**3. Plus costs and interest at Court rates with effect from the date of this judgement.**

**Dated and delivered in open Court this 20<sup>th</sup> day of November, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Respondent

No appearance for Claimant