



**REPUBLIC OF KENYA**

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

**CAUSE NO. 39 OF 2017**

**JOSEPH KAMAU NYAKARURA.....1<sup>ST</sup> CLAIMANT**

**GABRIEL NJUGUNA KIRUGU.....2<sup>ND</sup> CLAIMANT**

**FRANCIS MWANGI MUIGA.....3<sup>RD</sup> CLAIMANT**

**GABRIEL MUIRU WAWERU.....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**MUHUGU FARM LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Wednesday, 20<sup>th</sup> December, 2017)

**JUDGMENT**

The claimants filed the memorandum of claim on 17.02.2017 through Namada & Company Advocates. The respondent prayed for judgment against the respondent for:

- a) A declaration that the respondent's aforesaid actions amounted to summary dismissal from employment which dismissal was unlawful and unfair.
- b) A declaration that the claimants are entitled to payment of their terminal dues and compensatory damages as pleaded in paragraph 12 and `13 of the claim.
- c) An order for the respondent to pay the claimants their due terminal benefits and compensatory damages totalling to Kshs. 1, 608, 920.00.
- d) Interest on (c) above from the date of filing the suit till payment in full.
- e) Cost of the suit plus interest thereon.

The claims are on the headings of one month pay in lieu of notice, pay for annual leave throughout period served, house allowance for the period served, severance pay at 15 days for each year served, pay for off days not taken, service gratuity for period NSSF was not remitted at 15 days per year served.

The claimants' case is that the 1<sup>st</sup> claimant was employed as a night guard, the 2<sup>nd</sup> claimant as a supervisor, the 3<sup>rd</sup> claimant as a night guard and the 4<sup>th</sup> claimant as a supervisor. The claimants' last monthly pay was Kshs. 10, 700, Kshs.7, 700.00, Kshs.10, 400.00 and Kshs. 7, 700.00 respectfully.

Further, they say they worked 6.00pm to 6.00am 7 days per week including Saturdays, Sundays and on public holidays and they were not given annual leave throughout the service.

The 1<sup>st</sup> claimant's case is that on 19.12.2014 his employment was terminated on account of redundancy because work had reduced and there was no need for his services. He was told he would be recalled when work became available. The 2<sup>nd</sup> claimant stated that his employment was terminated on 01.12.2014 on similar grounds. The 3<sup>rd</sup> claimant states that his services were terminated on 20.12.2014 on similar grounds. The 4<sup>th</sup> claimant's case is that his employment was terminated on 01.12.2014 upon similar grounds. The claimants' case is that their respective termination was conveyed by the respondent's manager one Peter Mburu Kimani.

The claimants' further case was that they were not recalled back as was promised and that the respondent's position that there was no work for them to perform was not true because after the termination other persons were employed by the respondent to fill the vacancies created after their respective termination. Thus, the claimants claimed that their termination amounted to unfair summary dismissal.

The statement of defence was filed on 24.04.2017 through Jesse Kariuki & Company Advocates. The respondent's case was that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants were served with a three months' notice during which they remained at work with full pay and the labour officer received the notice as well. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants were terminated due to frequent and huge amount of coffee that was lost. After the termination there had been no reports of lost coffee as before when the claimants were still in service. The 4<sup>th</sup> claimant deserted job after a service of less than one month. Thus the respondent stated that the claimants' claims were unfounded and the suit be struck out or dismissed with costs.

**First** the court returns that the claims and prayers for pay for house allowance, leave, public holiday, off days and overtime were in the nature of a continuing injury and were time barred under section 90 of the Employment Act, 2007 as the suit was filed on 17.01.2017 long after lapsing of the prescribed 12 months time of limitation, the cessation of the injury having been at termination sometimes about or before December 2014.

**Second** the court returns that the termination of the claimants' employment was unfair. The respondent has denied that the termination was on account of redundancy as alleged for the claimants. The case for the respondent is that the claimants were dismissed on account of misconduct and as per the termination notices on record. For the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants there is no reason to doubt that they were terminated upon being given 3 months notices as filed in court. There is no reason to doubt that there had been reports of lost coffee as was testified and urged for the respondent. However, the respondent failed to invoke section 41 of the Employment Act, 2007 on notice and hearing. The termination notices did not provide the reason for termination. The misconduct was not disclosed at the hearing and the alleged lose of coffee was not linked to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants. The dismissal of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants is found to have been unfair for want of due process under section 41 of the Act and for want of a valid reason under section 43 of the Act. There was no prayer for compensation in that regard. For the 4<sup>th</sup> respondent there was no disciplinary action as per section 41 of the Act after the alleged desertion and the termination was equally unfair. As notice for termination had been issued, the court returns that there would be no justification for pay in lieu of termination notice.

There was no redundancy and the court returns that the claimants were not entitled to severance pay as claimed. Further, it has been established that the claimants were members of the NSSF and there will be no award of service gratuity in view of section 35 (6) of the Act.

In conclusion the suit herein is determined with orders:

- a) The termination of the claimants' employment by the respondent was unfair.

b) Each party to bear own costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Wednesday, 20<sup>th</sup> December, 2017.**

**BYRAM ONGAYA**

**JUDGE**