



**REPUBLIC OF KENYA**

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

**Cause No. 34 Of 2013**

**(FORMERLY CAUSE NO. 1761 OF 2011 AT NAIROBI)**

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

**-VERSUS-**

**SIRGOEK FLOWERS LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 20<sup>th</sup> September, 2013)**

**JUDGMENT**

The claimant **Trade Union** filed the memorandum of claim on 18.10.2011 and the respondent filed the statement of response on 2.05.2012. On 2.04.2013 the claimant filed an amended memorandum of claim setting out the prayers:

- a. **That the court finds the dismissal of the greivants, members of the claimant, was wrongful, un-procedural and unfair.**
- b. **That the court awards and order the respondent to pay full terminal benefits in accordance with the CBA in force to each grievant including:**
  - i. **days worked if any;**
  - ii. **notice in lieu of pay;**
  - iii. **annual leave if any;**
  - iv. **pro-rata leave;**
  - v. **leave traveling allowance;**
  - vi. **gratuity per each completed year of service;**
  - vii. **12 months compensation; and**
  - viii. **Certificate of service.**

The respondent filed amended memorandum of response on 9.05.2013 and prayed that the court upholds the grievants' termination as lawful and to dismiss the suit with costs.

The claim as filed related to 23 grievants. On 29.05.2013, the parties recorded in court consent with respect to the dispute for all grievants except for Hillary Kibet Sum, Ann Kiplimo and Hellen Jepkemboi Kipchumba. For the three grievants, the parties agreed to go to full hearing. At the hearing, Hillary Kibet Sum (**CW1**) and Ann Kiplimo (**CW2**) gave evidence to support their respective claims. The respondent's witness was its manager Andrew Kaitany (RW). The main issue for determination is whether the employment of the three grievants was unfairly terminated.

The evidence on record shows that CW1 was terminated by the letter dated 18.03.2011 being **exhibit 2(c)** on amended memorandum of response. The letter addressed to CW1 stated as follows:

**“RE: SUMMARY DISMISSAL**

**Following the disciplinary meeting held on 17<sup>th</sup> March 2011, and after having heard and carefully considered your representations during that meeting regarding your conduct on Thursday, 17<sup>th</sup> March 2011, you are hereby summarily dismissed from employment.**

**The reasons are as follows:**

**You aggressively and with a loud voice prevented a supervisor, Mr. Jonathan Chepkiyeng’, from carrying out his duties as assigned to him by the manager, Mr. Andrew Kaitany. You did this in front of your manager, other supervisors and other employees.**

**You further took it upon yourself to command and assign duties to the supervisor, Mr. Jonathan Chepkiyeng’, that were contrary and against the wishes of your manager.**

**It is clear from the statement of Mr. Johnathan Chepkiyeng’, that he felt your actions and words to be threatening to him, enough to cause him not to complete the task assigned to him by his manager.**

**In your representations you have not issued any apology or shown any regret for your actions and utterances.**

**Your actions and utterances were disrespectful and extremely insulting to both your manager and supervisor and they amount to gross misconduct as per section 44(4) (d) of the Employment Act 2007.**

**You are therefore hereby summarily dismissed from employment.**

**You shall be paid for days worked and leave earned.**

**Yours faithfully**

**Signed**

**Director”**

Prior to the issuance of the termination letter, a meeting attended by CW1 and convened by the management was held on 17.03.2011 and CW1 declined to give his oral representation in self exculpation. At the meeting, it was recorded that CW1 confirmed the account of the reasons for the disciplinary action to have been complete and accurate. The record of proceedings is exhibit 2(b) on the amended memorandum of defence.

The court has considered the evidence and finds that CW1 knew the disciplinary case that confronted him, he was heard but declined to make representations to exculpate himself and the court finds that the termination was fair. CW1 was accorded due process and in the opinion of the court the reasons for termination were valid as established by the respondent.

CW2 was allegedly given a show-cause letter dated 21.03.2011. The letter addressed to her being **exhibit 4(a)** on the amended memorandum of response stated as follows:

**“RE: GROSS MISCONDUCT**

**On Tuesday 15<sup>th</sup> March 2011 at about 9am, after a disciplinary meeting with your manager and directors in which you were issued a verbal warning for your misconduct on Saturday 12<sup>th</sup> March 2011, you were instructed by your manager and directors to report to your normal duties immediately.**

**You refused to do so and instead of returning to your work place you chose to walk out of the company gates.**

**On Wednesday 16<sup>th</sup> March 2011 you were again absent from duty without any permission from your supervisor(s) or manager.**

**On Thursday 17<sup>th</sup> March 2011, you again failed to report to duty in the morning and in the afternoon you arrived at the gate and when your manager invited you in to resume your normal duties, you refused to do so and refused to work.**

**To date, you have not given any reason for being absent without permission.**

**The company views your absence without leave or permission from the work place as an act of gross misconduct warranting serious disciplinary action.**

**The company also views your refusal to obey the instructions of your directors and your manager as an act of gross misconduct warranting serious disciplinary action.**

**You will be given an opportunity, in presence of another employee of your choosing, to state your description, reasons and explanations for your actions. And these will be taken into account and considered before a final decision is reached on what disciplinary action will be taken, if any.**

**Yours faithfully**

**Signed**

**Manager”**

The disciplinary meeting was said to have been held on 21.03.2011 and CW2 was said to have been heard in self exculpation. The termination letter was issued the same date being **exhibit 4(b)** on the amended memorandum of response. CW2 denied ever receiving the show-cause letter. RW conceded that there was no record of the alleged hearing. The court has considered the evidence on record. There is no mention of CW2 using a mobile phone at work and is not one of the misconducts alleged in the show cause letter as otherwise testified by CW2. The letter contradicts the oral evidence as given by CW2 and RW. Accordingly, the court finds that the show cause letter given to CW2 and the alleged disciplinary hearing never took place. CW2 was not accorded due process and the reasons for termination were invalid. The court finds that the dismissal was unfair and she is entitled to the remedies as prayed for.

Hellen Jepkemboi Kipchumba did not give evidence to support her case. RW testified that she was terminated from employment on account of absence without leave or permission. The court finds that she has failed to establish her claims and her case shall fail.

In view of the consent record in court substantially settling the dispute and the findings of the court in this judgment, it is the opinion of the court that it will be fair for each party to bear own costs of this case.

In conclusion, the court makes the following orders:

- a. The claims by Hillary Kibet Sum and Hellen Jepkemboi Kipchumba shall fail as their termination was not unfair.

- b. A declaration that the termination of Ann Kiplimo was unfair and the respondent to pay her the dues as claimed and prayed for including 12 months gross salaries for unfair termination at the rate of her last gross monthly salary.
- c. The payment in (b) to be effected by 1.11.2013, failing interest to run at court rates from the date of this judgment till full payment.
- d. Each party to bear own costs of the case.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 20<sup>th</sup> September, 2013.**

**BYRAM ONGAYA**

**JUDGE**