



**Musimbi v Kenafric Manufacturing Limited & another (Cause
338 of 2018) [2024] KEELRC 568 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 568 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 338 OF 2018
L NDOLO, J
MARCH 14, 2024**

BETWEEN

VIOLET MUSIMBI CLAIMANT

AND

KENAFRIC MANUFACTURING LIMITED 1ST RESPONDENT

NIDE SERVICES LIMITED 2ND RESPONDENT

JUDGMENT

1. By her Memorandum of Claim as amended on 27th March 2018, the Claimant sued the 1st and 2nd Respondents, citing unlawful termination, failure to pay terminal dues and sexual harassment as issues in dispute.
2. The 1st Respondent filed a Memorandum of Response dated 7th June 2018 and the 2nd Respondent filed a Statement of Defence dated 28th August 2018.
3. The matter went to full trial where the Claimant testified on her own behalf. Lorna Solopian testified for the 1st Respondent and Hesbon Muhanji for the 2nd Respondent.

The Claimant's Case

4. The Claimant states that by a contract between the 1st and 2nd Respondents, it was agreed that the 1st Respondent would supply workers to the 2nd Respondent with the workers being under the supervision and control of the 1st Respondent.
5. The Claimant claims to have worked for the 2nd Respondent from 2nd June 2009 to 22nd November 2017 when her employment was terminated. She states that she worked under the supervision of the 1st Respondent's quality checkers and factory supervisors.



6. She further states that in the course of work on 9th November 2017, she was involved in an argument with the 1st Respondent's agent, Fredrick Omondi about gum that had accidentally dropped on the floor during production. The Claimant avers that she asked a colleague to pick the gum on her behalf but Omondi insisted that the Claimant picks it herself.
7. The Claimant alleges that Omondi reacted angrily by switching off the machine the Claimant was operating. The Claimant reacted by shoving Omondi aside.
8. The Claimant accuses Omondi of sexual harassment with threats regarding her employment status. She cites the following particulars of harassment:
 - a. In May 2017, Omondi without warning, touched the Claimant's face under the pretext of checking whether she had applied make up on her face and eyebrows;
 - b. In September 2017, Omondi forcefully pulled the Claimant's skirt down in front of her colleagues alleging that she was wearing a miniskirt at work;
 - c. In October 2017, Omondi touched the Claimant's face and head stating that she was putting on too much makeup and wasting money on her looks.
9. The Claimant avers that in all these occasions, she complained to the 2nd Respondent's agent, Enoch Rubusia but no action was taken against Omondi.
10. The Claimant states that on 22nd November 2017, she was suspended/dismissed from her duties at the 1st Respondent's premises by the 2nd Respondent on allegations of gross misconduct.
11. The Claimant claims the following from the 2nd Respondent:
 - a. One month's salary in lieu of notice.....Kshs. 16,000
 - b. Damages for unfair termination.....192,000
 - c. Untaken leave days for 6 years.....77,538
 - d. Housing allowance.....230,400
 - e. Overtime payment.....128,128
12. She further seeks damages from the 2nd Respondent, for retention as a casual worker for a period of 8 years.
13. In addition, she seeks general damages and punitive damages from the 1st and 2nd Respondents, for sexual harassment.
14. Finally, she asks for costs of the case.

The 1st Respondent's Case

15. In its Memorandum of Response dated 7th June 2018, the 1st Respondent states that the Claimant never worked for it under any circumstances, whether under a contract of employment entered into by the 2nd Respondent on its behalf or vide a contract of employment entered into by the 1st Respondent on behalf of the 2nd Respondent. The 1st Respondent maintains that it has never performed any service or any job under the direction of an officer of the 2nd Respondent.



16. The 1st Respondent's case is that there was no employer/employee relationship between it and the Claimant. The 1st Respondent therefore challenges the jurisdiction of this Court entertain the Claimant's claim as against it.

The 2nd Respondent's Case

17. In its Memorandum of Defence dated 28th August 2018, the 2nd Respondent states that the Claimant is its former employee, who had been hired and posted to work at the 1st Respondent's factory.
18. The 2nd Respondent admits having employed the Claimant as a general worker effective 22nd June 2009. The Respondent states that the Claimant was posted to work for the 1st Respondent pursuant to a two-year renewable contract between the 1st and 2nd Respondents.
19. The 2nd Respondent states that throughout her employment, the Claimant was stationed at the 1st Respondent's factory from where she was dismissed on 10th November 2017, on account of gross misconduct. At the time of dismissal, the Claimant earned a monthly salary of Kshs. 20,162.
20. According to the 2nd Respondent, although all employees supplied by it were under the overall responsibility of its co-ordinator, the day-to-day supervision of the work and workers was undertaken by the 1st Respondent's management.
21. The 2nd Respondent states that on the night of 9th November 2017, the 1st Respondent's Quality Checker, Fredrick Omondi gave instructions to the Claimant, which she refused to obey. It is alleged that the Claimant argued with Omondi and ended up assaulting him before being restrained by a workmate.
22. The 2nd Respondent avers that the Claimant was issued with a show cause letter dated 10th November 2017, to which she responded on 11th November 2017. The Claimant is said to have been invited to a disciplinary hearing on 13th November 2017, which she chose to attend without a witness.
23. The Respondent further avers that at the disciplinary hearing, the Claimant did not respond to the accusation of acting violently towards a person placed in authority over her, but instead chose to dwell on alleged previous incidents of sexual harassment by the Quality Checker. According to the Respondent, the Claimant had not reported any of the alleged incidents of sexual harassment.
24. On 22nd November 2017, the Claimant was dismissed for gross misconduct upon which she was paid her terminal dues, which she acknowledged in full final settlement. She was issued with a certificate of service on 24th November 2017.

Findings and Determination

25. There are three (3) issues for determination in this case:
- a. Whether the 1st Respondent is a proper party in these proceedings;
 - b. Whether the Claimant has proved a case of wrongful dismissal;
 - c. Whether the Claimant is entitled to the remedies sought.

The 1st Respondent's Joinder

26. The 1st Respondent denies the existence of any employment relationship between it and the Claimant. On her part, the Claimant states that the 2nd Respondent was her employer, an averment that is admitted by the 2nd Respondent.



27. The 1st Respondent's witness, Lorna Solopian told the Court that the Claimant was not deployed at the 1st Respondent's premises.
28. In the absence of any documentation to support the existence of a manpower supply arrangement between the 1st and 2nd Respondents, as alleged by the 2nd Respondent, the Court is unable to infer any employment relationship between the Claimant and the 1st Respondent.
29. The only finding to make therefore is that the 1st Respondent is not a proper party in these proceedings and the claim as against it is struck out.

The Dismissal

30. On 22nd November 2017, the 2nd Respondent wrote to the Claimant as follows:

“Dear Musimbi

Re: Termination Of Service.

Your attention is drawn to the subject matter as a result of an incidence that occurred on the 9/11/2017, Our Ref.Nide/KI/SC/VM/11/2017 of Friday, November 10, 2017, your response to our mentioned show cause letter and the disciplinary hearing meeting held on 13th November 2017.

The issue of the subject matter being having acted violently towards your superior that amounted to acts of insubordination.

As witnessed in CCTV footage and at the disciplinary hearing as much as you claim incidences of sexual harassment by the QC, still you were obligated in restraining yourself from engaging in acts of insubordination, it should be noted that your action amounts to a breach of your contractual obligation by lowering the dignity of a person placed in authority over you. This is an act of insubordination that cannot be allowed in a work environment.

In this respect, we are left with no alternative but to subject you as per the subject matter based on the issue of the subject matter (sic) with effect from 10th November 2017. Kindly ensure that you obtain clearance so as to be able to receive your terminal dues and a certificate of service.

Yours faithfully

(signed for)

Muhanji Hesbon

For: Human Resource Manager”

31. This letter accuses the Claimant of insubordination, particulars being that she declined to take instructions from her superior and in the process acted violently against him. The Claimant herself testified that on 9th November 2017, she was involved in an argument with her supervisor, regarding gum that had accidentally dropped on the ground during production. She confirmed having shoved the supervisor aside so that she could continue working.
32. Section 43 of the *Employment Act* sets the standard for establishment of a valid reason for terminating employment in the following terms:
 43. Proof of reason for termination



- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
33. This provision mirrors the ‘range of reasonable responses test’ which was defined by Lord Denning in *British Leyland UK Ltd v Swift* [1989] IRLR in the following terms:

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”
34. The Claimant sought to justify her actions by fronting accusations of sexual harassment by the supervisor. However, an allegation of sexual harassment, although serious, cannot be used as a defence to accusations of misconduct by an employee. Moreover, there was no evidence that the Claimant had raised any complaint of sexual harassment prior to the incident that led to her dismissal.
35. The essence of the ‘range of reasonable responses test’ is that in determining a claim of wrongful dismissal or unlawful termination, the Court does not seek to replace the employer’s decision with its own. All the Court asks is whether a reasonable employer would have terminated the employment relationship and if the answer is in the affirmative, the Court will not disturb the employer’s decision.
36. In this case, the Claimant crossed the line by first, disobeying the express instructions of her supervisor and second, by physically shoving him aside. There was therefore a valid reason for her dismissal.
37. The next question is whether in executing the dismissal the employer observed the following procedural fairness requirements set out in Section 41 of the *Employment Act*:
 - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
38. There is evidence that the Claimant was issued with a show cause letter to which she responded. She was then subjected to an oral hearing, whose minutes she signed.



39. Although in her final submissions, the Claimant attempted to raise the issue of time within which she was required to respond to the charges levelled against her, it is evident that she did not raise this issue either before or during the disciplinary proceedings. On the whole, the Court is satisfied that the procedural fairness requirements of Section 41 of the *Employment Act* were satisfied.
40. Flowing from the foregoing, I find and hold that the Claimant's dismissal was substantively and procedurally fair. The claims for compensation and notice pay are therefore without basis and are disallowed.

Other Claims

41. According to the evidence on record, the Claimant was paid for accrued leave days as part of her terminal dues.
42. Having been a piece rate worker, the Claimant was paid a consolidated piece rate which would ordinarily be inclusive of a housing element.
43. The claims for overtime compensation and damages for sexual harassment were not proved.
44. Finally, the Claimant's entire claim fails and is dismissed with each party bearing their own costs.
45. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MARCH 2024

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JUDGE

Appearance:

Mr. Wangira for the Claimant

Mr. Waweru h/b for Mr. Juma for the 1st Respondent

Mr. Namasake for the 2nd Respondent

