



**REPUBLIC OF KENYA**

**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.151 OF 2015**

**(as consolidated with Cause No.149 of 2015, 150 of 2015 and 152 of 2015.)**

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

NICODEMUS OOKO ODHIAMBO.....CLAIMANT

VERSUS

JAMES FINLAYS KENYA LTD.....RESPONDENT

**JUDGEMENT**

This matter was originated vide a Memorandum of Claim dated 10th June, 2015. It does not disclose an issue in dispute on its face.

The respondent in a Statement of Defence dated 6th October, 2015 denies 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 was employed by the respondent. This was with effect from 2007 to 13th June, 2014 when he was unlawfully terminated with no payment of his dues.

It is the claimant's further case that this termination was unlawful in that;

- a) The claimant trade union was not informed of the intention to be dismissed nor was the claimant given opportunity to be heard.*
- 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.*

The claimant further avers that during the terms of his employment he was grossly underpaid having regard to the Regulation of Wages (General)

(Amendment) and then in force and also worked overtime, rest days and public holidays without pay.

He prays for;

a) *2 months pay in lieu notice*

*basic + house allowance*

*9024 + 1353 x 2 months*

*Kshs. 20,754*

b) *Service gratuity*

*22 days x yrs worked x basic/30days*

*22days x 12 years x 9,024/30*

*Kshs.79,411*

c) *Leave dues*

*21 days x yrs worked x basic + hse allow/30days*

*21 days x 12 yrs x 10,377/30 days*

*Kshs.87,166.8*

d) *Compensation for unfair termination*

*10,377 x 12 months*

*Kshs.124,524*

***TOTAL CLAIM***

***Kshs.311,855***

In the penultimate he 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 may deem fit to grant.*

The claimant's case is that he is a former employer of the claimant, he having been employed to perform the duty of plucking tea and was assigned employee No. 303781 and worked at Kaproret Estate.

It is the respondent's further case that the respondent has for several years undertaken tea plucking and uses different modes with different set tasks. These are hand plucking, shear plucking and machine tea harvesting. The same been on for a long time now and are utilized on a rotational basis depending on the weather and volume of produce.

The respondent's other case is that on 29th May, 2014 the respondent decided to allocate shear plucking to forty-one (41) employees who included the claimant. They were all briefed by the management and at the appropriate moment they reported to their working stations with an exception of the claimant and twelve (12) others. On 5th June, 2014, the claimant was allocated the duty of shear plucking but chose to

instead hand pluck. This was defiance and the estate manager engaged the claimant on the terms and conditions of employment and the consequences of indiscipline on his part. He however, refused to heed instructions and proceeded to the leaf shelter and demanded to weigh his leaves. When weighing was declined, he refused to obey instructions and sat around the leaf shelter and declined to go back to work.

It is the respondent's further case that on diverse dates between 6th June, 2014 and 10th June, 2014 the claimant was involved in similar cases of neglect of duty, absenteeism and defiance despite counsel by the management and his shop stewards.

On 11th June, 2014, a meeting was held between the estate management and the shop steward which meeting agreed on a report to work on 12th June, 2014 but again, the claimant declined to return to work as instructed forcing the respondent to issue a show cause letter. On 13th June, 2014, he appeared before a disciplinary committee and on failure to support his case, he was dismissed from employment. The union thereafter appealed against the decision of dismissal but this and the request for reinstatement were dismissed.

The respondent therefore submits a case for lawful termination and stands on this. The respondent further denies the need for notice to the claimant in a case of summary dismissal and also submits that he was paid for his leave days. This also applies to the terminal benefits now claimed.

This matter came to court variously until the 11th February, 2015 when it was consolidated with causes no.153 of 2015 and 154 of 2015 besides orders for a determination of the issues by way of written submissions. On 16th March 2016

Cause No.149 of 2015 and 150 of 2015 were consolidated into this series. This cause (151 of 2015), was appointed the lead case.

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 termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this. The claimant sustains and submits a case of wrongful, unfair and unlawful termination of employment whereas the respondent denies this.

The claimant in his written submissions dated 22nd February, 2016 reiterates his case that the termination of his employment was contrary to S. 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 does not furnish written submissions but in defence foments a case of lawful termination of employment in that the claimant was issued with a show cause letter and was taken through a disciplinary process where he was unable to offer a substantive defence to the issues raised by the respondent.

He was paid for untaken leave. The other limbs of the claim are untenable in law and therefore the fallacy of this claim.

The respondent's case outweighs that of the claimant's on the veracity of the evidence adduced. There is ample evidence of substantive and procedural fairness in dealing with the termination of employment of the claimant.

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 dissipates into nothingness. 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 clears all the issues for determination.

Delivered, dated and signed this 17<sup>th</sup> 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.