



**Miheso v Kaimosi Tea Estate Limited (Cause 346 of 2013)  
[2014] KEELRC 610 (KLR) (14 March 2014) (Judgment)**

*Stephen Miheso v Kaimosi Tea Estate Limited [2014] eKLR*

Neutral citation: [2014] KEELRC 610 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE 346 OF 2013**

**B ONGAYA, J**

**MARCH 14, 2014**

**BETWEEN**

**STEPHEN MIHESO ..... CLAIMANT**

**AND**

**KAIMOSI TEA ESTATE LIMITED ..... RESPONDENT**

**A person with illiteracy is a person with disability and thus entitled the rights of persons with disabilities**

*The case revolved around whether a person with illiteracy was a person with disability and the effect of such a person thumb printing a letter of resignation without knowing the contents of the said letter. The court held that a person with illiteracy was a person with disability and was entitled the rights of persons with disabilities. The court further found that acceptance of the alleged claimant’s letter requesting to resign was not a valid reason for the termination because at the time of termination the respondent’s field manager and the general manager failed to confirm that the claimant had authored the alleged request to resign and the respondent was reckless in failing to address the claimant’s ensuing grievance.*

Reported by Kakai Toili

**Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – rights of persons with disabilities - whether a person with illiteracy person was a person with disability and thus entitled the rights of persons with disabilities – Constitution of Kenya, 2010, article 54(1)(d); Employment Act, 2007, sections 2, 5(3)(a), 9(3) and (4).

**Labour Law** – employment – termination of employment – unfair termination of employment – whether termination of employment of a person with illiteracy as a result of acceptance of a resignation letter allegedly authored by him/her was valid where the employer failed to confirm that the person had authored the request to resign - Employment Act, 2007 sections 9(3) and (4).



## **Brief facts**

The claimant was employed as a tea picker at the respondent's company. He was illiterate as he could not read or write hence he authenticated his documents by a thumb print. In October 2012 the claimant, while at work in the farm, was given a letter dated October 23, 2012 by the supervisor. It was only after he thumb printed the said letter that his colleagues told him that he had signed his resignation letter. He did not know or understand the meaning of the letter. Subsequently on the October 29, 2012 he received a letter titled notice of resignation from the field manager accepting his resignation.

## **Issues**

- i. Whether a person with illiteracy person was a person with disability and thus entitled the rights of persons with disabilities.
- ii. Whether termination of employment of a person with illiteracy as a result of acceptance of a resignation letter allegedly authored by him/her was valid where the employer failed to confirm that the person had authored the request to resign.

## **Relevant provisions of the Law**

### **Employment Act, 2007**

#### **Section 5(3)(a)**

*(3) No employer shall discriminate directly or indirectly, against an employee nor prospective employee or harass an employee or prospective employee—*

*(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;*

## **Held**

1. The claimant's termination was triggered by the alleged letter of resignation purportedly authored by the claimant and expressing the claimant's alleged request to resign.
2. Section 2 of the Employment Act, 2007 defined "disability" to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning, or physical incapability, which impacted adversely on a person's social and economic participation. A person with illiteracy like the claimant was a person with disability and was entitled the rights of persons with disabilities as protected in the Constitution and the relevant statutes.
3. Under section 5(3)(a) of the Employment Act, 2007, the claimant was entitled to freedom from harassment by the respondent on account of the disability of illiteracy and in particular, under the section the claimant was entitled to freedom from harassment in respect of termination of employment or other matters arising out of the employment relationship.
4. The claimant being a person with illiteracy, was entitled to other appropriate means of communication (other than writing and reading) as provided for in article 54(1)(d) of the Constitution. In particular, the claimant was entitled to verbal explanations of applicable terms and conditions of service in a language that the claimant understood in view of the employment relationship. That was under the Employment Act in section 9(3) and (4).
5. The court arrived at that finding because the respondent had initiated the idea of resignation and it ought to have been an offer under which the claimant ought to have been invited to accept or reject. It was fraudulent for the respondent to hatch a request to resign on the part of the claimant without the claimant harboring any such intention and in which case, the court's view was that the respondent ought to have made an offer for resignation and in good faith invited the claimant to accept or reject it but which never happened in the case.
6. There was no valid agreement to end the employment relationship by resignation. Further, the respondent was required to cause the contents of the alleged letter to be explained to the claimant in a language that the claimant understood. In the circumstances, the respondent failed to discharge the



- crucial statutory obligations imposed upon the respondent as an employer and in protection of the claimant as provided for in sections 9(3) and (4) of the Employment Act.
7. Acceptance of the alleged claimant's letter requesting to resign was not a valid reason for the termination because at the time of termination the respondent's field manager and the general manager failed to confirm that the claimant had authored the alleged request to resign and the respondent was reckless in failing to address the claimant's ensuing grievance.
  8. The claimant was entitled to the declaration that the termination was unlawful and unfair. The claimant was entitled to gratuity as provided for under the CBA.
  9. The court considered the evidence and found that the claimant opted to stay at his home throughout the employment despite the respondent's provision of reasonable housing at the farm. The claimant confirmed in his testimony that the respondent's general manager had issued an internal memo and at a meeting with the workers explained the availability of reasonable housing at the farm. Thus, the court found that the prayer with respect to housing failed.
  10. The court was not setting a principle that an employer could not pay reasonable house allowance where the employer had imposed reasonable available housing accommodation for the employee but nevertheless, the employee has opted to stay in own better or equally reasonable housing. In the circumstance the provisions of section 31 of the Employment Act, 2007 should be adhered to.

*Judgment entered for the claimant against the respondent for Kshs. 154, 790.00 by May 1, 2014, and in default, interest at court rates to be payable from the date of the judgment till full payment.*

#### **Citations**

#### **Statutes**

1. Constitution of Kenya, 2010 — article 54(1) (d) — Cited
2. Employment Act, 2007 (Act No 11 of 2007) — section 2; 5 (3) (a); 31; 43; 49(1) (c) — Interpreted

#### **Advocates**

*Chepkwony & Company Advocates* for Claimant

*Onyinkwa & Company Advocates* for Respondent

### **JUDGMENT**

1. The claimant Stephen Miheso filed the memorandum of claims on October 14, 2013 through Chepkwony & Company Advocates and prayed for judgment against the respondent.
2. The respondent Kaimosi Tea Estate Limited filed the memorandum of defence on November 5, 2013 through Onyinkwa & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.
3. The case was heard on February 24, 2014. The claimant gave evidence to support his case and the respondent's witness was its manager, Dan Kipchirchir Kebenei(RW).
4. The claimant was employed by the respondent from 2001 to December 2012 and assigned to pick green tea leaves. The claimant testified that he did not know how to read and write and that he authenticated documents by his thumb print.
5. In October 2012 the claimant, while at work in the farm, was given a letter dated October 23, 2012 being No 1 on the respondent's list of documents. The letter was delivered by the claimant's supervisor. The claimant testified that he did not know or understand the meaning and effect of the letter as it was not explained to him by David Ngetich, the supervisor who delivered it to him and asked the claimant to put his thumb print. The claimant complied. Immediately the claimant put his finger print, he



heard his workmates shouting that he had been terminated. The letter in issue was in Kiswahili and essentially stated that the claimant was thanking the respondent for the opportunity to serve for such a long period of time, he felt frail and tired and he was requesting the respondent to release him from continued employment so as to go and rest at his home.

6. Subsequently, the claimant received the letter dated October 29, 2012 from the respondent being No 2 on the respondent's list of documents. The letter which was addressed to the claimant stated as follows:

Dear Sir,

RE: Your Notice of Resignation

We are in receipt of your resignation letter dated October 23, 2012 and hereby confirm accepting your notice to resign from employment.

We thank you for services rendered to this company from February 26, 2001.

Your notice period should be of two months, and therefore your last working day will be December 23, 2012.

Kindly see the undersigned to finalize preparations and payments of all your dues after handing over all the company property under your custody.

The company takes this opportunity to wish you good health and happiness in your future Endeavours.

Yours faithfully,

For: Kaimosi Tea Estates Limited

Signed

Field Manager”

7. The claimant testified that the respondent's field manager had verbally conveyed to him that he was due for termination because work had reduced in which event, the manager had advised the claimant that he was to be paid terminal dues including service pay for 12 years and house allowance. After the letter of December 23, 2012, the claimant testified that he was paid the last salary and overtime only. The claimant raised a complaint with the respondent's General Manager who responded by directing the claimant to leave the respondent's premises.
8. It was the claimant's testimony that he never wrote a resignation letter, he was hoodwinked to put his thumb print on the alleged resignation letter, after termination he received Kshs 56, 826.00 as last salary and not gratuity as alleged in computed retirement benefits being exhibit No 3 on the respondent's list of documents and he prayed for remedies as set out in the memorandum of claim. The claimant admitted that he saw on the notice board the internal memorandum No 6/2012 dated February 29, 2012 (No 4 on respondent's list of documents) and further recalled that the General Manager had explained the memo to the employees at a meeting. The memo was a reminder to an earlier memorandum of 1.04.2009 and it advised the respondent's employees residing outside the company premises were to ensure that they got allocated company houses not later than 31.03.2012 to enable them to stay within the farm and any employee who opted not to comply would be deemed to have opted to stay outside the estate. The memo advised that the respondent had enough houses to be occupied by the employees.
9. RW testified that the claimant opted to resign and he was paid his monthly salary for December 2012, his gratuity and one way bus-fare as per clause 24 and 32 of the collective bargaining agreement (CBA).



RW further testified that the claimant opted to stay at his home rather than take occupancy of the reasonable housing provided for employees by the respondent. The claimant was therefore not entitled to house allowance as claimed. As for the resignation letter of 23.10.2012, RW testified that he did not know how the letter was authored and it was taken to his office by some clerk. RW further testified that most of the respondent's employees were illiterate or semi-literate and RW did not know if the claimant ever went to school. He also stated that the provisions of the CBA had been used to calculate the gratuity that was paid to the claimant

10. The court has considered the pleadings, the evidence and the submissions on record and finds that the only issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings.
11. The claimant's 1<sup>st</sup> prayer is for a declaration that his termination was unlawful. RW testified that most of the respondent's workers were illiterate or semi-literate, the alleged resignation letter was delivered to RW'S office by a clerk and RW lacked knowledge of how the letter had been authored. There is no doubt that the claimant's termination was triggered by the alleged letter of resignation purportedly authored by the claimant and expressing the claimant's alleged request to resign.
12. The court has considered the evidence on record and particularly the evidence by the claimant that he was illiterate and that he had been duped to sign the alleged resignation letter. The documents on record show that the claimant consistently signed by his thumb print. Accordingly, the court finds that the claimant was illiterate. What was the consequence and obligation placed upon the respondent in view of the claimant's illiteracy?
13. Section 2 of the [Employment Act, 2007](#) defines "disability" to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning, or physical incapability, which impacts adversely on a person's social and economic participation. The court holds that a person with illiteracy like the claimant is a person with disability and is entitled the rights of persons with disabilities as protected in the [Constitution](#) and the relevant statutes. The court further holds that under section 5(3) (a) of the [Employment Act, 2007](#), the claimant was entitled to freedom from harassment by the respondent on account of the disability of illiteracy and in particular, under the section the claimant was entitled to freedom from harassment in respect of termination of employment or other matters arising out of the employment relationship.
14. It is the further holding of the court that the claimant being a person with illiteracy, he was entitled to other appropriate means of communication (other than writing and reading) as provided for in article 54(1)(d) of the [Constitution](#). In particular, the claimant was entitled to verbal explanations of applicable terms and conditions of service in a language that the claimant understood in view of the employment relationship. The [Employment Act, 2007](#) specifically protects illiterate employees in section 9(3) and (4) which provide as follows:
  - (1) ....
  - (2) ....
  - (3) For the purpose of signifying his consent to a written contract of service an employee may?
    - (a) sign his name thereof, or



(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.

(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that employee understands.”

15. The court has taken into account the quoted sections, considers that by permutation and expansion they apply to a contract to end employment by agreement as may be initiated by the employer and finds that the claimant ought to have imprinted, on the alleged letter for agreement to resign, his thumb or one of his fingers in the presence of a person other than the respondent’s appointed supervisor who asked the claimant to sign the letter. The court has arrived at that finding because the respondent had initiated the idea of resignation and it ought to have been an offer under which the claimant ought to have been invited to accept or reject. The opinion of the court is that it was fraudulent for the respondent to hatch a request to resign on the part of the claimant without the claimant harboring any such intention and in which case, the court’s view is that the respondent ought to have made an offer for resignation and in good faith invited the claimant to accept or reject it but which never happened in the case. Thus, the court finds that there was no valid agreement to end the employment relationship by resignation as was submitted and suggested for the respondent. Further, the respondent was required to cause the contents of the alleged letter to be explained to the claimant in a language that the claimant understood. In the circumstances, the court finds that the respondent failed to discharge the crucial statutory obligations imposed upon the respondent as an employer and in protection of the claimant as provided for in the quoted section.
16. The claimant testified that he raised a complaint about the termination with the respondent’s General Manager who responded by directing the claimant to leave the respondent’s premises. That conduct by the General Manager in failing to address the claimant’s genuine concern and grievance is at the core of whether the respondent had a valid reason in terminating the claimant’s employment.
17. Under section 43 of the Act, the respondent was required to prove the reason for termination being the matters which the respondent at the time of the termination of the contract genuinely believed to exist and which caused the respondent to terminate the services of the claimant. The court finds that acceptance of the alleged claimant’s letter requesting to resign was not a valid reason for the termination because at the time of termination the respondent’s field manager and the General Manager failed to confirm that the claimant had authored the alleged request to resign and the respondent was reckless in failing to address the claimant’s ensuing grievance.
18. On account of the provisions of section 43 of the Act and on account of the respondent’s failure to uphold and protect the claimant’s rights as set out earlier in this judgment as a person with disability on account of being a person with illiteracy, the court finds that the claimant was unfairly terminated from employment. The court further finds that the claimant is entitled to the declaration that the termination was unlawful and unfair. In the circumstances, the court awards the claimant the maximum compensation of 12 months last gross monthly salary under section 49(1)(c) of the Employment Act, 2007 at the rate of Kshs10,362.00 making Kshs 124, 344.00.
19. The 2<sup>nd</sup> prayer is for service gratuity of Kshs 113, 982.00. The court finds that there is no dispute between the parties that the claimant was entitled to gratuity as provided for under the CBA. The court finds that the claimant is entitled as prayed less Kshs 83, 536.00 comprised of Kshs 56,826.00 as



gratuity paid to the claimant and Kshs 26, 710 as loan undisputedly recovered and both computed as per exhibit No 3 on the respondent's list of documents. Thus, under the prayer, the court finds that the claimant is entitled to Kshs 30, 446.00 being gratuity due but not paid.

20. The 3<sup>rd</sup> and last substantive prayer is for payment of house allowance. The court has considered the evidence and finds that the claimant opted to stay at his home throughout the employment despite the respondent's provision of reasonable housing at the farm. The claimant confirmed in his testimony that the respondent's General Manager had issued an internal memo and at a meeting with the workers explained the availability of reasonable housing at the farm. Thus, the court finds that the prayer shall fail.

21. In making the finding, the court is not setting a principle that an employer shall not pay reasonable house allowance where the employer has imposed reasonable available housing accommodation for the employee but nevertheless, the employee has opted to stay in own better or equally reasonable housing. The relevant provision is section 31 of the *Employment Act, 2007* and which provides as follows:

31. An employer shall at all times, at his own expense, provide reasonable housing
- (1) accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
  - (2) This section shall not apply to an employee whose contract of service?
    - (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
    - (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).
  - (3) The Minister may, on the recommendation of the Board by notice in the Gazette, exclude the application of this section to a category of employees and such category of employee shall be dealt with as shall be specified in the notice."

22. In view of the provisions of the section, in the opinion of the court, outside the clear exceptions in subsections (2) and (3), under subsection (1) the employer must either provide reasonable housing accommodation as prescribed or pay reasonable house allowance. The further opinion by the court is that in exercising the election under subsection (1), the employer is governed with the agreement between the parties or the established conventional practice in the industry in issue or both. In the present case, clause 16 of the CBA on housing provided as follows:

16.

Housing

Every Employer shall at all times at his own expenses, provide reasonable housing accommodation for his employees at or near to the place of employment, or shall pay to employees who are not housed a house allowance of 15% of the basic wage applicable to his grade.



Provided that, subject to any order which may be made under the Regulation of Wages and Conditions of Employment Act, the obligation of the Employer as regards housing, shall not, by reason of this section, extend to any case in which an employee is able to return at conclusion of his daily work, to a place of residence for which he pays no rent and which is not disapproved of by an authorized officer. Further, that where an employee subsequently requests housing accommodation, and shall be given a period of grace amounting to six months in which to construct such accommodation. The employee shall not, under these circumstances, be eligible for any housing allowance.

Housing will be allocated impartially dependent upon the category of employee and regardless of colour, race, creed or sex.”

23. The court finds that the respondent complied with the provisions of the clause as agreed and throughout the subsistence of the employment relationship with the claimant.
24. In conclusion, judgment is entered for the claimant against the respondent for Kshs 154, 790.00 by May 1, 2014 and in default, interest at court rates to be payable from the date of the judgment till full payment.

**SIGNED, DATED AND DELIVERED IN COURT AT NAKURU THIS FRIDAY, 14<sup>TH</sup> MARCH, 2014.**

**BYRAM ONGAYA**

**JUDGE**

