



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 574 of 2010**

**PETER RAMBEKA OINGA..... CLAIMANT**

**VERSUS**

**MABROUKIE ESTATE.....RESPONDENT**

**JUDGMENT**

The claimant Peter Rambeka Oinga filed the memorandum of claim on 24th May, 2010 through the firm of Mogusu Miencha & Company Advocates. He also filed the written submissions on 15th June 2011. The respondent Mabroukie Estate filed the memorandum of reply including the written submissions on 17th September 2010 and further filed the supplementary memorandum of reply on 13th July, 2011 through the Federation of Kenya Employers.

The claimant prays for orders against the respondent thus:

1. A decision that the respondent's termination of the claimant's employment be set aside;
2. That the claimant be reinstated to his employment forthwith and without loss of benefits;
3. The claimant be paid his full salary and allowances during the period of **her** unlawful termination of employment;
4. In alternative and without prejudice to the above the claimant be paid in full **his** terminal benefits being Ksh.154,485/= including terminal benefits pay at the rate of 15 days worked for each completed year worked at 7 x 3,287 making Ksh.23,009/=, one month notice pay at Ksh.6,574/=, 12 months' salary compensation for loss of employment at Ksh.78,886/= and annual leave for 12 years;
5. The respondent to compensate the claimant for unlawful termination of employment at the equivalent of 12 months gross salary;
6. The court to issue such orders as it may deem fit and just to grant;
7. The respondent to pay costs of this cause; and
8. Interest at court rates.

The claimant alleges that he had worked for the respondent for uninterrupted period from September 2003 to October 2009. In support of the allegation the claimant has produced his pay slips for September 2003 and September 2009. It has been submitted for the respondent that the claimant was a seasonal worker

engaged to pick tea leaves during times when the leaf production was good. Thus, the respondent submitted that the claimant was an employee on fixed term contract as from 2nd June to 30th June 2009 and later 1st September to 31st September 2009. The respondent has produced the relevant copies of the fixed term contracts dated 2nd June 2009 and 1st September 2009 respectively. The Claimant has explained his failure to produce any of the written contracts on the ground that the same were in the possession of the respondent. However, the claimant has also failed to produce all the relevant pay slips for the other months of the alleged uninterrupted employment. In the circumstances the court finds that the claimant was not in uninterrupted employment of the respondent as alleged but the claimant was on a fixed term contract as proved by the respondent.

The claimant has produced a note dated 16th October 2009 written by the claimant's supervisor to the respondent's Assistant Manager. The note stated thus, ***"Please I have terminated the bearer of this note C/No. 7595 – Peter Rabeko from work as he has a problem of attaining the minimum Kilos of 34. I will inform you about him more verbally afterwards. Thanks. Riare T/L SIGNED"***. In view of the note the claimant acted accordingly and left employment. It has been submitted for the respondent that the ground for termination of the claimant was that he failed to meet the performance target of 34 kg of tea required for the daily plucking. That the note given to the claimant did not reach the Assistant Manager but that the claimant decided to read it and terminate his employment through desertion. Accordingly, it was submitted for the respondent that the claimant being a seasonal employee was dismissed on grounds of absconding duty.

The Employment Act, 2007 is clear on the procedure governing termination on the ground of poor performance. Subsection 41 (1) of the Act provides that before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity and the employer shall explain to the employee, in a language the employee understands, the reason for which the employer is considering the termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation. Subsection 41(2) requires the employer, before terminating the employment of an employee or summarily dismissing the employee under the section to hear and consider the employee's representations which the employee may have to make in view of the alleged misconduct or poor performance. In this case the respondent acted in contravention of these clear provisions of the Act. The termination note given to the claimant was a decision to terminate and not an intention by way of a request by the supervisor for the management to consider the termination. The claimant did not abscond duty but had no reason to come to work in view of the termination note. In any event, the respondent has not produced any subsequent letter of termination on the alleged ground of absconding and neither has the respondent produced any administrative communication to the claimant that only an officer in the management could terminate his services. The court finds that such submissions for the respondent are unfounded and are mere afterthoughts that do not cure the breach of the express standards expected of the respondent's handling of the claimant's case.

In view of the findings of the court, the claimant is entitled to setting aside of the unlawful termination. However, he is not entitled to reinstatement since his employment was a fixed term contract lapsing on 31st October, 2009. An order for reinstatement would serve no purpose. The claim for payment for leave not taken is not justified because the claimant had not worked for more than two consecutive months as provided for in clause 19(c) (iii) of the collective agreement and section 28(1) (b) of the Employment Act, 2007.

The court enters judgment for the claimant against the respondent for orders:

1. a declaration that the claimant's termination of employment by the respondent was unlawful;
2. Payment by the respondent to the claimant a sum of Ksh.13,148.00/= being gross salary for two months for unlawful termination plus interest thereon at court rates from the date of judgment till the date of full payment.
3. The respondent to pay costs of the case.

Delivered in court at Nairobi this 5<sup>th</sup> day of October, 2012, in the presence of the Respondent's Counsel and in absence of the Claimant.

**BYRAM ONGAYA**  
**JUDGE**