



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

**AT KERICHO**

**CAUSE NO.144 OF 2016**

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

**PHILIP KIBITOK SITIENEI.....CLAIMANT**

**VERSUS**

**NANDI TEA ESTATES LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Statement of Claim dated 27th September, 2016. The issues in dispute are therein enlisted as;

1. *Unlawful and unfair termination.*
2. *Compensation for injuries in the course of employment.*

The respondent in a Defence to Claim dated 6th October, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was engaged by the respondent as a Tea Plucker in January, 2016. He served diligently until 1st June, 2016 when his employment relationship was terminated by way of dismissal. He avers that this was unfair and unlawful for the following reasons;

- a) *No opportunity to be heard was accorded.*
- b) *No notice of misconduct was given prior to the dismissal.*
- c) *No misconduct existed.*
- d) *No opportunity to attend a hearing in the presence of a fellow employee of his choice was accorded or his union officials.*
- e) *No warning over misconduct was given.*
- f) *The union was not informed of the intended termination.*
- g) *The labour office was not notified of the termination.*

*h) The termination was motivated by reasons of injuries sustained in the course of employment which was not a fair reason.*

It is the claimant's further case that he was subjected to unfair labour practices in contravention of Article 41 of the Constitution in that the dismissal resulted from acts of injury in the cause of employment. He also submits that the respondent was duty bound by law and the implied terms of the employment contract to;

*10. a. Provide a safe work environment.*

*b. Provide protective gear to the claimant.*

*c. Clear the surrounding work environment in order to avoid big hedges that could conceal any dangerous animals.*

*d. Fence off the work place in order to avoid any dangerous and stray animals from attacking the claimant and any other employee.*

*11. The claimant avers that as a consequence of the breach of duties foregoing by the respondent he was beaten by a wild dog on the 18<sup>th</sup> March, 2016 while on duty and sustained the following injuries:-*

*a) Two bite wounds on the lateral aspect of the right leg which is now septic with some areas of necrosis.*

*b) In ability to effectively use the right lower limbs as the wounds bleed easily.*

Further,

*12. The claimant as a consequence of the foregoing has suffered loss and damage for the reasons:-*

*a) He would require to undergo further treatment of the septic/necrotic wounds which will involve surgical debridement, soft tissue and skin grafting.*

*b) He will be required to complete the anti-rabies vaccine.*

*13. The claimant prays for general costs of future treatment of Kshs.150,000 and special damages for the injuries sustained.*

#### *PARTICULARS OF SPECIAL DAMAGES*

*a) Medical report – 6,000*

He prays as follows;

*a) A declaration that his termination from employment was unfair and unlawful.*

*b) For reinstatement to employment coupled with payments of salaries from the date of dismissal until reinstatement.*

*c) The claimant as an alternative but without prejudice to the foregoing he claims:-*

*i) 1 month salary in lieu of notice - Kshs.10,052*

*ii) 12 months salary as compensation for unfair and*

**Kshs.130,676**

d) Damages for breach of the right to fair labour practices.

e) General damages, special damages and costs of future medical treatment.

f) Costs and interests.

The respondent's case is that there was never a termination of the employment of the claimant. It is her case that the claimant deserted duty and left employment on his own volition after he fell sick of a wild dog bite and totally failed to report to work on 1st August, 2016. He has never dismissed, sacked and or terminated whichever is the term but absconded or deserted duty on 31st July, 2016 and is guilty of desertion in violation of Collective Bargaining Agreement (CBA) between the union and company binding on the claimant.

The respondent's further case is a denial of liability for salary in lieu of notice or at all and calls the claimant to strict proof thereof. She also denies liability for the injuries of the claimant as follows;

8. *“THAT, the respondent is a stranger to the allegation that the claimant was bitten by wild dogs as alleged in the claim and that the respondent is not liable for such wild claims by wild dogs.*

She *in toto* denies liability and prays that the claim be dismissed with costs.

The matter was heard on 28th October, 2016 whereby the claimant gave a brief outline of his claim. The parties thereafter agreed for a determination by way of written submissions.

The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent.
2. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this suit?

The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. This is a contentious issue in this cause with the parties taking opposing positions. The claimant puts in a case of unprocedural and unlawful termination which fact is denied by the respondent.

It is the respondent's further case that the claimant was never terminated from employment but instead absconded duty after she fell sick after a wild dog bite and failed to report to work on 1st August, 2016 and is guilty of misconduct. She *in toto* denies dismissal and insists, avers and submits a case of desertion of duty by the claimant.

The claimant's list of documents comprises of the following;

1. 2 Demand letters.
2. Replies to demand letters.
3. Treatment note dated 26<sup>th</sup> May, 2016.

4. Treatment note dated 29<sup>th</sup> March, 2016.
5. Treatment note dated 16<sup>th</sup> April, 2016.
6. Treatment note dated 26<sup>th</sup> March, 2016.
7. Treatment note dated 8<sup>th</sup> March, 2016.
8. Medical report dated 26<sup>th</sup> July, 2016.
9. Receipt for medical report dated 26<sup>th</sup> July, 2016.
10. Pay statement for January, 2016 and May, 2016.
11. Identity card.

So far, so good.

The claimant in his written submissions dated 7th November, 2016 eloquently does and reiterates his case with a claim of Kshs. 150,000.00 and Kshs.800,000.00 as general damages for injuries sustained. I however note and observe that beyond the claim, the claimant does not tender any evidence in support of his case. He ably sets out and documents a case of treatment for a wild dog bite but fails to proffer any nexus between the dog bite, treatment and this claim. He does not adduce evidence to connect the relationship between his sickness, treatment and termination, if any, of his employment. The list of documents above do not come to his aid. This claim must therefore fail.

The claimant had a duty of proving his claim on a balance of probabilities. This is more so with the blatant denial of termination by the respondent. He chose not to. I therefore find a case of no termination of the employment of the claimant by the respondent. And this answers the 1st issue for determination.

With a finding of a case of no termination of employment, the other issues for determination abate and are not worthy of consideration.

I am therefore inclined to dismiss this claim with an order that each party bears their own costs of the claim.

Delivered, dated and signed this 8th day of December 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Ms Soita holding brief for Kigamwa instructed by Ombua Kigamwa & Company Advocates for the Claimant.
2. Mr. Koko holding brief for Kitur instructed by S.K Kitur & Company Advocates for the Respondent.