



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

**AT NAIROBI**

**CAUSE NO. 1547 OF 2013**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION.....CLAIMANT**

**VERSUS?**

**HARVEST LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant's claim was filed on 26<sup>th</sup> September 2013 seeking resolution of a dispute framed as the wrongful dismissal of Agnes Atsiaya and Margaret Mbula. The Claimant pleaded that the putative claimants were employed at the Respondent's flower farm in Athi River on diverse dates. Agnes was employed on 1<sup>st</sup> February 2000 earning Kshs. 8,804 plus housing allowance of Kshs. 2837/- at time of her termination while Margaret was employed on 5<sup>th</sup> July 2002 earning 7,265/- plus housing allowance of Kshs. 1,970/- and both worked as bunchers in the grading hall at the time of their termination. The Respondent issued them with letters of termination on 11<sup>th</sup> March 2011 on grounds of insubordination. Notice was paid and the grievants were dissatisfied and the dispute was reported to the Minister for Labour who appointed a conciliator. Parties did not agree and a certificate of disagreement was issued on 18<sup>th</sup> March 2013. The Claimant averred that the insubordination was not documented and no warning letters were issued and that the termination was contrary to Section 43 of the Employment Act. The Claimant thus sought payment of one year compensation plus the gratuity for years worked as well as costs of the suit.
2. The Respondent filed a Memorandum of Defence on 20<sup>th</sup> November 2013. The defence was that the grounds for termination of the services of the grievants was reasonable and that the putative claimant accepted the termination as it was their insubordination that made their dismissal inevitable. The Respondent averred that the putative Claimants refused to sign a disciplinary form that required them to answer to the claims or charges against them. The Respondent pleaded that their actions were a violation of the employment terms and the Employment Act and their claims are unjustified. The Respondent thus prayed that the Claimant's prayers be dismissed with costs.
3. The parties proposed to dispose of the matter by way of written submissions in line with Rule 21 of the Industrial Court (Procedure) Rules 2010. The Claimant filed written submissions on 27<sup>th</sup> May 2015 while there were none filed by the Respondent. The Claimant submitted that the grievants were both terminated on the same day for allegedly failing to sign a disciplinary form after failing to follow instructions on bunching. The Claimant submitted that under Section 41 of the Employment Act the employer was required prior to termination to explain to the employee

the reason the employer was contemplating dismissal and the employee is entitled to have another employee or shop floor union representative present during the explanation. The Claimant submitted that the Respondent had not demonstrated that this was done and relied on the case of **Shankar Saklani v DHL Forwarding (K) Limited [2012] eKLR** on procedural fairness and the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** for a definition of insubordination. The Claimant also relied on the decision in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**. The Claimant submitted that the denial of the grievants of the cardinal right to natural justice which requires that no one should be condemned unheard led to a loss of employment wrongfully.

4. The Employment Act has provisions on termination. Section 41 of the Act provides as follows:-

41. (1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

5. The Respondent was duty bound to lay the accusations against the putative Claimants and hear their response in the manner prescribed by law. Failure to do so rendered their dismissal unlawful and unfair in the circumstances. The letters of termination indicated that service pay was to be computed. None of the parties indicated whether this was paid alongside the notice. In the premises, the Court having found that the dismissal was unlawful orders compensation as follows:-

- a. For Agnes Atsiaya compensation for unlawful termination capped at 6 months Kshs. 67,146/-
- b. For Margaret Mbula compensation for unlawful termination capped at 6 months Kshs. 55,410/-
- c. The grievants to each receive a Certificate of Service

d. Respondent to pay costs of the suit

f. In terms of Section 49 of the Employment Act, the sums in 5(a) and (b) are subject to statutory deductions.

Orders accordingly.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of July 2015**

**Nzioki wa Makau**

**JUDGE**