



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 931 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL

CLAIMANT

VERSUS

GREENLAND BUTCHERY

RESPONDENT

JUDGMENT

1. The Claimant is registered trade as a union under the provisions of the Labour Relations Act, 2007, whose mandate is to represent interest of workers in the commercial and food manufacturing sector.
2. The Respondent is a shop engaged in the business of selling meat to the general public and is situate in Mesora Shopping Complex, Buruburu Shopping Centre, in Nairobi County.
3. The Claimant filed the instant Claim on behalf of Beatrice Sikuku, the Grievant herein (Membership No. 20571) a paid up member of the Claimant, who was employed by the Respondent in the position of a cashier.
4. The trade dispute, subject of the instant claim was first reported to the Ministry of Labour and Social Protection in accordance with the provisions of Section 62 of the Labour Relations Act and a conciliator appointed.
5. Upon appointment the conciliator invited the parties for several conciliation meetings, but the meetings did not bear any fruits so the conciliator advised the Claimant to refer the matter to this Court by dint of the provisions of Section 69 of the Labour Relations Act.
6. Through its claim dated 9th May, 2016, the Claimant avers that the Grievant was employed by the Respondent on or about 19th August, 2011 in the position of cashier and at a monthly salary of Kshs.6,000/- which she earned until 20th July, 2014 when her employment was terminated on the grounds of alleged theft.
7. The Claimant contended that the Grievant's termination was unlawful and was contrary to the provisions of Articles 36 and 41, of the Constitution of Kenya, 2010 as read with Section 41 of the Employment Act, 2007, Section 4, 52, 62 and 69 of the Labour Relations Act, 2007 and Section 12 of the Employment and Labour Relations Act, 2011.
8. In the instant claim, the Claimant seeks the following orders:
 - (a) Payment in lieu of notice Kshs.22,070.95
 - (b) Payment in lieu of leave Kshs.51,994.10
 - (c) Payment for 20 days worked in
July, 2014 Kshs.16,921.00
 - (d) Underpayment of wages Kshs.576,001.30
 - (e) Severance pay Kshs.22,070.95

(f) Maximum compensation Kshs.304,578.60

TOTAL Kshs.993,636.90

(g) Costs to the union.

9. The Respondent despite being served with the summons and the memorandum of claim, failed to enter appearance or to file its defence. The suit proceeded as undefended Claim and the Claimant was directed to proceed by way of written submissions and witness affidavit.

Claimant's Case

10. In her witness statement sworn on 9th May, 2016, the Grievant states that she was under the Respondent's employment from 19th August, 2011 until 20th July, 2014 when her services were un-procedurally, unlawfully and unfairly terminated on account of alleged loss of money.

11. The Grievant averred that her termination was as a result of a transaction that happened on 18th July, 2014 when after tallying the records against the cash at hand, she had excess cash of Kshs.5,000/-.

12. That on 19th July, 2014 as she prepared the accounts, she noted a shortage of Kshs.5,000/-. The Grievant did inform the Respondent of the two discrepancies and tried to explain the issue but the Respondent did not accept her explanation.

13. That on 20th July, 2014 the Respondent ordered her to give him her phone on allegation that the Grievant had stolen money from the proceeds of the business and deposited the same into her personal Mpesa account.

14. Ms. Sikuku stated that she complied with the Respondent orders and handed over her phone and bag for the Respondent who confirmed that there was no such deposit made.

15. The Grievant further stated that the Respondent proceeded to assault her and took a sum of Kshs.3,800/- from her hand bag before throwing it back to her and handing back her phone.

16. That the Grievant did report the assault to the police under OB No. 32/2014 and received treatment at Metropolitan Hospital. She however withdrew the assault case.

17. The Grievant maintained that the Respondent refused/failed and/or ignored to pay her terminal dues upon termination forcing her to report the matter to the Claimant.

18. She further stated that the union did write to the Respondent seeking to settle the dispute but their efforts did not bear any fruits forcing the union to report the trade dispute to the Cabinet Secretary.

19. A conciliator was appointed but the dispute could not be resolved as the Respondent failed to honour any of the invites to attend to the meetings forcing the Claimant to file the instant claim.

20. She averred that she was not accorded a chance to a fair hearing prior to the termination of her employment and was condemned unheard. That she is therefore entitled to the reliefs sought in the Memorandum of Claim.

Claimant's Submissions

21. The Claimant in its submissions maintained that the Grievant's termination from the Respondent's employment was un-procedural, unfair and unlawful as she was not accorded an opportunity to defend herself on the allegations of theft and/or loss of money.

22. The Claimant further submitted that the termination was in violation of the provisions of Section 41 of the Employment Act, 2007, relying on the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** where the Court held that for a termination to be fair it must have both substantive justification and be procedurally fair.

23. The Claimant further contended that it had proved its case as against the Respondent and is therefore entitled to the reliefs sought in its memorandum of claim. The Claimant urged this Court to allow the claim in terms of the reliefs sought therein.

Determination

24. Having considered the pleadings, evidence, submissions and authorities cited by the Claimant the following are the issues for determination:

(a) Whether the Claimant has *locus standi* to prosecute this claim;

(b) Whether there existed an employer-employee relationship between the Grievant and the Respondent herein;

(c) Whether the termination of the Grievant's employment was valid both procedurally and substantively;

(d) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant has locus standi to prosecute the instant claim

25. The Claimant contended that the Grievant was its member and attached a copy of her membership card, membership number 20571 to its Claim as proof of her membership. The Claimant further contended that the Grievant was a paid up member of the union. It is on this basis that the Claimant filed the instant claim against the Respondent herein on behalf of its member.

26. In the case of **Kenya Shipping, Clearing and Warehouses Workers Union v Africair Management and Logistics Limited (2016) eKLR** it was held:

“The obligation of the Trade Union to represent its Members in and out of Court, and the right of the Members to representation in work related grievances and disputes, flows from the membership of the Employee to the Trade Union. These are obligations and rights created by membership. Recognition is between the Trade Union and the Employer. Membership creates a relationship between the Trade Union and its Members. The two relationships are not the same thing, and do not have the same legal effect. Trade Unions collect regular membership fees from Employees, and the Employees in return, enjoy the representation and protection of the Trade Union under the Union Constitution and the law. Membership allows the Employees to have the Trade Union’s legal representation in Court, while Recognition allows the Union to collectively bargain with the Employers, for the benefit of Members, and all Unionisable Employees.”

27. I thus find the Claimant had locus standi to file this suit on behalf of the Grievant.

Whether there existed an employer-employee relationship between the Grievant and the Respondent herein

28. The Claimant in its pleadings and submissions maintained that the Grievant was employed by the Respondent herein on 19th August, 2011 in the position of a cashier and was earning a monthly salary of Kshs.6,000/-.

29. The Claimant further maintained the Grievant was never issued with a letter of appointment or a contract of employment for the duration the Grievant was under the Respondent’s employment.

30. The Claimant wrote to the Respondent to meet and discuss the termination of the Grievant through its letters dated 1st August 2014 and 15th August 2014 but the Respondent did not respond to any of the Claimant’s letters forcing it to proceed and report the trade dispute to the Labour Officer in line with the provisions of Section 62 of the Labour Relations Act vide its letter dated 26th September 2014.

31. The Labour Officer accepted the report and appointed a conciliator on 7th October 2014. Parties were further directed to submit their proposals in writing to the conciliator.

32. The Claimant prepared its proposal vide its letter dated 11th November 2014 and forwarded it to the conciliator for consideration. There is no indication on record that the Respondent responded to the conciliator’s request.

33. The conciliator subsequently invited parties for conciliation/investigation meetings on 22nd December 2014, 23rd January 2015 and 11th February 2015. The Respondent failed and/or ignored and/or refused to attend the said meetings personally and/or send its representatives.

34. The Respondent having failed to avail any evidence to rebut the Grievant’s evidence, I find that the Claimant was indeed under the Respondent’s employment.

Whether the termination of the Grievant’s employment was valid both procedurally and substantively;

Unfair Termination

42. Section 45(1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment –

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

43. In this case the Claimant testified that the Grievant was terminated on the ground of alleged theft. It further averred that the Grievant was not accorded an opportunity to defend herself of any allegations as required under the mandatory provisions of Section 41 of the Employment Act, 2007.

44. The Claimant maintained that the Grievant was not paid her terminal dues after the separation.

45. The above evidence was not rebutted by the respondent and therefore I find and hold that the Claimant has discharged the burden of proving unfair termination of the Grievant's employment by the respondent. On the other hand, I find that the respondent has failed to discharge the burden of proving a valid and fair reason for dismissing the Claimant. It has also failed to prove that a fair procedure was followed. In the case of **Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (KUDHEHA) v Fatuma Mohammed (2015) eKLR** the Court held that verbal contracts are valid and that an employee on verbal contract is equally entitled to a fair hearing prior to his/her termination.

Whether the Claimant is entitled to the reliefs sought

46. The Claimant has tabulated the Grievant's terminal dues as a cashier. Based on the nature of work that she was doing, it is my view that the Grievant was not a cashier but a shop assistant.

47. Having found that the Grievant's termination was indeed unlawful and unfair she is entitled to the following reliefs: -

i. Payment in lieu of Notice

48. The Grievant is entitled to compensation under this head by dint of Section 35 of the Employment Act, 2007. I award her Kshs.13,201.55 plus 15% house allowance (Kshs.1,980.20) making a total of **Kshs.15,181.80** in line with the minimum wage for cashier under the Regulation of Wages (General) Order, 2013.

ii. Payment in lieu of leave at Kshs.51,994.10/-

49. The Grievant is entitled to compensation under this head in absence of any evidence from the Respondent to rebut the averments of the Grievant that she did not proceed on leave as required. I award her leave for two years, 11 months at 21 days per annum being 61.25 days at **Kshs.32,000/-**.

iii. Payment for 20 days worked in July, 2014 at Kshs.16,921/-

50. In absence of any evidence to prove payment of her salary for days worked in July, 2014 the Grievant is awarded the sum of **Kshs.11,678.40** being salary for days worked in July, 2014.

iv. Underpayment @ Kshs. 576,001.30/-

51. I have examined the Regulations of Wages (General) (Amendment) Order, 2011 to 2013 and note that the Grievant was indeed underpaid during the period of her engagement with the Respondent and is therefore entitled to compensation under this head which I award her at **Kshs.264,892/-** made up as follows –

$$2011 = (11,775 - 6,000) \times 8$$

$$2012 = (13,512 - 6,000) \times 12$$

$$2013 - 2014 = (15,182 - 6,000) \times 14$$

v. Severance Pay

52. This not being a case of redundancy the Grievant is not entitled to this relief.

vi. Maximum compensation at Kshs.304,578.60/-

53. Taking into account the Grievant's length of service and the Respondent's conduct in the termination transaction, it is my view that an award of 4 months' salary as compensation in the sum of **Kshs.60,727.20** is reasonable and award the Grievant the same.

54. The Respondent is directed to issue Certificate of Service to the Grievant in compliance with Section 51 of the Employment Act, 2007.

55. The Claimant is awarded costs of this suit and interest at Court rates from the date of judgment until payment in full.

56. In conclusion judgment is entered in favour of the Grievant against the Respondent as follows:

i. Payment in lieu of notice Kshs.13,201.55

ii. Payment in lieu of leave Kshs.32,000.00

iii. Payment for 20 days worked in

July 2014 Kshs.11,678.40

iv. Underpayment Kshs.264,892.00

v. Compensation for unfair

Termination Kshs.60,727.20

TOTAL Kshs.384,479.40

vi. Certificate of service

vii. Costs of the suit

57. Interest shall accrue at court rates from the date of this judgment until settlement in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE