



**REPUBLIC OF KENYA**

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

**CAUSE NO. 144 OF 2015**

**ROBERT KINYUA KANAMPIU.....CLAIMANT**

**VERSUS**

**KIONYO TEA FACTORY CO. LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 9<sup>th</sup> June, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 31.08.2015 in person. He prayed for judgment against the respondent for:

- a. An order declaring termination of the claimant illegal and wrongful.
- b. An order for payment of all unpaid terminal benefits, underpayment and wrongful deduction of KRA TAX plus general damages for wrongful dismissal.
- c. Costs of the suit.

The respondent filed the response to the memorandum of claim on 23.09.2015 through Lucy Mwai & Company Advocates. The respondent prayed for an order dismissing the claimant's claim with costs.

The respondent employed the claimant sometimes in 2002 and on 2.01.2004 he was appointed to the position of Tea Collection Clerk. The claimant testified that by September 2012 he was on leave and he reported to work on 23.10.2012 at the end of his leave. His manager was absent so that he was not assigned duty but he opted to assist his workmate in the work of Tea Collection Clerk. By the letter dated 24.10.2012 he was deployed to the production department and he reported. He worked from 24.10.2012 to 28.10.2012. Effective 29.10.2012 the claimant testified that he was unwell because since 07.12.2010 he had a broken hand. The hospital prescribed light duty and the claimant handed the prescription to the Factory Unit Manager as advised by the Production Manager. The Factory Unit Manager directed that the claimant be assisted as per the prescription. That was sometimes on 30.10.2012. The claimant's evidence was that he was not assisted and that effective 30.10.2012 he was not at work because he was not assigned light duties.

The record shows that by the letter dated 3.01.2013 the respondent notified the claimant that he had been absent from duty without permission since 5.12.2012 and the claimant was asked to show cause why serious disciplinary action would not be taken against him. The claimant replied by the letter of 08.01.2013 and the respondent's letter of 8.01.2013 directed the claimant to report to the Production Manager with immediate effect for allocation of duties failure to which severe disciplinary action, including summary dismissal, would be taken against the claimant. By the letter dated 22.03.2013 the claimant wrote to the Factory Unit Manager lamenting that from 1.12.2012 to March 2013 he had not been allocated duties. The claimant stated in that letter that he had written and visited the office to be

assigned a better working place in view of his health but he had not been given an answer. He had visited the office on 19.03.2013 but he had not been given a clear answer. He requested to be released from the respondent if he was not going to be assigned light duties.

The respondent's letter of 23.03.2013 referred to the claimant's letters of 08.01.2013 and 22.03.2013 and reminded the claimant that the deployment to work at the factory would stand and the claimant's continued desertion of duty then at 3 months would lead to summary dismissal so that the letter served as the final warning.

By the letter dated 17.07.2013 the claimant was invited to attend staff disciplinary committee hearing on 18.07.2013 at 8.30am. The letter informed the claimant that he was entitled to be accompanied with a union representative. The meeting was held as scheduled and the claimant attended but not accompanied by the union representative. The claimant informed the meeting that he was not willing to work at the factory's production department as deployed because he had injured his hand in 2008 and again in 2011 as per the medical documents he had provided to the respondent's management. The claimant confirmed to the meeting that he had been given an option to choose where to work at the factory and he had chosen to work at the leaf count section but when another officer with a disability deployed at the section came back from leave, the claimant was moved to the withering section where he was to gather empty sisal bags together and then load them into the vehicle. Being dissatisfied with the assignment, the claimant walked away from duty. The minutes show that the claimant insisted that he would not work at the factory as deployed and he would not return to work if not deployed out of the factory because he had worked as a leaf collection clerk for over 10 years. At that point, the minutes show the claimant failed to give the meeting the best way forward and he abruptly left the meeting. The meeting decided that the claimant would be terminated from employment because he was not willing to continue in employment.

The letter conveying the termination was dated 19.07.2013. The termination was effective 19.07.2013 on account of the claimant being absent from duty without permission or lawful cause effective 05.12.2012. The letter stated that the claimant would be paid salary for days worked but not yet paid; pay in lieu of accrued leave pro-rata basis; and gratuity for years served as per the current CBA where applicable.

The dispute was subject of conciliation proceedings between the respondent and the claimant's union and the conciliation agreement dated 23.04.2014 resolved as follows:

- i. The grievant Robert Kinyua Kanampiu be paid Kshs. 21, 990.00 being one month salary in full and final settlement of his claim plus notice of two months' salary in lieu.
- ii. The dispute between the parties is thereby fully resolved.
- iii. That the amount be paid within two weeks from the date of the agreement.
- iv. The parties will always work together and hold consultative meetings to foster the prevailing industrial harmony.

The **1<sup>st</sup> issue** for determination is whether the claimant's termination was unfair. The claimant's case is that the contract of employment was that he would work as a Leaf Collection Clerk and deployment to the production department as a Factory Worker amounted to unfair termination of his contract. The court has considered the material on record and finds that the claimant had a valid grievance and once he was deployed out of the job of Leaf Collection Clerk, he was entitled to consider himself terminated from employment. The court finds that the respondent breached the contract of employment when he deployed the claimant away from the contractual position and job the parties had agreed. Indeed, the claimant made it clear at the purported disciplinary hearing that for as long as he would be deployed to the factory, he would not remain in employment. The court finds that the claimant had a genuine complaint against the respondent, the complaint was responsible and with foundation as envisaged in section 46(h) of the Employment Act, 2007. Under that section, the court returns that the reason for termination was an unfair reason as the termination was unfair because the claimant had a genuine complaint. In alternative and as submitted for the claimant, upon the deployment to the production department as a factory worker, the respondent by that conduct fundamentally breached the contract of employment under which the claimant was to serve as a Leaf Collection Clerk so that the court returns that the claimant was unfairly and constructively terminated from employment. The court finds that the issue of absenteeism without lawful

reason or permission was subsumed in the claimant's complaint but which the respondent for unexplained reasons chose not to address. In any event, the court finds that the respondent failed to show that it had taken deliberate steps to assign the claimant light duties as was prescribed by the hospital.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

1. The court returns that the claimant is entitled to the declaration that the termination was unfair.
2. The respondent has admitted that the claimant is entitled to **Kshs.22, 761.00** on account of wrongfully deducted and withheld tax. The court finds that the claimant is entitled accordingly.
3. The claimant has showed and the respondent does not deny that the claimant served for 11 continuous and complete years without a break. The evidence is that the claimant was paid 9 years and not 11 years for the service gratuity. The respondent has not given any good reason why the 2 initial years of service would not be eligible for payment of gratuity and the court returns that the claimant is entitled to be paid the unpaid gratuity for 2 years making **Kshs.43, 377.00** as per the claimant's submissions.
4. The court has considered the numerous shortcomings recorded against the claimant including smoking within tea leaf buying centre precincts, reported leaf losses attributable to the claimant and mixing of dates when the tea leaves were weighed and the court returns that despite the long service of over 11 years, the claimant contributed substantially to his being deployed from the position of Leaf Collection Clerk and therefore his constructive and unfair termination. The court has further considered that while resisting deployment away from the work of the Leaf Collection Clerk, the claimant nevertheless had initially condoned the deployment or otherwise breach of the contract by the respondent by accepting to serve at the production department until the other officer with disability reported back on duty. The court finds that such action on the part of the claimant was inconsistent with and tended to foster the otherwise unfair constructive termination. The court puts that claimant's contribution to his termination at 75% and awards the claimant 3 months' salaries in compensation under section 49(1) (c) of the Employment Act, 2007 making **Kshs.65, 970.00** at Kshs. 21, 990.00 per month.
5. As the claimant has substantially succeeded in his claim he is awarded costs of the suit fixed at **Kshs. 40,000.00**.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the contract of employment of the claimant by the respondent was unfair.
2. The respondent to pay the claimant **Kshs. 172, 108.00** by 01.08.2016 failing interest to be payable thereon from the date of the suit till full and final payment.

**Signed, dated and delivered** in court at Nyeri this **Thursday, 9<sup>th</sup> June, 2016**.

**BYRAM ONGAYA**

**JUDGE**