



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO. 36 OF 2014**

**DELVIN BOSIBORI NYACHOTI**

**CLAIMANT**

v

**MARIDADI FLOWERS LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Delvin Bosibori Nyachoti (Claimant) was engaged by Maridadi Flowers Ltd (Respondent) with effect from 1 April 2006 as a general worker in the production department. The appointment letter stated that the employment was of a permanent nature.
2. On 1 May 2007, the Respondent appointed the Claimant as a Supervisor in the production department.
3. On 11 May 2013, the Respondent terminated the services of the Claimant, and the reason given in the termination letter was poor work performance. The termination letter advised the Claimant that she would be paid one month pay in lieu of notice and other dues all amounting to Kshs 52,444.82.
4. The Claimant being dissatisfied with the termination of services instituted legal proceedings against the Respondent on 7 February 2014 stating the issue in dispute as *wrongful dismissal of the Claimant from her employment by the Respondent* and seeking a declaration that the dismissal was wrongful, compensation, general damages, loss of future earnings, reinstatement, terminal benefits and costs of the Cause.
5. The Respondent filed its Memorandum of Defence on 27 March 2014, and the Cause was heard on 7 October 2014.

**Claimant's case**

6. The Claimant's pleaded case is that the termination of services was without colour of right or notice, unlawful, malicious, contrary to rules of natural justice and the Employment Act, 2007.
7. The Claimant testified.
8. In regard to the reasons for termination of services, the Claimant testified that on 11 May 2013, while on duty she was issued with a termination letter and the reason given was *poor work performance*. According to the Claimant, the reason given was not true because the work of cutting flowers was not her responsibility, but supervision of workers who cut flowers. She further stated that her performance was not poor.

9. On the process followed before termination, the Claimant stated that prior to the decision to terminate her services, she had been issued with several warning letters, 4 in 2013 (Respondent's appendix 2). She stated the reasons in the warning letters were not true and she had been forced to sign the warning letters.

10. The Claimant further stated that she was called to a disciplinary hearing where the allegations related to poor performance and that she was given an opportunity to make representations.

11. Finally, the Claimant informed the Court that she was seeking service pay for 7 years, pay in lieu of notice and 12 months compensation for unfair termination.

12. In cross examination, the Claimant stated that her responsibilities included ensuring the workers did not spoil the flowers and that her supervisees followed instructions and that she was a contributor to the National Social Security Fund. The gross pay at time of termination of services was Kshs 16,594/-.

### **Respondent's case**

13. The Respondent opted not to call any witnesses and indicated it would rely on the record, documents filed and written submissions.

14. In its Defence, the Respondent contended that the Claimant was underperforming and was warned 14 times and that the dismissal was procedurally fair. The warning letters and minutes of the disciplinary hearing were annexed to the Defence.

15. The Respondent's Memorandum of Defence however was full of mere denials and putting the Claimant to strict proof on her pleadings.

### **Issues arising**

16. Like in any complaint of unfair termination/wrongful dismissal, three core issues arise. These are the law applicable, whether the termination was unfair and appropriate remedies.

### ***Applicable law***

17. Sections 10, 35, 41, 43, 45 and 47 of the Employment Act, 2007 are directly implicated in the present Cause.

18. The statutory burden on an employee complaining of unfair termination or wrongful dismissal is found in section 47(5) of the Employment Act, 2007. It is a very low threshold.

19. The Claimant testified that she was not given notice. Pursuant to section 35 of the Employment Act, 2007, written notice is necessary before termination. There is also provision for pay in lieu of termination.

20. The Claimant was issued with a termination letter on 11 May 2013. There was no notice. In this regard, the Claimant has met the low statutory threshold expected of her and the Court will proceed to examine whether other provisions of law on termination were satisfied.

### ***Whether the termination was unfair***

### ***Procedural fairness***

21. Procedural fairness safeguards in cases of termination of employment are primarily found in section 41 of the Employment Act, 2007. The Claimant testified that she was called to a disciplinary hearing and informed of the allegations against her. She made representations.

22. The minutes of the hearing were annexed to the Memorandum of Defence.

23. Without discussing the ingredients of procedural fairness, the Court is satisfied that the Respondent complied with the procedural fairness safeguards before taking the decision to terminate the services of the Claimant.

### ***Substantive fairness***

24. The statutory anchor to substantive fairness in termination of employment disputes is found in sections 43, 45 and 47 of the Employment Act, 2007.

25. Section 43 of the Act has placed a statutory burden upon the shoulders of an employer to prove the reasons for termination. The reason given for the termination of the services of the Claimant was poor work performance.

26. The Respondent however opted not to call evidence to prove this reason. In her evidence, the Claimant had stated that the reason was not true. Despite the several warning letters issued to the Claimant over time and 4 just before the termination, it was incumbent upon the Respondent to demonstrate poor work performance as a reason for termination.

27. The Claimant's evidence therefore remains uncontroverted. The Respondent merely annexed documents to its Defence. That was not enough in light of the Claimant's evidence.

28. Section 45 of the Employment Act, 2007 on the other hand expects an employer to prove the reasons for termination as valid and fair reasons. The Respondent did not call evidence to discharge this burden.

29. On the basis of the material placed before Court, the Court finds that the Respondent has failed to prove poor work performance as a reason for terminating the services of the Claimant or that the reason was a fair and valid reason.

30. Before discussing remedies, the Court needs to observe that parties should take care in how they plead their cases. In the instant case, the issue in dispute was stated as *wrongful dismissal*. In the body of the Memorandum of Claim, the complaint was pleaded as *unfair termination*. Although under the Employment Act, similar remedies have been provided for unfair termination and wrongful dismissal, conceptually they are different.

### **Appropriate remedies**

#### ***Three months salary in lieu of notice***

31. The termination letter indicated that the Claimant would be paid one month pay in lieu of notice. This was in line with clause 5 of the appointment letter as Supervisor dated 1 May 2007.

32. The Claimant has therefore failed to show either a statutory or contractual basis for an award of three as opposed to one month pay in lieu of notice.

33. Parties did not disclose in evidence whether the Claimant was paid the dues as indicated in the termination letter. If the one month pay in lieu of notice

34. was not paid, the Court would award the Claimant Kshs 15,000/- as one month pay in lieu of notice.

#### ***Service gratuity for 7 years***

35.

36. The Claimant sought Kshs 2,670,024/0 on account of what was pleaded as service gratuity.

37. On the basis of the Claimant's admission that she was contributing to the National Social Security Fund and by dint of section 35(6) of the Employment Act, 2007, this head of relief is untenable and stands to be dismissed.

### ***Compensation for wrongful dismissal***

38. Under section 49(1) of the Employment Act, 2007 the equivalent of not more than twelve months gross wages is one of the primary remedies where a Court makes a finding of unfair termination or wrongful dismissal.

39. The remedy is discretionary and the Court is enjoined to consider any, some or all of the factors enumerated in section 49(4) of the Act. In order to exercise the discretion judiciously and not arbitrarily, a Claimant should put forth which of the factors the Claimant wants the Court to consider. This will enable a Respondent to also submit on why such factors ought not to be considered. This was not done.

40. But there is evidence that the Claimant served the Respondent for some 7 years. Based on the length of service, the Court would award the Claimant the equivalent of 6 months gross wages assessed at Kshs 99,564/- as compensation for wrongful dismissal.

### ***General damages and Loss of future earnings***

41. No precedent, statutory or contractual foundation for these reliefs was placed before Court. The same are rejected.

### ***Reinstatement***

42. In evidence, the Claimant did not inform the Court of her wishes on the prayer for reinstatement. The Respondent did also not inform Court on the practicality of ordering reinstatement.

43. The employment relationship is one of trust and confidence and without material from the parties as to the continued existence of trust and confidence, the Court declines to award this relief.

### ***Costs***

44. The Claimant was directed to file and serve her written submissions on or before 15 October 2014. By the time of writing this judgment, those submissions had not been filed.

45. The Court therefore declines to award costs to the Claimant.

### ***Conclusion and Orders***

46. From the foregoing, the Court finds that though the termination of the Claimant was procedurally fair, the Respondent has failed to prove the reasons for termination, and that the reason was valid and fair and therefore holds that the termination was substantively unfair.

47. The Court awards and orders the Respondent to pay the Claimant

(a) One month pay in lieu of Notice	Kshs 15,000/-
(b) Equivalent of 6 months wages compensation	Kshs 99,564/-
<b>TOTAL</b>	<b>Kshs 114,564/-</b>

48. The reliefs for service gratuity, general damages, loss of future earnings and reinstatement are

dismissed.

49. Each party to bear their own costs.

50. For the avoidance of doubt, the one month pay in lieu of notice is payable only if the Claimant did not collect the dues as set out in the termination letter.

**Delivered, dated and signed in open Court in Nakuru on this 31<sup>st</sup> day of September 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Ombui instructed by Omwoyo Masese & Co. Advocates

For Respondent Mr. Kinyanjui, Industrial Relations Officer, instructed by Agricultural Employers Association

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**11/11/2014**

**Radido J in Chambers**

**RULING**

In the judgment delivered on 31/10/2014 the date of delivery was erroneously indicated as 31/ 9/2014.  
The error is corrected to read 31/10/2014.

The ruling to be typed and furnished to all the parties.

**Dated this 11th day of November 2014.**

**RADIDO STEPHEN**

**JUDGE**