



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 372 OF 2014**

**CONSLATA WITAMBIRA LWICHI**

**CLAIMANT**

v

**HARVEST LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Conslata Witambira Lwichi (Claimant) sued Harvest Limited (Respondent) on 14 August 2014 alleging unfair termination and seeking one month pay in lieu of notice, leave earned but not taken/pro rata leave, days worked, travelling allowance, compensation, all totaling Kshs 1,521,192/- and a certificate of service.
2. The Respondent filed a Response on 19 September 2014. The Claimant filed a Response to Defence on 24 September 2014, and the Cause was heard on 17 February 2015.

**Claimant's case**

3. The Claimant's case is that she was employed by the Respondent on 20 March 2013 as Assistant Manager, Post Harvest. The contract of employment however was dated 2 November 2013.
4. On the separation, the Claimant stated on 9 April 2014, she received through email a show cause letter which she responded to through email as well but there was no feedback.
5. She also stated that on 15 July 2014, she reported at 7.30 am for duty as usual to enable her sign off a truck to take goods to the airport.
6. At about 8.00am, she was called to the office where she found the Respondent's General Manager, Post Harvest Manager and Human Resources Assistant Manager. The General Manager then told her that he was not comfortable working with her and he gave her a termination of employment letter dated 9 July 2014 indicating her employment had been terminated effective 15 June 2014 (a month earlier).
7. The General Manager asked her to hand over and clear and that she was escorted out of the Respondent's premises.
8. As to the reasons for the termination, the Claimant stated that this could be because of bad blood after her relationship had ended with the General Manager in 2004. She stated that she was not given notice or paid in lieu and that she was not paid her dues.
9. In cross examination, the Claimant stated the show cause letter related to allegations of missing flowers to which she responded.
10. She also stated that she resigned from the Respondent in 2004 after the loss of her husband but was later re-engaged.

**Respondent's case**

11. The Respondent's pleaded case is that the Claimant's employment was terminated because of insubordination and failure to perform and therefore the termination of employment was justified and in accordance with the Employment Act, 2007.
12. The Respondent called its Post Harvest Manager to testify. She stated that the Respondent had received complaints from the General Manager and Accounts Office about quality and variance between what was produced, sold and the stock in one of the farms where the Claimant was in charge.
13. She also stated she visited the farm for a week to help but things continued to go wrong and so the Claimant was suspended but on pay.
14. The witness confirmed that the Claimant was issued with a show cause letter through email on 9 April 2014, and the allegations against her were outlined in the letter but she did not respond and was consequently dismissed, after a meeting.
15. During cross examination, the witness stated that email correspondence was an official method of communication and that she had several emails from the Respondent to the Claimant but none from the Claimant to the Respondent.
16. She also stated that a disciplinary hearing was held on 15 July 2014 and that she came with the termination letter dated 9 July 2014 from Nairobi. The effective date of termination of employment was 15 June 2014.

### **Issues for determination**

17. The Court has considered the pleadings, testimony, documents and the submissions and identified the issues for determination as, *whether there was unfair termination and appropriate remedies.*

### **Unfair termination**

18. The Claimant was paid by the month. Pursuant to section 35(1)(c) of the Employment Act, 2007 she was entitled to 28 days written notice of termination of employment (by virtue of clause 10(a) one month written notice or pay in lieu of notice was provided for).
19. The Claimant was not dismissed either through contractual or statutory provision and therefore she was entitled to written notice. The same was not given and the Court finds that the Claimant has proved there was unfair termination of employment.

### **Procedural fairness**

20. By dint of section 41 of the Employment Act, 2007 an employee is entitled to a hearing before termination of employment based on grounds of *misconduct, performance or physical incapacity.*
21. The hearing envisaged by section 41 of the Act can be carried out through correspondence or through an oral hearing.
22. The Claimant was issued with a show cause letter dated 9 April 2014. The show cause letter set out the allegations the Claimant had to respond to. Her explanations were to be made before 11 April 2014.
23. The Claimant admitted she responded to the accusations but there was no feedback until her employment was terminated in July 2014.
24. According to the Claimant, no hearing was conducted. But the Respondent's witness testimony was that a hearing was held on the morning of 15 July 2014.
25. The Respondent's witness testimony as regards the hearing is that she came for the hearing or meeting with the termination of employment letter from Nairobi. The letter was dated 9 July 2014 and the effective date of termination was 15 June 2014.
26. The logical inference from the letter is that a decision had been taken to terminate the employment of the Claimant on or before 15 June 2014. That decision was reduced into writing on 9 July 2014 and therefore any purported meeting or hearing on the morning of 15 July 2014 was a sham. It was a camouflage.
27. The meeting of 15 July 2014, in the Court's view did not come close to what would meet the requirements of section 41 of the Employment Act, 2007.

## **Substantive fairness**

28. An employer is also under a statutory obligation to prove the reasons for termination of employment (section 43 of the Employment Act, 2007) and that the reasons are valid and fair reasons (section 45 of the Act).
29. The letter terminating the Claimant's employment made reference to *issues touching on responsibilities entrusted to you and the laid down Company Standard Operating Procedures... The Standard Operating Procedures continuing being flouted by you resulting into inaccurate and therefore misleading data being forwarded to Headquarters on several occasions.*
30. These are the *reasons* the Respondent was expected to prove and prove as valid and fair reasons.
31. The Respondent did not prove what Standard Procedures were in place. The procedures flouted by the Claimant were not demonstrated. No iota of the misleading data sent to headquarters by the Claimant or sanctioned by her was proved or presented before Court.
32. The Respondent may have had a good case but it dealt with its case casually. It failed to prove the reasons for the termination of the Claimant's employment or that the reasons were valid and fair reasons.

## **Appropriate relief**

### ***Days worked and not paid***

33. The Claimant sought Kshs 57,692/- under this head. The Respondent, through the termination of employment letter offered to pay the Claimant net salary for July 2014.
34. According to the Respondent's exhibit 1, the amount was Kshs 48,387/-.
35. The Claimant is entitled to earned wages and the Court would award her Kshs 48,387/- as tabulated by the Respondent who has the experience in calculating wages.

### ***One month pay in lieu of notice***

36. The Respondent had offered the Claimant Kshs 100,000/- being one month pay in lieu of notice. She is entitled to this pursuant to the contract and statute.

### ***Severance pay***

37. The Claimant sought Kshs 50,000/- as severance pay. The case was not presented as one of redundancy. Severance pay is inapplicable.

### ***Leave earned and pro rata leave***

38. Under this head, the Claimant sought Kshs 86,667/- and Kshs 23,333/- respectively. The Respondent had offered Kshs 134,615/- and the Court would accept its calculations and award Kshs 134,615/-.

### ***Travelling allowance***

39. The contract of employment provided for leave traveling allowance of Kshs 3,500/- per year. The Court would find in favour of the Claimant on this head.

### ***12 months compensation***

40. The Claimant has succeeded in her claim for unfair termination. One of the primary remedies is the equivalent of not more than 12 months gross wages as compensation.
41. The Claimant served the Respondent for slightly over a year. Considering the length of service, the Court would award the equivalent of 2 months gross wages assessed as Kshs 200,000/- (based on the wage in the May 2014 pay slip).

## ***Certificate of Service***

42. This is a statutory right of every employee and the Respondent should issue one to the Claimant forthwith.

## **Conclusion and Orders**

43. The Court finds and holds that the termination of the employment of the Claimant was unfair and awards her and orders the Respondent to pay her

- |                                    |                |
|------------------------------------|----------------|
| a. Days worked                     | Kshs 48,387/-  |
| b. One month pay in lieu of notice | Kshs 100,000/- |
| c. Outstanding leave               | Kshs 134,615/- |
| d. 2 months wages compensation     | Kshs 200,000/- |

TOTAL                    **Kshs 483,002/-**

44. Claimant to have costs of the Cause.

**Delivered, dated and signed in Nakuru on this 17<sup>th</sup> day of April 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mr. Chege instructed by Kanyi, Koge & Co. Advocates

Nixon Raiback Court Assistant