



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 132 OF 2013**

**SIMON KIPROTICH CHEPCHOWOI.....CLAIMANT**

**-VERSUS-**

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

(Before Hon. Justice Byram Ongaya on Thursday, 31<sup>st</sup> July, 2014)

**JUDGMENT**

The claimant filed the memorandum of claim on 21.05.2013 through Wamaasa and Company Advocates. The claimant filed the amended memorandum of claim on 23.09.2013. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's employment contract with the respondent remained in force for the period between 2<sup>nd</sup> November, 2008 to 5<sup>th</sup> October, 2012 and that the same was constructively and unlawfully terminated by the letter dated 14<sup>th</sup> March, 2013 by S. K. Kitur & Company Advocates and that the claimant is entitled to full salary for the said period.
- b. General damages for loss of employment.
- c. A declaration that the termination of employment of the claimant is contrary to the Employment Act No.11 of 2007 and CBA signed on 26.11.2008.
- d. A compensation of Kshs.596,352.00 being underpayment for the period 1.01.2008 to November, 2008 Kshs.7,282.00; accrued leave for the years 2008, 2009, 2011 and 2012; two months pay in lieu of notice Kshs.14,764.00; 21 days pay per year for 10 years worked as severance pay Kshs.56,840.00; 12 months' salaries for the unfair termination being Kshs.97,440.00; and full salary for period between 5.11.2008 and 3.10.2012 being Kshs.380,164.00.
- e. Costs of the suit.
- f. Interest on (c) above at court rates.
- g. Any other relief the honourable court may deem fit to grant.

The respondent's response to claim was filed on 17.06.2013 through S. K. Kitur & Company and the respondent's amended response to amended claim was filed on 08.11.2013.

The claimant was employed by the respondent on 1.02.2003 as a clerk. On 5.11.2008, the claimant was

arrested by the police on account of the respondent's report that the claimant had allegedly stolen the respondent's tea leaves valued at Kshs.1,200,000.00. The respondent was charged with 3 counts of stealing by clerk contrary to section 281 of the Penal Code in Criminal Case No. 3785 of 2008 at the Principal Magistrate's Court at Kapsabet. The trial court in the criminal proceedings found that the prosecution had not established a *prima facie* case against the claimant then as the accused person and the claimant was acquitted under section 215 of the Criminal Procedure Code as he had no case to answer. The acquittal was on 3.10.2012.

On 22.11.2012, the claimant's advocates wrote a demand letter to the respondent that the claimant's termination had been unfair and unlawful. The respondent replied by its advocates' letter dated 14.03.2013 admitting that the claimant had been arrested and prosecuted at the instance of the respondent but urging that the initiation of the prosecution was by the police officers and the respondent had terminated the claimant's employment on account of gross misconduct. The claimant was dissatisfied and he filed the suit.

The **1<sup>st</sup> issue** for determination is whether the claimant was terminated. The claimant testified that since the arrest in 2008, he had never been allowed back at work. The court finds that the claimant was entitled to consider himself terminated once the respondent made a complaint leading to the arrest and the prosecution. The court finds that the claimant was constructively terminated from employment.

The **2<sup>nd</sup> issue** for determination is whether the termination was fair. As regards disciplinary cases in the employment relationship and where in the opinion of the employer there exist a criminal element, this court set out the guiding applicable principles in the case of **Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO [2013] eKLR, Industrial Cause No. 37 of 2013 at Nakuru**. At page 13 to 14 of the judgment, the court stated as follows:

**“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:**

- a. **Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.**
- b. **If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**
- c. **If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.**
- d. **To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.”**

The court upheld the same opinion in the case of **John Kirui Torongei –Versus- National Cereals and Produce Board [2013] eKLR**.

In the present case, the court finds that once the respondent made the report to the police, the respondent was thereby bound by the outcome of the police investigative steps and the ensuing criminal prosecution. The court finds that at all material time the respondent did not have a valid reason to terminate the claimant's employment. The constructive termination was unfair for want of valid reason as is envisaged in section 43 of the Employment Act, 2007. The court has considered the 10 years service and that the claimant did not contribute to his termination and finds that the claimant is entitled to the 12 months' pay for compensation as prayed for being **Kshs.95,748.00** at Kshs.7,979.00 as per the CBA's prescribed monthly pay.

The 3<sup>rd</sup> issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

1. The claimant testified that he was employed as clerk grade III and was paid Kshs.6,720.00 instead of Kshs.7,979.00 and he claimed the difference in view of the underpayment. The court finds that the claimant is entitled to Kshs.1,259.00 by 11 months of underpayment making **Kshs.13,849.00**.
2. Under clause 28 (b) of the CBA, the claimant was entitled to 2 months termination notice and the court finds that he is entitled to 2 months' pay in lieu of the termination notice he was not accorded making **Kshs.15,958.00**.
3. The claimant has prayed for full salary for 5.11.2008 to 3.10.2012 when he was acquitted. The court upholds its opinion in Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11, where the court stated thus **"In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, '(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;'. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged."** The court upholds the opinion and finds that the claimant is entitled to **Kshs.380,164.00** as prayed for.
4. The court finds that as the claimant was not at work and has already been found entitled to the salaries for the leave periods for 2008, 2009, 2011 and 2012, the court finds that the leave never accrued and the claimant is not entitled as prayed.
5. Clause 21 (a) of the CBA entitled the claimant to 21 days' pay for each year served being gratuity. Accordingly, the court finds that the claimant is entitled to **Kshs.56,840.00** as prayed

for.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The declaration that the constructive termination of the employment of the claimant was contrary to the Employment Act No. 11 of 2007 and CBA signed on 26.11.2008.
2. The respondent to pay the claimant a sum of Kshs.562,559.00 by 1.09.2014, failing, interest at court rates to be payable from the date of this judgment till full payment.
3. The respondent to deliver to the claimant the certificate of service by 1.09.2014.
4. The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Thursday, 31<sup>st</sup> July, 2014.**

**BYRAM ONGAYA**

**JUDGE**