



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.9 OF 2015

(Before D. K. N. Marete)

EBEL PETER LOSUR.....CLAIMANT

VERSUS

JAMES FINLAYS KENYA LIMITED.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 25th August, 2014. It does not highlight the issue(s) in dispute on its face.

The respondent vide a Respondent's Statement of Response dated 2nd June 2015 opposes the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, he worked for the respondent. This was for the period 2007 to 17th May, 2014 when the respondent terminated its services and refused to pay his terminal dues. The particulars of unlawful termination are as hereunder;

- a) *The claimant trade union was not informed of the intention to declare the claimant redundant.*
- b) *No leave pay was given.*
- c) *No two month's salary in lieu of notice was paid.*
- d) *The required severance pay was not paid.*

He claims as follows;

- a) *2 months pay in lieu notice*

Basic + House Allowance

9,024 + 1,353.6=10,377.6x2 Months

Kshs.20,754

- b) *Service Gratuity*

22 days x Years worked x Basic/30

22 x 7 Years x 9024/30

Kshs.46,323.2

c) *Leave due*

26 days x years worked x Basic

+ House allowance/26

26 x 7 years x 10,377/26 days

Kshs.72.636

d) *Compensation for unfair termination*

Gross pay x 12 months

10,377 x 12 months

Kshs.124,524

e) *Unremitted NSSF*

400 x 84 months

Kshs. 33,600

TOTAL CLAIM

Kshs.297,840/-

In the penultimate the claimant prays as follows;

- a) *A declaration that the termination process as carried out by the Respondent is unlawful and that during his employment with the Respondent, he was not remunerated as required by law.*
- b) *Payment of the sums of money claimed under paragraph 9 above.*
- c) *Costs and interests.*
- d) *Any other relieve the Honourable Court may deem fit to grant.*

The respondent's case is that the claimant was employed as a tea plucker and assigned duties at the respondent's estate with effect from 23rd June, 2001 at a salary based on kilos picked and in terms of the subsisting Collective Bargaining Agreement (CBA.) He was issued with a contract of employment as annexed in the response to claim.

On 23rd April 2014, the claimant performed his duties carelessly so that he caused the burning of two (2) sacks of leaf and also went on to accuse the estate assistant of using insulting language on him.

It is a further defence case that on 14th May, 2014 the claimant was invited for a disciplinary meeting which he attended with a shop steward in the presence of the estate management. He was awarded an opportunity to offer a defence against his inaction but this was not credible and therefore the decision of termination of his employment. The respondent therefore submits a lawful termination of employment. This is as follows;

7) *... we humbly submit the claimant was dismissed on valid reasons and the process was transparent and fair. The chronology of events leading to the claimant's dismissal was so clear and he knew that he had committed misconduct but was not willing to be remorseful.*

8) *It is not disputed that the claimant was working at field 12. After plucking tea, it was his responsibility to ensure that the same is delivered immediately so that the leaves do not burn. On 23rd April, 2014, he failed to ensure that the green leaves are delivered in time and for that reason 2 sacks got burnt.*

9) *The Estate Assistant intervened and tried to find out the reason for the burnt tea leaves by asking the Claimant the reason thereof. Instead the Claimant became rude and used abusive language towards the Estate Assistant.*

10) *What followed was that the Claimant was requested to meet the Estate Manager the following day. He ignored the request which was a sign of insubordination. The Claimant was issued with a show cause letter to explain why disciplinary action cannot be taken against him for disobeying.*

11) *He responded to the show cause letter but his explanation was wanting. He failed to address the cause of the delay. On use of insulting language, he alleged that the estate Assistant approached him in a rude manner and for that reason he used an abusive language. He did not deny having used the abusive language to a person who was placed in authority.*

12) *The management convened a disciplinary meeting whereby the Claimant and the shop steward attended. He was properly represented as per the CBA provisions. He was given a chance to verbally defend his actions. After lengthy discussions his actions were found to be improper in the circumstances and he was dismissed from employment.*

The issues for determination therefore are;

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

The 1st issue for determination is whether the employment of the claimant was wrongful, unfair and unlawful. The parties come out with opposing positions on this.

The claimant in his written submissions reiterates his case that the termination of his employment was contrary to Section 40 of the Employment Act. He was relieved of his duties but not adequately enumerated as per the law and no notice of termination was issued. He therefore urges the court to declare the termination unlawful and that he was not remunerated in accordance with the law.

The respondent in her written submissions dated 23rd March, 2016 submits the case of lawful termination of employment in that the claimant was issued with a show cause letter and was taken through a disciplinary process which he ignored and chose to take his own cause in the matter. He was paid his terminal benefits on dismissal and therefore the fallacy of this claim.

The respondent's case outweighs that of the claimant on the veracity of the evidence adduced and presented. The evidence and case of the respondent overwhelms the claimant's by far. The claimant does not answer the respondent's case but insists on his. Inasmuch as this appears to be a case of your word against mine, it all tilts in favour of the respondent. I therefore find a case of lawful termination of the employment of the claimant and hold as such.

On the above finding of the 1st issue for determination, the 2nd issue is lost. The claimant would not be entitled to the relief sought having lost on a case of unlawful termination of employment.

I am therefore inclined to dismiss the claim with orders that each party bears their own cost of the claim. This answers all the issues for determination.

Delivered, dated and signed this **17th** day of **May 2016**.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Rugut instructed by Chepkwony & Company Advocates for the claimant.
2. Mr. Masese instructed by the Federation of Kenya Employers for the respondent.