



**REPUBLIC OF KENYA**

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

**CAUSE NO. 185 OF 2014**

**(Originally Nairobi Cause No. 921 of 2012)**

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

**v**

**MARIDADI FLOWERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Kenya Plantation & Agricultural Workers Union (Union) commenced legal proceedings against Maridadi Flowers Limited (Respondent) on 31 May 2012, and the issue in dispute was stated as

*unfair, wrongful dismissal of Ms. Elizabeth Muthoni Mukuria P/No. 3755-Office Assistant and Refusal to pay terminal benefits to PAUL Ndiga Nyambura P/No. 3326.*

2. The Respondent filed a Memorandum of Response and Set –Off on 22 August 2012.

3. On 3 June 2014, Mbaru J ordered that the Cause be transferred to Nakuru for hearing and determination.

4. The Cause was heard on 17 March 2015. Both Grievants testified and the Respondent called 2 witnesses. The Union filed its submissions on 7 April 2015. The Respondent was directed to file submissions before 22 April 2015, but it filed the same only on 20 May 2015.

5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Collective Bargaining Agreement between the Union and Respondent applied to the Grievants, whether the termination of employment of Elizabeth Muthoni Mukuria was unfair, whether Grievants owe Respondent pay in lieu of notice and appropriate remedies.*

6. The Court will refer to Elizabeth Muthoni as the 1<sup>st</sup> Grievant and Paul Ndiga as the 2<sup>nd</sup> Grievant.

**Whether the Collective Bargaining Agreement between the Union and Respondent applied to the Grievants**

7. The reliefs sought by the Grievants were primarily anchored on the provisions of a Collective Bargaining Agreement signed between the Agricultural Employers’ Association (of which the Respondent is a member) and the Union.

8. The Respondent contended that the Grievants were occupying managerial positions and hence were not covered by the Collective Bargaining Agreement; they were excluded from membership of the Union.
9. The 1<sup>st</sup> Grievant was an Office Assistant while the 2<sup>nd</sup> Grievant was an Irrigation and Fertigation Controller.
10. A Collective Bargaining Agreement applies and covers at the first instance, those employees who are members of the Union. These employees signify their membership of the Union by signing Form S which is then forwarded to the employer.
11. Pursuant to section 59(3) of the Labour Relations Act, the terms and conditions agreed in a collective bargaining agreement become incorporated into the individual employee's contract of employment.
12. No evidence was produced to show that any of the Grievants were members of the Union. Membership cards were not produced. There was no suggestion that the Grievants were making monthly contributions to the Union. The pay slips produced did not have particulars of any deductions towards the Union.
13. Further, the copy of the Collective Bargaining Agreement produced in Court did not have the job category of Office Assistant or Irrigation and Fertigation Controller.
14. The terms of a collective bargaining agreement also bind all unionisable employees of an employer whether they are members of the Union or not. This application is through the intervention of the statute and more specifically, section 59(1) (b) of the Labour Relations Act.
15. The Court therefore must examine whether the Grievants were unionisable employees.
16. A unionisable employee is defined in the Labour Relations Act as *employee eligible for membership of (that) trade union*.
17. Although the Union did not demonstrate that the Grievants were unionisable, generally a reading of Articles 36 and 41(2) (c) of the Constitution leave no doubt that there are no constitutional limits or restrictions as to which category of worker, manager or junior, may join a Union.
18. In consideration of this history of industrial relations, the category of employees' covered are ordinarily set out in a recognition agreement. The recognition agreement would generally outline the categories of employees covered and those who are excluded because of the confidentiality/responsibility of their duties.
19. Although the Respondent was granted leave to produce a recognition agreement between the parties herein, no such recognition agreement was produced. Because it was the Union asserting the applicability of the collective bargaining agreement to the Grievants, the Court would have expected it to produce the recognition agreement.
20. But the Court is alert to the fact that industrial relations in Kenya have always involved social partners and the State in what is referred to as tripartism.
21. In this regard the partners mutually agreed in a document called the Industrial Relations Charter that certain categories of employees, because of the nature of their duties would not be unionisable.
22. The parties did not make any reference to the Industrial Relations Charter at all or produce a copy.
23. Considering the way the case was prosecuted and the material produced, the Court is unable to determine whether the Grievants were unionisable and or excluded from enjoying the benefits of the Collective Bargaining Agreement produced herein. Their claims herein therefore cannot be determined on the basis of the Collective Bargaining Agreement but on their individual contracts and the law.

## **Whether termination of employment of Elizabeth Muthoni Nyambura was unfair**

24. Elizabeth Muthoni Nyambura's pleaded case was that she was unfairly, unlawfully and wrongfully dismissed on 13 February 2012 contrary to the provisions of section 41, 43, 45 and 46 of the Employment Act, 2007.

25. The Respondent's pleaded case was that Elizabeth Muthoni was not dismissed but left the work place voluntarily and without notice.

26. In testimony, the 1<sup>st</sup> Grievant stated that on 13 February 2012, she reported to work as usual. In the course of the morning, the Human Resources Officer asked her and a colleague if they knew who had leaked information that an employee called Esther Juma had been dismissed. They both denied knowledge after which the Human Resources Officer told her she was not ready to continue working with her. At this point, the Administrator, who was also present, told her the action amounted to gross misconduct.

27. The 1<sup>st</sup> Grievant also stated that she was not afforded an opportunity to be heard and that she reported to the Labour Officer who recommended she be paid her dues.

28. During cross examination, the 1<sup>st</sup> Grievant stated that her duties included typing of letters (termination) and that she was not allowed to disclose such letters to others.

29. She also stated that she did not know that Esther Juma would be dismissed on 13 February 2012, and that she did not see the dismissal letter in the computer or send it from the computer in the Accounts Office to the computer in the office she was working.

30. The 1<sup>st</sup> Grievant also denied informing one Esther Kamau Haki about the letter dismissing Esther Juma.

31. She further stated that she did not say she wanted to quit and stated she was not issued with a dismissal letter.

32. In re-examination, the 1<sup>st</sup> Grievant stated that they shared a computer and log-in did not require a password. Similarly, the computer in the Accounts office did not require a password.

33. The Respondent's first witness was its Human Resources Manager. She stated that on the material day, Esther Juma went to her office and asked her whether she (Esther Juma) could start clearing but when she sought an explanation, Esther Juma offered none. The witness therefore went to the Office Assistants' office with the Administration Manager and sought clarifications on whether they had told Esther Juma about her dismissal letter, and Esther Haki told her that she had been shown the letter by the 1<sup>st</sup> Grievant.

34. When she confronted the 1<sup>st</sup> Grievant about forwarding the dismissal letter through email to the computer in the Office Assistants' office, she admitted and then walked out and did not report to work the next day. On 15 February 2012, she received a letter from the Labour office.

35. In cross examination, the witness stated that although the computer from which the dismissal letter was emailed was accessible to many people, it is the 1<sup>st</sup> Grievant who emailed a copy of the letter.

36. The Respondent's second witness was Esther Haki Kamau. She stated that the 1<sup>st</sup> Grievant went to the Accounts Office on 13 February 2012 to prepare a packing list and when the 1<sup>st</sup> Grievant came back, she told the witness that she had forwarded something through email and the witness should not tell anybody else. It was Esther Juma's dismissal letter. The witness also stated that the 1<sup>st</sup> Grievant informed her she could not email the witness' dismissal letter.

37. The witness also stated that she informed Esther Juma about the dismissal letter after which she (Esther Juma) went to confront the Human Resources Manager. When the 1<sup>st</sup> Grievant was confronted, she got annoyed and left.

38. The Court has carefully considered the versions given by both sides.

39. The Respondent's second witness testimony that the 1<sup>st</sup> Grievant told her she had emailed something (dismissal letter) was not challenged or controverted.

40. Her further testimony that the 1<sup>st</sup> Grievant got agitated and left was also not controverted or challenged. This testimony corroborated the testimony of the Respondent's first witness that the 1<sup>st</sup> Grievant left work after the confrontation over the email.

41. It is not disputed that the 1<sup>st</sup> Grievant reported to the local labour office and a letter dated 15 February 2012 was addressed to the Respondent.

42. In complaints of unfair termination of employment/wrongful dismissal, the Employment Act, 2007 has provided the evidential burden to be discharged by an employee before the employer is called upon.

43. The burden placed upon employees is set at a very low threshold. It is located in section 47(5) of the Employment Act, 2007 and provides

***For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer (emphasis mine).***

44. The 1<sup>st</sup> Grievant in the instant case has failed to discharge the very low threshold burden to prove that an unfair termination of employment or wrongful dismissal occurred. The 1<sup>st</sup> Grievant simply walked away in a huff.

45. The Court therefore finds that the Respondent did not unfairly terminate the employment of the 1<sup>st</sup> Grievant.

#### ***Whether Grievants owe Respondent one month pay in lieu of notice and any other liabilities***

46. The 1<sup>st</sup> Grievant walked out without giving the requisite notice. The appointment letter provided for separation by giving one month written notice or pay in lieu of notice.

47. The Respondent is therefore entitled to Kshs 16,200/- being the equivalent of one month basic pay as pay in lieu of notice.

48. The 2<sup>nd</sup> Grievant resigned with immediate effect. His appointment letter also provided for one month notice of termination of employment. None was given.

49. In the circumstances, he owes the Respondent Kshs 20,000/- as one month pay in lieu of notice and the liabilities should be offset from any dues payable.

#### **Appropriate remedies**

##### ***Compensation***

50. The Court has reached the conclusion that the 1<sup>st</sup> Grievant has failed to prove there was unfair termination of employment.

51. Compensation, which is one of the primary, though discretionary remedies where the Court finds unfair termination of employment, is therefore not available to her.

52. The 2<sup>nd</sup> Grievant did not allege unfair termination.

### ***Contractual/statutory entitlements***

53. However, there are other entitlements which accrue to employees by virtue of the employment relationship and they accrue irrespective of the manner of separation because of contractual or statutory provisions. On this basis, the Court will examine the remaining heads of claim sought by the Grievants.

### ***Gratuity***

54. The Court has reached a conclusion that there is no material to conclude the Grievants were covered by the Collective Bargaining Agreement. The Grievants did not disclose any other contractual or statutory basis for this relief and it is declined.

### ***One way travelling allowance***

55. If this head of claim was predicated on the Collective Bargaining Agreement, it also fails for reasons discussed under gratuity above.

### ***Underpayment of wages***

56. No evidence was led on this relief and it is declined. Even quantification was not given and the Court cannot pluck figures from the air and award the Grievants.

### ***Leave***

57. The 1<sup>st</sup> Grievant's testimony was that she went on annual leave in 2011 during the duration of employment.

58. According to the Respondent's letter dated 16 March 2012, the 1<sup>st</sup> Grievant had 91 outstanding leave days which was computed as equivalent to Kshs 49,140/-.

59. The 1<sup>st</sup> Grievant did not dispute the computations or tender any other computations. The Court finds she is entitled to Kshs 49,140/-.

60. The Respondent tabulated the 2<sup>nd</sup> Grievant's entitlement as 76 leave days computed into cash entitlement of Kshs 50,667/-.

61. The 2<sup>nd</sup> Grievant did not provide any other calculations and he is entitled to Kshs 50,667/-.

### ***Days worked and house allowance***

62. The Respondent calculated the 1<sup>st</sup> Grievant's February 2012 wages as Kshs 7,020/- and house allowance as Kshs 1,800/- She did not offer any rival figures and the Court finds she is entitled to Kshs 8,820/-.

63. As regards the 2<sup>nd</sup> Grievant, the Respondent calculated his wages and house allowance for February 2012 as Kshs 3,333/-. He is entitled to the same.

### ***Overtime***

64. The 1<sup>st</sup> Grievant's dues as calculated by the Respondent included Kshs 976/- as overtime to which she is entitled.

***Pay in lieu of Notice***

65. In light of the finding that there was no termination of employment by the Respondent, this head of claim is not available.

***Certificate of Service***

66. This is a statutory right and the Respondent should issue one to the each Grievant within 7 days.

**Conclusion and Orders**

67. The 1<sup>st</sup> Grievant's claim on unfair termination of employment fails and the same is dismissed.

68. However, the Courts finds and holds that the 1<sup>st</sup> Grievant was statutorily and contractually entitled to and the Court awards her

(a) Leave	Kshs 49,140/-
(b) February 2012 wages	Kshs 8,820/-
(c) Overtime	Kshs 976/-
<b>TOTAL</b>	<b>Kshs 58,936/-</b>

69. The Respondent deposited Kshs 56,936/- with the Labour Officer. In computing the amount due, consideration should be made of the amount deposited and the set off of Kshs 16,200/- being one month pay in lieu of notice which should also be deducted from the total award.

70. The Court also finds and holds that the 2<sup>nd</sup> Grievant is entitled to and the Court awards him

(a) Wages for February 2012	Kshs 3,333/-
(b) Pending leave	Kshs 50,667/-
<b>TOTAL</b>	<b>Kshs 54,000/-</b>

71. From the award, one month pay in lieu of notice of Kshs 20,000/- and any balances owing to the Saccho as demonstrated in the January 2012 pay slip should be deducted.

72. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 22<sup>nd</sup> day of May 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant  
Agricultural Workers Union

Mr. Muli, Legal Officer, instructed by Kenya Plantation &

For Respondent

Mr. Mwangi instructed by Mohamed Muigai Advocates

Court Assistant

Nixon Raiback