



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1746 OF 2013

GLADYS WAWIRA KIURA.....CLAIMANT

VERSUS

LICHI SECURITY SYSTEMS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 26.10.2013 contending that his services were unlawfully/wrongfully terminated by the respondent while on her annual leave and her terminal dues withheld. She therefore prayed for the following reliefs:-

- (i) Two month salary in lieu of notice Ksh.27,960/=
- (ii) Unpaid leave for two years..... Ksh.27,960/=
- (iii) Gratuity payment @ 16 days for every year of service..... Ksh. 97,860/=
- (iv) Refund of sacco shares..... Ksh.60,300/=
- (v) House allowance arrears (14 years)..... Ksh.352,296/=
- (vi) Compensation maximum (12 x 13,980)..... Ksh.167,760/=

Ksh.734,136/=

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- (vii) Cost of this suit
- (viii) Refund of sacco share and salary Kshs.13,080 from March 2011 to the date of judgment and order for reinstatement.
- (ix) Issue of Certificate of Service.
- (x) Any other relief that the court find/deem fit to grant.

2. The respondent filed defence on 26.11.2013 denying the alleged unlawful/wrongful termination and averred that it is the claimant who deserted her employment after she was granted leave of 14 days starting 16.1.2011. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 24.10.2018 when the claimant testified as Cw1 and the respondent called her Acting Operations Manager Rw1 Wallace Mungai Njuguna as Rw1. Thereafter only, the respondent filed written submissions with the time given by the court.

Claimant's Case

4. Cw1 testified that she was employed by the respondent in 1996 as a Secretary earning Kshs.4,000 per month but she was not issued with appointment letter until 2.9.1997. That the letter was backdated to 1.6.1997 and the salary was Kshs.5,000 but later it was increased to Kshs.13,980 per month.

5. Cw1 further testified that in March 2010 a new Operations Manager, Mr. Ambrose Gichu was appointed alongside other staff members.

That the new Manager started to intimidate and threaten her and other old staff with terminations as a result the working environment became harsh and uncondusive but she endured. That as at December 2010 the company recruited new staff who literary took over her routine duties and when she raised it with the Director, he told her to quit the job if she was uncomfortable.

6. Cw1 further testified that in February 2011 she applied for her annual leave and the HR Manager M/s Rahab Njung'e rejected but when she insisted, the HR Manager gave her only two weeks. That while on leave, she applied for extension of the leave and 14 days were added to her leave. However, before the leave was over, the Assistant HR Manager told her that she had already been replaced and there was no need of reporting back.

7. Cw1 further testified that after the leave days lapsed, she reported back to work but she was kept waiting at the reception and the Operations manager Mr. Ambrose spoke to her with hostility asking her who told her to report back.

8. After waiting the whole day at the reception M/s Rahab told her to go home and call her the following day. That when she called Rahab the following day she was told not to bother going back to the office. Then she called Mr. Ambrose Gichu but he ignored her calls.

9. Cw1 admitted that she had a loan from Highlands Micro Finance which is owned by the Director of the respondent and the responded was her guarantor. She further contended that she was repaying the loan through check off system from her salary and the instalment were deducted but the respondent failed to remit to the Micro finance. She therefore contended that the recovery of Kshs.50,000 from her terminal dues was not only wrongful but also unauthorized.

10. On cross examination Cw1 stated that she reported back to work on schedule but she was kept at the reception the whole day. She further admitted that she wrote demand letter dated 15.8.2013 asking for her terminal dues less one month salary in lieu of notice. She further admitted that by the same letter she acknowledged a loan balance of Kshs.18,406 and authorized respondent to deduct it form the terminal dues. She further admitted that the letter was responded to by the respondent's letter indicating that the loan balance was Kshs.50,000.

She however maintained that the loan was less than the said Kshs.50,000 because she had been deducted some loan instalments by the respondent but the same had not been remitted to the Micro finance. She denied being in charge of the payroll and stated that it was Mr. Ambrose Gichu.

Defence case

11. Rw1 testified that the claimant was employed by the respondent from 1996 and worked until 26.1.2011 when she went for a 14 days leave. That before reporting back she sought extension of the leave and 13 more days were added to her so as to report back on 4.3.2011. Rw1 further testified that by the time the claimant went for her leave, she had outstanding leave of 25.75 days and as such by the said extension her leave days were exhausted.

12. Rw1 further testified that the claimant is the one who failed to report back after the leave and asked the respondent to deduct one month salary in lieu of notice from her terminal dues. That by the time the claimant left she had a loan of Kshs.50,000 from Highland Micro Credit Limited guaranteed by the respondent. That the claimant failed to repay the loan and the respondent paid Kshs.59,572 to the Micro Finance on behalf of the Claimant and a receipt was issued. He admitted that the claimant was deducted loan installments for June, July, and August 2010.

13. Rw1 concluded by stating that as at the time of leaving the respondent, the claimant was serving as Administrative Secretary and her gross salary was Kshs.11,970 per month.

14. On cross examination Rw1 admitted that he had no copy of the guarantee agreement but only the loan repayment schedule providing for repayment upto 23.11.2013. He further admitted as at 4.3.2011, the claimant had not been served with any warning letter. He further admitted that as at June 2007, the claimant had share balance of Kshs.60,000 at the Lich SACCO. He contended that the claimant was the SACCO Treasurer and he was not aware whether she was refunded her share.

Analysis and Determination

15. There is no dispute that the clamant was employed by the respondent until 26.1.2011 when she went on leave but never resumed her duties. The issues for determination are:

- (a) Whether the claimant was unfairly/wrongfully terminated or she deserted the employment without prior notice;
- (b) Whether the reliefs sought should be granted.

Unfair dismissal or desertion

16. Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee who alleges that he was so

terminated. In this case, the claimant stated that she proceeded on leave and was to report back on 4.3.2011 but before the leave ended she was told by the Assistant HR Manager not to report back because she had been replaced by another person. The claimant, however, reported back as scheduled but she was not allowed to resume work and instead she was kept at the reception the whole day during which time the Operations Manager Mr. Ambrose Gichu humiliated her by rudely asking her who told her to report back. That she went home at the end of the day and on the following day she was told by the HR Manager not to bother reporting back and her calls to Mr. Gichu were all ignored. She contended that she was terminated by the respondent who had schemed to terminate the services of the old staff by systematically recruiting new staff which took over her routine duties. She therefore denied that she deserted her employment without notice.

17. The respondent has on the other hand denied ever terminating the claimant and contended that it is the claimant who deserted her employment after proceeding on leave and failing to report back as scheduled. She relied on the claimant's letter dated 15.8.2013 by which she demanded her terminal dues less one month salary in lieu of notice.

18. After careful consideration of the evidence and the submissions presented, I find on a balance of preponderance that the contract of service herein was terminated by the claimant through desertion. As correctly contended by the defence, the offer of one month salary in lieu of notice to the respondent by the claimant vide her letter dated 15.8.2013 amounted to an admission that she is the one who terminated the contract without notice. I therefore find that the claimant has not proved on balance of probability she was unfairly terminated by the respondent required by section 47(5) Employment Act and return that she is the one who deserted her employment.

Reliefs

19. In view of the foregoing, I dismiss the claim for salary in lieu of notice and compensation for unfair/wrongful termination.

20. The claim for gratuity was admitted by the respondent by her letter dated 1.8.2013 being $Kshs.11,970 \times 14/2 = Kshs.80,500$

I therefore grant that prayer to the claimant.

21. The claim for leave is considered for lack of evidence. The leave records produced by the respondent indicated that as at 2010, the claimant had leave balance of 35 days. Adding the leave accrued in January and February 2011 being 3.5 days, the accrued leave as at February 2011 being 3.5 days, the accrued leave as at February 2011 were 38.5 days. From 26.1.2011 to 4.3.2011, the working days used as leave were 32 leaving a balance of 6.5 leave days equaling to $Kshs.11,970 \times 6.5/26 = Kshs.2,992.50$.

22. The claim for House Allowance arrears for 14 years is dismissed for lack of merits. The pay vouchers produced by the respondent and not objected to by the claimant indicate that the salary paid to the claimant was gross pay.

23. The claim for refund of SACCO shares of Kshs.60,300 is allowed but it shall be paid by the SACCO. However the claim for salary from 4.3.2011 to the date of this judgment is dismissed for lack of merits and legal basis.

24. Finally, the claim for certificate of service is granted because it is a right every employee under section 51 of the Employment Act.

Conclusion and Disposition

25. I have found that the claimant has not proved that she was unfairly terminated by the respondent but then she is the one who deserted her employment. I have further found that the claimant is entitled to the terminal dues computed by the respondent, accrued leave of 6.5 days, plus refund of SACCO shares. Consequently, I enter judgment as follows:-

(a) Gratuity80,500.00

(b) Leave..... 2,992.00

83,492.00

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The claimant is also awarded costs and interest at Court rate from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE