



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 199 OF 2015

(Before D. K. N. Marete)

CHERUIYOT KIPKEMOI JOEL.....CLAIMANT

VERSUS

TIRGAGA TEA FACTORY CO. LIMITED.....RESPONDENT

JUDGEMENT

This matter comes to court vide an Amended Memorandum of Claim amended on 24th September, 2015. The issues in dispute are therein cited as;

- a) Whether the claimant was unlawfully, unprocedurally and unfairly summarily dismissed from employment by the respondent;*
- b) Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim;*
- c) Whether the claimant is entitled to an award of certificate of service;*
- d) Whether the claimant is entitled to an award of compensation for breach of contract and*
- e) Who should pay costs and interest of the suit;*

The respondent in a Reply to Amended Memorandum of Claim dated 19th November, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he formerly was an employee of Kapkoros Tea Factory Co. Ltd having been confirmed on 30th August, 2011 to the position of Special Rated Worker (SRW) in the workshop department. He had ceased to be an employee of Kapkoros on 1st December, 2011 upon appointment by the respondent to the position of Tea Extension Services Assistant II with the authority of the Factory Unit Manager. This was on permanent pensionable terms with the following entitlements;

- i) Gross pay of Kshs.30,210/- per months;*
- ii) House allowance of Kshs.500/- per month;*
- iii) Medical allowance of Kshs.500/-per month;*

(iv) Fuel allowance of Kshs.9800/- per month;

(v) Other benefits and allowances coming with positions;

(vi) Thirty (30) working days leave and Kshs.8,000/- leave travel allowance per annum respectively.

He reported to the Field Services Coordinator (FSC) of the respondent.

The claimant's other case is that on 2th February, 2014 he applied for 60 days unpaid leave to attend to a serious domestic matter at home. This was granted with effect from 1st March to 13th May, 2014.

It is his further case that he resumed his normal duties after the said unpaid leave as indicated in the leave application form. He continued working peacefully without interruption until 26th May, 2014 when his employment was terminated without notice on the untrue grounds that he had tendered resignation as Tea Extension Services Assistant II in Kapkoros Tea Factory Co. Ltd.

It is the claimant's other case that he at no time rendered his services to Kapkoros Tea Factory Co. Ltd as the company had its own Tea Extension Services Assistant II and other staff who worked independent of the respondent. He did not either have any obligation to tender his resignation to Kapkoros. He deems his termination of employment on 26th May, 2014 as unlawful and unprocedural, erroneous and or malicious.

Again, the claimant's case is that his termination from employment was ill intended, unlawful, tainted with illegality and was null and void and against the principles natural justice as hereunder;

(i) Failure by the respondent to conduct proper investigations into the allegation against the claimant.

(ii) Failure to give the claimant a fair hearing to present his grievances to the Board of Directors as requested by the claimant.

(iii) Failure to adhere to the procedure of termination of services as stipulated in the contract which require that an adequate notice of one month be given by either part.

(iv) Failure to substantiate the allegations against the claimant coming from sources that were not party to the contract. The claimant's case against the respondent is substantive and with all probable chance of success.

He claims as follows;

i. One month pay lieu of Notice

Basic + Hse Allowance

37750 + 5045

Kshs.42,795/-

ii. Compensation for unfair termination (Section

19 (c) of the Employment Act)

42795 x 12

Kshs.513,540/-

iii. Severance Pay

15% of yearly salary x years worked

15% of 513540 x 2.6 yrs	Kshs.200,280.6/-
iv. Leave prorated, 2015	Kshs.42,795/-
v. Leave travel allowance	
8000 per year x years worked	
8000 x 3 yrs	Kshs.24,000/-
vi. Fuel allowance of 9800 per month for the entire period worked	Kshs.294,000/-
vii. Medical allowance @500 per month	
500 x 30 months	Kshs.15,000/-
TOTAL	<u>KSHS.1,175,205.6/-</u>

In the penultimate, he prays as follows;

a) A declaration that the action to terminate the claimant was unlawful, unprocedural, unfair and that it is null and void.

b) The sum of KSHS.1,175,205.6/-

c) A Certificate of service as per section 51 of the Employment Act.

d) Costs and interest of his suit from the time of filing until the date of conclusion.

e) An order directing payments of claimant's unpaid salary, benefits, allowances together with other general damages with effect from 13th May, 2014 to the time of case conclusion assessed as follows;

(i) Salary of Kshs 30,210/- per month x 113 months to date	Kshs.392,730/-
(ii) House allowance of Kshs.5,045 per month x 13 months	Kshs.6,5585/-
(iii) Medical allowance of Kshs. 500 per month x 13 months	Kshs.6,500/-
(iv) Accrued fuel allowances of Kshs.9,800 per month x 42 months	Kshs.411,600/-
(v) Leave travel allowance of Kshs.8,000 per month x 3 yrs	Kshs.24,000/-
(vi) Interests on i, ii, iii, iv and v at court rates.	

(vii) *Costs of the suit*

f) *Orders to reinstate the claimant to his employment*

g) *Any other relief that the honourable court deems fit to grant.*

The respondent's case is that at all material times of the suit the claimant was an employee of Kapkoros Tea Factory Co. Ltd but seconded to herself as her administrative functions were performed by the Kapkoros Board of Directors. She (respondent) was a satellite of Kapkoros.

The respondent therefore enters a case of denial of the particulars of the claimant's case in that there was no direct employment relationship between herself and the claimant. She further faults the claimant's performance record and even claim on termination and avers as follows;

4.7 The Respondent denies the contents of paragraph 8 of the amended Memorandum of Claim and avers that the Claimant's performance record was questionable. A clear illustration being his desertion of work from the 23rd – 31st January 2014, an act tantamount to gross misconduct which could lead to Summary Dismissal from employment. Annexed hereto and marked 'TT 3' is a copy of letter dated 14th February 2014 demanding the Claimant to issue a written explanation why strict disciplinary measures

should not be taken against him for such gross misconduct.

5.1 In regard to the submissions laid out in paragraph 9 of the amended Claim, the Respondent avers that: on 22nd February 2014, the Claimant applied for 60 day leave commencing on 1st March 2014 to 14th May 2014. Annexed hereto and marked "TT 4" is a copy of his application letter.

5.4 The Respondent denies the submissions set out in Paragraph 11 of the amended Claim and avers that the Claimant himself voluntarily resigned on his own volition when he tendered his resignation letter. Further that he clearly understood the consequences of his resignation in lieu of notice and clearly expressed his regret to the company for any inconveniences he would cause upon his resignation. See annexure "TT 6"

5.7 In respect to Paragraph 12 & 13 of the amended Claim the Respondent avers that the Claims set out therein are malicious and out rightly false since

the Claimant was never terminated nor dismissed from employment. He resigned following due process and the Company was under no obligation to decline the wishes of the Claimant on his voluntary resignation. Further that the Claimant voluntarily cleared himself from employment as indicated in his Clearance Certificate annexed herein and marked "TT 5". After which the Respondent issued him a Certificate of Service which he voluntarily and readily accepted. Annexed hereto and marked "TT 9" is a copy of the Claimant's Certificate of Service.

This matter came to court variously until 10th February, 2017 when it was heard with testimony from the claimant.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in his written submissions dated 8th November, 2017 reiterates his claim and faults the respondents case for bearing contradictions as follows;

- i. Reliance on a resignation letter addressed to the factory unit manager Kapkoros tea factory limited.*
- ii. Failure to acknowledge that Kapkoros tea factory tea company limited and Tirgaga tea factory company limited are two separate entities in law pursuant to the provisions of the companies Act, cap 486*
- iii. Reliance on the termination letter that was not from the respondent who was the legitimate employer in law.*
- iv. Denial of the terms and conditions of the employment contract.*
- v. Denial of the 60 days leave that was granted to the claimant and thereafter relying on the letter granting leave in their arguments.*
- vi. Misdirection on the operation of companies registered under the companies Act.*
- vii. That the claimant was in a salaried employment until 13th May 2014 as per the evidence tendered whereas the termination letter states that the claimant was employed until 1st March 2014 raising immense concerns as to the validity of the purported resignation.*
- viii. That the respondent issued a valid certificate of service despite the various errors that were highlighted by the claimant in his submissions with regard to the purported certificate of service.*

He further submits as follows;

- i. That the said resignation letter is invalid, null and void*
- ii. That consequently, the said certificate of service is invalid null and void*
- iii. That the termination letter issued to the claimant is not binding both in fact and in law.*
- iv. That the claimant's rights within the Employment Act, the constitution of Kenya and all other relevant laws have been infringed and the claimant moved to this honorable court to seek redress.*

The respondent submits a case of resignation by the claimant through his letter dated 26th February, 2014 and addressed to Kapkoros Tea Factory Co. Ltd. She further annexes copies of a Tea Packer Certificate and a Tea Manufacturing Licence for the first half of 2015 as evidence of her relationship with Kapkoros. This, she claims is acknowledged by the claimant in his conduct and even demand letter dated 11th September, 2014.

She seeks to buttress this on the authority of **Catherine Kanaiza Aradi v Little Lambs Company Limited (Little Lambs Children Centre, [2017] eKLR** where the court in dismissing pleas of constructive unfair termination by an employee who had resigned, held thus;

...For an employee to prove constructive termination of employment the employee must therefore prove breach of their employment contract by the employer that would justify the employee treating the contract as terminated.

She testified that she asked for leave for purposes of sitting for examinations and was told to fill a form. She further testified that before that some work had been withdrawn from her and given to other employees among them a sister to the Managing Director. In her letter of resignation the

Claimant states as follows-

She further supports her case by submitting and producing the resignation letter as follows;

“REF: RESIGNATION LETTER

I would like to inform you that I am resigning from my position as The Secretary of Little Lambs School effective from 19th March, 2014; I will assume this is satisfactory unless otherwise noted. Circumstances are such that I will no longer be able to come into the office and please accept this letter as a notification that I am leaving my position due to personal reasons.

While I greatly appreciated most of my time with your institution, recent changes in the institution have made me feel unable to continue working at Little Lambs School. However I appreciate the opportunities I have been given at the institution and your professional guidance and support. I wish both you and the institution much success in the future.

Please let me know what to expect as far as my accrued services and my final pay. If I can be of assistance during this transition, please let me know. I hope I can rely on you for a positive reference in the future.”

A scrutiny of the respective cases of the parties tilts this matter in favour of the respondent. The respondent has overwhelmingly built his case of lawful termination by demonstrating a clear cut case of resignation on the part of the claimant. This is done through the respondents list of documents in support of the defence. The claimant merely denies this. He does not come out to prove his case of unlawful termination of employment on a preponderance of evidence or even the lighter principle of balance of probabilities. This is a peculiar case of denial coming from the opposite side. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case for unlawful termination of employment, he is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of November 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Mr. Koech instructed by Bett & Company Advocates for the respondent.