



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**ELRC. CAUSE NO 598 OF 2016**

**MARGARET GATHUGU NKONGE.....CLAIMANT**

**-VERSUS-**

**ATHI FARM EXPORTERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit on 12.4.2016 alleging that her services were terminated by the respondent on 11.2.2016 and her terminal dues withheld. She therefore prayed for the following reliefs:

- (a) A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.**
- (b) A declaration that the Claimant was entitled to a Contract of Service**
- (c) The sum of Kshs. 224,000.000 particularized in paragraph 19.**
- (d) Certificate**
- (e) Costs of this suit**
- (f) Interest on the amount awarded at court rate.**

2. The respondent filed defence on 3.4.2017 denying alleged termination of the claimant's employment and averred that it is the claimant who absconded duty by failing to report back to work after the suspension period lapsed on 19.3.2016. She therefore prayed for the suit to be dismissed with costs because she does not owe the claimant any terminal dues.

3. Both parties tendered evidence during the hearing but only the claimant filed written submissions after the hearing.

**Claimant's evidence**

4. The claimant testified as CW1. She adopted her written statement and produced 7 documents attached to the claim as exhibits. In brief she stated that she was employed by the respondent on 22.9.2010 as a Field Grader but later became supervisor at the packaging and dispatch go-down. Her starting salary was Kshs. 10000 per month but later it was increased to Ksh. 16000 per month. She further testified that on 11.2.2016, at 3 p.m. her boss, M/s. Eunice Mwikali visited the go-down and found fresh beans thrown about and got annoyed with her and ordered her to go away. She contended that the said action was taken without according her any disciplinary hearing. She however confirmed that she was served with a suspension letter but refused to sign it because she was not going to be paid any salary during the suspension.

5. She further testified that she went back to the office severally to plead for her job until she was told not to go back there again. No terminal dues were paid to her after that.

6. In cross-examination she admitted that bullet number 2 of her job description dated 27.9.2010 provided that she was Pack House Quality Controller with the duty of ensuring that all packed produce adhere to the set quality standards. She further admitted that she signed the job description dated 4.2.2016 which provided that she was supposed to ensure that there was no wastage of produce.

7. She admitted that she was served with the suspension letter dated 11.2.2016 but she refused to sign and preferred to be dismissed. She

changed her story to say that on 11.2.2016 M/s. Eunice visited the go down at the end of the day's work when the cargo was being taken to the Airport and told her to go away.

### **Defence evidence**

8. M/s. Eunice Mwikali Mutune, the respondent's director testified as RW1. She also adopted her written statement dated 31.3.2017 and produced 8 documents as exhibits. In brief she confirmed that the claimant was employed by the respondent on 22.9.2010 earning Kshs. 10000 and confirmed as a permanent employee on 14.2.2011. On 4.2.2016 she was appointed supervisor and given duties and responsibilities dated 4.2.2016 including the duty to control raw material wastage.

9. RW1 further testified that on 11.2.2016 she served the claimant with suspension letter due to her poor performance but she refused to sign it and disappeared for good. She contended that the suspension was for one month and the claimant was supposed to report back on 19/3/2016 but she did not. RW1 denied that she dismissed the claimant as alleged. In cross-examination, RW1 contended that the claimant was not a diligent performer and she had been suspended severally for her mistakes. She further contended that she suspended the claimant on 21.2.2016 for failure to meet her target while on 11.2.2016 she suspended her for treating good beans as rejects. She maintained that after the last suspension the claimant disappeared for good.

### **Issues for determination**

10. There is no dispute that the claimant was employed by the respondent from 2010 to 11th February, 2016 when she was served with a suspension letter. The issues for determination are:

**(a) Whether the claimant deserted her employment or she was unfairly dismissed by the respondent.**

**(b) Whether the claimant is entitled to the relief sought.**

### **Desertion or unfair dismissal**

13. The claimant admitted that on 11.2.2016, RW1 visited the go-down and she was annoyed with her performance as the Supervisor of the go-down because of good beans which had been treated as reject while packing the produces for export. She further admitted that RW1 served her with a suspension letter dated the same date but she refused to sign and preferred to be dismissed.

14. RW1 on the other hand contended that on the said date she suspended the claimant from wastage of good beans by treating the same as rejects. She further contended that the claimant received the letter but refused to sign it and disappeared for good and never reported back on 19.3.2016 as indicated in the suspension letter.

15. I have carefully considered the evidence tendered. The undisputed suspension letter dated 11.2.2016 stated partly as follows:

***“ATT: MARGARET NKONGE***

***RE: SUSPENSION LETTER FOR 1 MONTH***

***Please note that you've been suspended from your duties as from tomorrow date 12.2.2016 to 19th 03.2016.***

***On 11th .02.16 morning, beans were found unsorted and disposed as rejects yet there were some good beans. ...”***

16. In my view the foregoing excerpt of the letter dated 11.2.2016 is clear that the employer intended to suspend the claimant from 12.2.2016 to 19.3.2016. There is nothing to suggest that the employer intended to dismiss the claimant from service. However, the claimant admitted that she refused to sign the suspension letter and preferred to be dismissed.

17. The foregoing conduct by the claimant corroborates the evidence by RW1 that the claimant refused to sign the suspension letter and disappeared for good. Consequently I find that the claimant was not dismissed by the respondent but she voluntarily deserted her employment after being served with a suspension letter. The desertion took effect from 20.3.2016 when she failed to report back after the lapse of the suspension period.

### **Reliefs**

18. In view of the forgoing finding, I decline to make declaration that the claimant was unfairly dismissed by the respondent. Accordingly, the claim for salary in lieu of notice and compensation for unfair termination is dismissed.

19. However the claim for salary for the 11 days worked in February, 2016 is granted as prayed since no proof of payment was adduced by the respondent. I therefore award the sum of Kshs. 16000 x 11/26 = Kshs. 6769.25.

20. The claim for certificate of service is also allowed.

21. In the end I enter judgment for the claimant against the respondent in the sum of Kshs. 6769.25 plus interest at court rates from the date of filing suit. She will also have certificate of service. Each party to bear their own costs.

**Dated, signed and delivered in open court at Nairobi this 17th day of January, 2020.**

**ONESMUS MAKAU**

**JUDGE**