



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAKURU**

**CAUSE NO.296 OF 2013**

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION ..... CLAIMANT**

**V**

**XPRESSIONS FLORA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Kenya Plantation & Agricultural Workers Union (Union) sued Xpressions Flora Ltd (Respondent) on 3 September 2012 and the issue in dispute was stated as *wrongful terminal (sic) of employment of Aggrey Nyongesa Ochango and Robert Kipyegon Chepkwony* (Grievants).
2. A Response was filed on 30 October 2013.
3. Because the Grievants were dismissed at different times, the Court directed on 12 February 2015 that different subfolders be opened in respect of each cause of action.
4. On 10 November 2015, the Court fixed the Causes for hearing on 2 February 2016. The Union was directed to serve a hearing notice.
5. When the Cause came up for hearing, the Respondent sought an adjournment which was declined. The Court indicated it would give reasons in this judgment.
6. The reason advanced by the Respondent's advocate for seeking an adjournment was the Respondent was willing to enter into negotiations for an out of court settlement.
7. The Court rejected the request because the Cause had been mentioned severally and in most of those appearances, the Respondent had not been represented.
8. Secondly, if the Respondent was genuinely interested in an out of Court settlement, it ought to have reached out to the Union long before the hearing date.
9. The Cause proceeded to hearing on 2 February 2016, and the Grievants testified. The Respondent also called its Human Resources Manager.
10. The Union filed submissions on 2 March 2016 while the Respondent's submissions were

filed on 1 April 2016 (Union attempted to sneak in evidence in form of a collective bargaining agreement through the submission, a practice unknown in law).

11. The Court has considered the pleadings, evidence and submissions and adopted the issues as framed by the Union, to wit, *whether the dismissal of the Grievants were wrongful and unfair and*

*appropriate remedies.*

### **Whether dismissals were unfair**

#### **Aggrey Nyongesa Ochango**

*Lapse of contract or dismissal or dismissal?*

12. This Grievant was on a fixed term contract valid from 1 August 2012 to 1 August 2013. He had served previous fixed term contracts.

13. The Grievant went on annual leave from 13 July 2013 and according to the leave form, he was to resume duty on 5 August 2013.

14. The evidence on record is that on resuming duty on 5 August 2013, the Grievant could not access the work place because his clocking card had been deactivated.

15. When he inquired from the Personnel Office, he was informed that he had been dismissed. No letter or reasons was given.

16. The Respondent's witness on her part testified that this Grievant's contract had lapsed and his name was removed from the system.

17. That the Grievant's contract was coming to an end is common, but the Court must examine whether it was the intention of the parties to bring the relationship to an end.

18. There are tell-tale signs that the parties and more so the Respondent did not intend to bring the contract to an end or put differently, that it evinced an intention not to extend or renew the contract.

19. And in this respect, the conclusion can be inferred from the fact that the leave application form which was approved by the Respondent indicated expressly that the Grievant was to resume duty on 5 August 2013.

20. Secondly, there was no indication from the Respondent that the Grievant was proceeding on terminal leave pending lapse of contract.

21. Another sign that there was an expectation that the relationship would continue was the fact that the Respondent had continuously renewed and or extended the Grievant's previous contracts.

22. The Grievant had a legitimate expectation to renewal or extension of contract, and in so far as the Respondent did not indicate whether renewal or extension was discretionary on its part, by purporting that the contract lapsed, it was stealing a march on the Grievant, in an unfair way.

23. The Respondent's conduct was an unfair labour practice which amounted to a dismissal and the Court so finds.

#### **Robert Kipyegon Chepkwony**

### *Abscondment or dismissal?*

24. The case advanced by the Respondent was that this Grievant absconded duty without lawful explanation from May 2013, and that he was informed through a letter dated 27 May 2013 that his name had been removed from the payroll.
25. The Grievant on the other hand contended that he was not allowed to access the workplace by guards on 23 May 2013 and attempts to meet the management were not successful.
26. An employee who is absent from work without permission or lawful cause is susceptible to dismissal, but in terms of section 41 of the Employment Act, 2007, an employer ought to conduct a hearing or at the very least attempt to reach the employee to explain the absence.
27. An employer may also issue an ultimatum.
28. The Grievant's testimony that the guards refused him entry on 23 May 2013 was not addressed or responded to by the Respondent.
29. There is therefore a probability that the Grievant was denied entry.
30. Even accepting that he had been absent without permission or other lawful cause, the Respondent should have allowed him in and listened to his explanations.
31. The Court therefore reaches the conclusion that this Grievant was dismissed without compliance with the statutory requirements outlined in section 41 of the Employment Act, 2007.

### **Appropriate remedies**

#### ***Reinstatement***

32. Reinstatement in the circumstances of the present case would not be an appropriate remedy despite the Grievants showing an interest in reinstatement. This is due to the time lapse.

#### ***Terminal benefits***

33. In the alternative, the Grievants sought terminal benefits (pay in lieu of notice and gratuity).

#### ***Gratuity***

34. In terms of clause 24 of the Collective Bargaining Agreement in place, gratuity is payable when an employee has more than 5 years of service.
35. Both Grievants had less than 5 years of service and are ineligible for gratuity.

#### ***Pay in lieu of notice***

36. However, in terms of section 35(1)(c) and 36 of the Employment Act, 2007, the Grievants are entitled to 1 month wages in lieu of notice as they were paid by the month.

#### ***Compensation***

37. Aggrey Nyongesa served for about 2 years and considering the length of service, the Court would award the equivalent of 3 months gross wages as compensation in terms of section 49(1)(c) of the Employment Act, 2007.
38. Robert Kipyegon served for about 4 years and considering the length of service, the Court would

award the equivalent of 5 months gross wages as compensation.

39.The contracts produced indicated the Grievants wages.

### **Conclusion and Orders**

40.The Court finds and holds that the Grievants were unfairly dismissed and awards them, and orders the Respondent to pay them

#### ***Aggrey Nyongesa***

(a) 1 month pay in lieu of notice	Kshs 4,495/-
(b) 3 months wages compensation	Kshs 18,885/-
<b>TOTAL</b>	<b>Kshs 23,380/-</b>

#### ***Robert Kipyegon***

(a) 1 month pay in lieu of notice	Kshs 5,519/-
(b) 5 months wages compensation	Kshs 36,595/-
<b>TOTAL</b>	<b>Kshs 42,114/-</b>

41.The Grievants are entitled as of right to Certificates of Service which the Respondent should issue within 14 days.

42.Because of the on-going social partnership between the parties, each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 22<sup>nd</sup> day of July 2016.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Union Mr. Khisa, Assistant Secretary General, Kenya Plantation & Agricultural Workers Union

For Respondent Mr. Mukira instructed by Maangi, Otieno & Co. Advocates

Court Assistant Nixon