



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 166 OF 2016

(BEFORE D. K. N. MARETE)

CHARLES RONO & 19 OTHERS.....CLAIMANT

VERSUS

KABIANGA TEA FARM.....RESPONDENT

JUDGEMENT

This matter is originated by way of a Statement of Claim dated 2nd December, 2016.

The respondent in a Memorandum of Response dated 21st December, 2016 denies the claim and prays that it be struck out with costs.

The claimant's case is that they were employed by the respondent to work in different capacities as farm attendants, foremen, plumbers, security, leaf clerks and worked towards enhancement of the company's vision and mission despite poor remuneration.

It is the claimant's further case that most of them worked from 1st November, 2008 and were confirmed on diverse dates in 2011. Their employment was terminated on 26th February, 2014 without pursuance of the requisite procedure on redundancy and also in violation of the laws on employment.

Again, the respondent did not offer any reasons for termination of employment and claimant avers that this was done discriminately along blood relationship with the management or political affiliation and further that those terminated were later replaced with new employees.

The claimants were also denied recommendation letters thus disabling them from getting other employment and were also not paid accumulated leave allowance, severance pay, refund of provident fund, leave pay, and service and payment in lieu of notice of termination.

They pray for the following orders of court;

- a. *THAT Declaration of that the termination was illegal, unlawfully and irregular for non compliance with redundancy procedures.*
- b. *THAT the Respondent be condemned in accordance with Section 49 of the Employment Act, 2007 laws of Kenya.*

- c. *General damages for loss of employment and retirement benefits from the date of judgement to the attainment of retirement.*
- d. *Aggravate4d damages and general damages for loss of salary, allowances and career.*
- e. *THAT the claimant be paid severance allowance pay in full*
- f. *THAT the claimants be paid termination notice pay in full termination notice*
- g. *Claimant be refunded/paid provident fund contribution for the period of employment*
- h. *Any other relief as the court may deem just and fit.*

The respondent's case is one of denial of the claim.

It is her further case that the claimants were paid terminal dues through their respective bank accounts as follows;

- a. *Severance pay equivalent to 15 days salary for every completed year of service.*
- b. *One month's salary in lieu of notice.*
- c. *Leave pay for those who had accrued leave days at the date of termination.*

The respondent's other case is that the claimants have not raised any issue over termination since 2014 and therefore this is an afterthought on their part. It is frivolous, malicious and brought out in bad faith and should be struck out at the earliest opportunity.

The claimants in a rebuttal to the Memorandum of Response reiterate their claim and deny the defence and further aver that no delay has been occasioned as all this time, there has been constant discussion with the *county* to employ the claimants which promise has not been fulfilled and yet new employees were recruited to replace them.

This matter came to court variously until 15th November, 2017 when the parties opted for disposal by way of written submission.

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's in their written submissions reiterates their claim and submits that their termination of employment was in contravention of section 40, 43, 45 (2) and 47 (5) of the Employment Act, 2007. From the onset, the respondent did not comply with section 40 of the Employment Act, 2007 on redundancy and the requisite of the law thereof. Secondly, no valid reasons were offered for termination in terms of section 43 of the Act. This is as follows;

40. (1)An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -

- a. *where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is*

employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.

b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.

d. where there is in existence a collective agreement between an employer and a trade union setting out termination benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

45 (1) of the Employment Act provides that no employer shall terminate the employment of an employee unfairly 45 (2) A termination of employment by an employer is unfair if the employer fails to prove-

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

b. That the reason for the termination is a fair reason –

i. related to the employees 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*

Section 47 (5) of the Employment Act which states that;-

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”

The respondent in her written submission dated 24th November, 2017 seeks to rely on;

a. *Its Memorandum of response filed on 21st December, 2016;*

b. *Its Manager's statement filed in court on 30th October, 2017 (see blue bundle);*

c. *Documents filed on 30th October, 2017 (see blue bundle)*

In further support of her defence she submits thus;

- a. *That the claimants were paid severance pay equivalent to 15 days salary for every completed year of service;*
- b. *That the claimants were paid one month's salary in lieu of notice;*
- c. *That the claimant's were paid leave pay for those who had accrued leave days at the date of termination;*
- d. *That the claimants' claim herein was an afterthought as they did not raise any issue with the respondent since the date of termination which was January, 2014 up to 2016 when the suit was filed;*
- e. *That the claimants were issued with recommendation letters.*

Again,

- a. *That the termination of some employees was done by the respondent in two phases i.e. January and February, 2014.*
- b. *That the reason for the said termination was to ensure that the farm remains afloat. The respondent deemed it fit to reduce costs and expenses.*
- c. *That the employees that were terminated had served only for 2 years or less. The claimant's pleadings and documents can also confirm this position.*
- d. *That the price of green leaf had been drastically reduced from Kshs. 24 to Kshs.17 hence affecting the income of the respondent.*
- e. *The farm was also struggling financially and there were some positions in the respondent's company that had 3 employees for one position.*
- f. *The respondent's manager further asserts that the terminated employees were paid terminal dues and recommendation letters issued. This position is also affirmed by the claimant's termination letters exhibited by the claimants.*

The respondent's overall submission is one of compliance with the law relating to redundancy and payment of terminal dues resultant to such redundancy. This is also displayed in the respondent's list of documents dated 23rd October, 2017.

The face of the letter of termination denotes a case of redundancy but does not display its requirements. The letter only provides for salary in lieu of notice and salary for February, 2014 and no more. It is also not a catalogue of pursuance of the procedural requirements anticipated under section 40 of the Employment Act, 2007. This is as follows;

Kabianga Tea Farm Board of directors vied their 6th board meeting held on 13th of Jan 2014 resolved to restructure the operations of the farm so as to realize improved results. Towards this end, some positions that were earlier designated as permanent have been rendered redundant with effect from 28th Feb 2014. You will therefore cease to be an employee of this company after working hour of the same date.

The company will pay you an equivalent of one (1) month's salary in lieu of notice. This will be consolidated together with February 2014 salary. Arrange with your immediate supervisor to hand over any company property that could be in your possession. You will then get the necessary clearance from him/her. You will be allowed to reside within the company premises for a

maximum period of 14 days from the date of this letter as you make arrangements to vacate.

On behalf of the board, I thank you so much for all the services that you may have rendered to the company during your tenure and wish you well in your future endeavors.

Thank you,

Patrick Rono

Ag. Manager

Again, the respondent's list of documents only displays the claimant's payments in the following categories; basic pay, leave pay, notice pay and in some instances overtime pay. Redundancy pay is not anywhere near. There is no evidence of compliance with section 40 (1) (b) of the Employment Act, 2007 requiring notice in writing to the claimants and the labour officer. Moreover, the respondent is silent on the claim that the claimants were upon termination immediately replaced by other employees. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimants are entitled to the relief sought. They are. Having succeeded on a case for unlawful termination of employment they are entitled to the relief sought.

I am therefore inclined to allow the claim and award relief as follows;

- i. Severance pay.
- iii. Six months compensation for unlawful termination of employment.
- iii. One month salary in lieu of notice.
- iv. The Commissioner of Labour be and is hereby ordered to facilitate a tabulation of this award in 120 days.
- v. Mention on March 5th April, 2018 for a report on tabulation and further directions of court.
- vi. The costs of the claim shall be borne by the respondent.

Delivered, dated and signed this 11th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. W. K. Ngeno instructed by W. K. Ngeno & Company Advocates for the claimants.
2. Mr. Langat instructed by Gordon Ogola, Kipkoech & Company Advocates for the respondent.