



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 235 OF 2015**

***(Before D. K. N. Marete)***

**ZACHARIA NYAMWAGA NYANGENO.....CLAIMANT**

**VERSUS**

**BLISS FLORA LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter came to court vide a Memorandum of Claim dated 25th August, 2015. The issues in dispute are therein cited as;

- a) *Notice*
- b) *Salary for 10 days for March, 2015*
- c) *Annual leave allowance unpaid*
- d) *Welfare benefits*
- e) *Salary for the unexpired term – (4 months)*
- f) *Compensation for unfair termination*
- g) *Service pay*

The respondent in a Reply to Memorandum of claim dated 4th December, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent on or about October, 2012 at a gross salary of Kshs.6,150.00 per month. This was on a yearly renewable contract. He served with due diligence and utmost loyalty as a Transporter at the production department until 31st March, 2015 when his services were unlawfully terminated.

It is the claimant's further case that on 10th March, 2015, at about 1530 hours he sought permission from his supervisor to travel to Kisii and attend to his daughter who was admitted a Kisii Level 5 Hospital. This was granted and he proceeded to Kisii on the same day.

The claimant's other case is that on 18th March, 2015, while still at the hospital, his daughter passed on and the claimant immediately called the supervisor on phone informing of the misfortune and requested for more days to organize the burial. This (burial) took place on 25th March, 2015 at Kegochi sub-location and the claimant returned to Njoro on 30th March, 2015.

His further case is that on 31st March, 2015 he reported back to work but on arrival at the work place he was approached by the Human Resource Officer who unilaterally and without any reason verbally terminated his contract of employment.

The claimant avers that this termination was unlawful, spiteful and fraudulent as follows;

- i. Claimant was never accorded an opportunity to show cause why employment ought not to have been terminated.*
- ii. Termination notice was never issued.*
- iii. Forging claimant's signature on clearance for/documents*
- iv. Locking claimant out of company premises.*
- v. The respondent never issued any termination letter to the claimant.*
- vi. The claimant was never paid his dues when he was terminated from employment by the respondent.*
- vii. The respondent never paid the claimant for 10 days worked during the month of March, 2015.*

He prays as follows:

- a. A declaration that the said termination was unlawful.*
- b. One month's pay in lieu of notice.....Kshs.6,150/=*
- c. Salary for the 10 days worked in the month of March 2015.....Kshs.1,984/=*
- d. Leave allowance.....Kshs.10,035/=*
- e. Welfare benefits.....Kshs.52,000/=*
- f. Salary for the unexpired term ( 4 months x 6, 150).....Kshs.24,600/=*
- g. Service pay (1<sup>st</sup> September, 2012 to 31<sup>st</sup>, August, 2014 = 2yrs).....Kshs.6,150/=*
- h. Compensation for unfair termination (6,150 x 12 months)..Kshs.73,800/=*
- i. Costs of this suit.*
- j. Interest at court rates.*

The respondent admits the particulars of the employment of the claimant: he was employed on 1st September, 2014 and issued with a letter of employment and his last working day was 12th March, 2015.

It is the respondent's further case that the claimant did not perform his duties with due diligence or

loyalty as claimed and that on 12th August, 2014 he was issued with a warning letter for absconding duty. On 15th and 18th February, 2015 he tendered his apologies for the offences committed.

The respondent avers that on 12th March, 2015, the claimant resumed work and proceeded with his duties of transporting roses from the green house to the cold room. On a routine monitoring tour, the Production Manager found the claimant seated and having abandoned the flowers in the trolley. He was requested to go to the Human Resource Manager and explain why he was not performing his assigned tasks.

Again, the respondent in finality avers that the Human Resource Manager heard the claimant's explanation and due to its unsatisfactory nature, he was requested to show cause why disciplinary action should not be taken against him. In his show cause letter dated 12th March, 2015 the claimant admitted that he was working while drunk and that he had abandoned his flowers in a trolley. This amounted to gross misconduct and the claimant was summarily dismissed.

In the penultimate, the respondent avers that on summary dismissal the claimant cleared and left employment only report to the county labour officer where on resolution, he was paid for his only entitlement, accrued leave through this office. His dues for days worked in March, 2015 had been paid through his account with Unaitas Sacco Society Limited and this is demonstrated through his pay slip and confirmation letter from the SACCO.

The matter came to court variously until 2nd October, 2017 when the parties agreed on a disposal of the matter by way of written submissions.

The issues for determination therefore are;

1. Whether the forensic report by the claimant should be considered in evidence in this cause.
2. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the forensic report by the claimant should be considered in evidence in this cause. The respondent through the Respondents Supplementary Submissions dated 27th November, 2017 addresses the issue of the Forensic Examiners Findings and or report in which the claimant rested a case of forgery of his signature by the respondent to facilitate some of the documentation in support of the defence. She counters this by relying on the authority of **Halsbury's Laws of England, Vol., 13 paragraph 1** as follows;

*“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation”.*

In furtherance of her submission that the report on forensic audit was inadmissible for being brought to court too late in the day, the respondent again sought to rely on the authority of **Concord Insurance Co. Limited vs. Nic Bank Limited Nairobi, High Court case 175 of 2011 [2013] eKLR** where Havalock, J. on a citation of **The English and Empire Digest Vol 18 (1975 Reissue), Sect. 9. At Sub-sect 7 (p.58)**, observed as follows;

*“Duty to Disclose – it is the duty of a party in an action who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not*

*disclosed in the schedule, to inform his opponent of the discovery, either by supplementary affidavit, the proper course, or at least by notice”.*

Further, the respondent also banked on the authority of **Asira – vs- Republic [1986]KlR 227** where the court observed as follows;

*“The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writing are so similar as to be undistinguishable.*

*It is the duty of a court to make an examination and satisfy itself whether the handwriting expert’s opinion can be accepted and the court cannot blindly accept such an opinion. The failure to demonstrate to the court the features of the so-called disguised handwriting meant that the court did not itself decided the issue.”*

I agree entirely with the respondents submissions on the issue of the forensic report submitted by the claimant. It is noted that the issue of forensic documents was raised in court on 15th November, 2017 when the claimant submitted that he had not filed his written submissions on account of not having obtained these documents from the labour officer. He prayed that a court order issues to the labour officer to formalize his request for such documents but this was declined by court. He thereon sought seven days leave to comply.

Notable again is that the respondent, despite having filed her written submissions did not object to the claimant’s submissions but only sought leave to revise the written submissions upon service by the respondent. This was allowed.

The respondent cannot now be heard to raise a finger against the forensic report by the claimant. This is because inspite of the late introduction of report, he did not object to its production or at all. As observed above, his reaction was total acquiescence from which he cannot now backtrack. Secondly, and in pursuance of her (respondents) submissions, this court has made an independent assessment of the situation so as to verify the acceptability or otherwise of the handwriting expert’s opinion. This forensic report is agreeable and faultless and therefore admissible. I therefore find that the forensic report by the claimant is useful tool in the determination of the issues in dispute and is admissible in the circumstances.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant submits a violation of his rights to be heard before termination of employment. This is a contravention of Article 50 (1) of the Constitution of Kenya, 2010 as follows;

*“every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”*

He buttresses this by a submission of a contravention of section 41 (1) and (2) of the Employment Act, 2007 which provides for substantive and procedural fairness as follows;

*41 (1) Subjection 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 in 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.*

*41 (2) Notwithstanding any other provisions 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, chose by the employee within subsection (1) make.*

It is his submission that his termination of employment was done by the Human Resource of unilaterally and without reason, with orders that he vacates the respondent's premises immediately. He was not afforded an opportunity to be heard thereby rendering the termination unlawful.

The claimant further sought to rely on the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** in a demonstration of the irregularity of termination. Here, the court observed thus;

*Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.*

*The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.*

*Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.*

*Summary dismissal on the other hand is largely at the instance of an employer. The standard applicable therefore are of a higher nature as this process is prone to abuse as the employer is in a more superior position than an employee. Summary dismissal can take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provisions or contractual term. However, even in cases of serious breach of a contract as under section 44(3) or on committing acts as outline section 44 of an employee being absent from work, being intoxicated, negligence, abusive, failure to obey lawful orders, criminal arrest or charges, suspect in a criminal case, all these serious act, such an employee is subject to be treated as under section 41 of the Employment Act with regard to being accorded a hearing.*

*Under subsection 43 (2) of the Employment Act, 2007, 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. However these reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee”.*

The claimant also submits a case of violation of section 43 (1) of the Employment Act, 2007 in that the respondent has not proven the reason for his termination as follows;

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

The respondent in her written submissions dated 14th November, 2017 set out to answer the following as

issues for determination;

- a) Whether the claimant was employed in October, 2012 or September, 2014.
- b) Whether the respondent terminated claimant's employment unlawfully, and
- c) Whether the claimant is entitled to the relief sought.

It is the respondent submission that the claimant was employed as a seasonal worker on a contract running from 1st September 2014 to 1st August, 2015.

The respondents other submission is a reiteration of her case that the respondent was validly terminated through a summary dismissal arising out of misconduct in the performance of his duties. He was found in an act of neglect of duty and drunk in the course of work thereby prompting his dismissal. This was however after being taken through disciplinary proceedings – a fact denied by the claimant.

This matter tilts in favour of the claimant. The Forensic Report submitted by the claimant brings out a case of adulterated documents purportedly executed by the claimant. These documents serve to support the cause of dismissal but with a finding of lack of authenticity in the signatures by the claimant, the respondent's case is diluted to irretrievable levels.

Even in the absence of the Forensic Report above, the respondent's case would still be a cropper. This is because the respondent does not tender any evidence in support of any disciplinary proceedings offering the claimant an opportunity to be heard in terms of section 41 (1) and (2) of the Employment Act, 2007. The absence of substantive and procedural fairness in the termination of employment clouds all other attributes of such termination. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 2 nd issue for determination.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having succeeded on a case for unlawful termination of employment he is entitled to the relief sought.

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

- i. One months salary in lieu of notice .....Kshs.6,150.00
- ii. 12 months compensation for unlawful termination  
of employment Kshs. 6150.00 x 12 months =.....Kshs.73,800.00  
**Total .....Kshs.79,950.00**
- iii. The costs of this 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. Tombe instructed by Tombe & Company Advocates for the claimant.
- 2. Mr. Mwitwa holding brief for Sambu instructed by Seth & Wathigo Cy Advocates for the respondent.