



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2238 OF 2016

SARA MUKABANA MUKA.....CLAIMANT/RESPONDENT

VERSUS

GRADUATE POOL PLACEMENT SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed suit on 2nd November, 2016 praying for orders that:-

(a) A declaration is made that the dismissal of the claimant was unlawful and unfair.

(b) That the claimant is entitled to payment of terminal benefits including:-

(i) one month salary in lieu of notice be paid;

(ii) house allowance for 6 years be paid;

(iii) overtime worked during weekdays and weekend be paid;

(iv) payment be made in lieu of leave days not taken;

*(v) Payment be made for public holidays worked for six **Years**.*

2. (c) Compensation for unlawful and unfair dismissal.

3. C.W.1, the claimant testified that she now lives at Mathare North. That she recorded a witness statement dated 19th September, 2016, which she adopted as her evidence in Chief and produced list of documents marked exhibits '1' to '3'.

4. C.W.1 stated that she was employed by the respondent as a General worker in September, 2009 and worked continuously until 29th August, 2015.

5. That initially she was placed at Kenafric who are key clients of the respondent.

6. That she worked day shifts from 7.30 a.m to 5.30 p.m. and night shifts from 5.30 p.m to 8.00 am in the morning. That this was arranged in a way that the claimant alternated every one week from day shift to night shift.

7. That at times C.W.1 was paid after two weeks and at times not paid. That on 29th August, 2015 while in the night shift at around 11 p.m, the supervisor, Mr. Jackson Muia assigned C.W.1 to help in packing packets at chicklets section. C.W.1 asked the supervisor to add more staff there as the work was a lot. The supervisor terminated her services. That when C.W.1 went back to work in the morning on 30th August, 2015, to be explained further by the Human Resource as to the cause of dismissal, Mr. Muia chased her out of the premises and told her never to be seen at KenaAfric Industries company. That C.W.1 tried to get assistance from head office in vain. C.W.1 stated that she started to work as a Machine Operator. She denied that she was a casual employee and that she earned Kshs 14,000 per month. That in the year 2013, she went for maternity leave for 3 months. That at times she would be taken to the chicklet section to do packaging. Under cross-

examination, C.W.1 said Mr. Tom of the respondent had promised to resolve the matter the following day but it did not happen. That Tom was C.W.1's supervisor at the Graduate pool, the respondent. C.W.1 denied that she was a difficult employee. She testified that she worked diligently as a machine operator. C.W.1 said she had two job cards one for Graduate Pool and another for Kenafric. C.W.1 stated that the dismissal was verbal by Mr. Muia of Kenafric. C.W.1 prays to be awarded as set out in the Statement of claim.

8. The respondent called R.W.1 Benjamin Muia who adopted a witness statement dated 4th November, 2020 as his evidence in Chief. R.W.1 stated that C.W.1 was a hard-working employee and that he was her supervisor. That C.W.1 got maternity leave for 3 months and did not come back thereafter. That she returned after 5 months and did not communicate her whereabouts during that time. That the respondent took her back when she returned upon explaining her case. That C.W.1 was a daily paid employee. That C.W.1 complained upon being transferred to Kenafric and requested to be returned to the old station. That the request was denied because there was no work at the old station. That C.W.1 was asked to leave if she did not wish to work at the new station. R.W.1 stated that C.W.1 was not dismissed from work. C.W.1 instead declined to work.

9. R.W.1 denied that Jackson Muia dismissed C.W.1. R.W.1 said Jackson Muia was an employee of Kenafric Industries and was running the operations assisted by a supervisor of the respondent.

10. R.W.1 added that the claimant was paid her dues even when she extended her leave without permission.

11. That the claimant started demanding that she be moved from the department she had been assigned to. The claimant failed to fill the requisite form to enable her to be transferred despite several requests to do so.

12. That the claimant then went to the production manager of Kenafric Industries to have her transferred to the department she wanted but the same would not be done and she was told that there was no vacancy at the said department.

13. That Jackson Muia had no authority to dismiss the claimant as he was not an employee of Real Careers Limited but a supervisor of Kenafric Company Industries.

14. That if, it is true, which is denied, that Jackson told her not to report to work, then the claimant ought to have asked the management of Real Careers to relocate her.

15. That the claimant thereafter left employment without justifiable cause or notice to the respondent. That the suit lacks merit and it be dismissed.

Determination

16. The parties filed their respective final submissions and the issues for determination are:-

(a) Whether the claimant absconded work or was dismissed from employment by the respondent.

(b) If the claimant was dismissed from employment, whether this was for a valid reason following a fair procedure.

(c) What reliefs, if at all, is the claimant entitled to.

17. In terms of Section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya, the claimant has the onus of proving on a balance of probabilities that the respondent terminated her employment. Upon discharging of that onus, the burden shifts to the respondent in terms of Sections 41, 43, and 45 of the Employment Act, 2007 to prove that the termination of employment of the claimant was for a valid reason and that the respondent followed a fair procedure in terminating the employment of the claimant.

18. In the present case, the claimant testified that she was verbally dismissed from her employment by one Jackson Muia, a supervisor of Kenafric Industries where she had been temporarily placed by the respondent. The claimant further testified that her efforts to return to her earlier station with the respondent were not fruitful and therefore her employment was unlawfully terminated.

19. R.W.1 on the other hand testified that the claimant absconded work for a long period upon completing her maternity leave. That upon her return she was placed at Kenafric Industries, a client of the respondent since the station where the claimant worked had no work at the time.

20. R.W.1 further testified that the claimant was unhappy with her placement at Kenafric and demanded to be returned to her earlier station.

21. That the claimant then absconded from work before the matter of her transfer had been concluded. The two versions as told by C.W.1 and R.W.1 are mutually destructive. However, the narrative told by R.W.1 appears to the Court more credible and therefore believable in that the respondent had reinstated the claimant to work even after she had absconded work for many days after her maternity leave without any permission. The conduct by the respondent does not portray a party that had intention to terminate the employment of the claimant. To the contrary, the respondent from the testimony of R.W.1 had even in the past accommodated C.W.1 severally when she was faced with family issues.

22. The Court is persuaded that there was a genuine reason to deploy C.W.1 to Kenafric but C.W.1 was not happy working at that station and chose to abscond her work without notice to the Respondent.

23. The Court does not believe that Jackson Muia terminated the employment of the claimant. As a matter of fact, Jackson had no authority to terminate the employment of the claimant.

24. Accordingly, the Court finds that the claimant has failed to discharge the burden of prove in this matter. The Court finds that the claimant absconded work without notice to the respondent and her employment was not unlawfully terminated by the respondent.

25. With regard to the issue of the reliefs sought by the claimant, upon finding that the claimant absconded work, it follows that she is not entitled to any payment in lieu of notice. The claimant is equally not entitled to compensation sought in the Statement of Claim.

26. The claimant earned a salary of Kshs 14,400 per month. The claimant did not tender any evidence that she was entitled to payment of house allowance at 15% of that monthly salary.

27. Equally, the claimant did not tender any sufficient evidence to show that she had worked overtime in respect of which she had made a claim whilst she still worked for the respondent and the respondent had failed to pay her.

28. The claimant also did not demonstrate sufficiently or at all that she had not been granted annual leave for the six (6) years she had worked for the respondent. The primary onus of proving that the stated rights were not enjoyed vests in the claimant. The burden then shifts to the respondent to demonstrate that indeed the claimant had for example applied for leave and was granted or was not entitled to payment of any overtime and or any house allowance.

29. Accordingly, the entire suit by the claimant fails and same is dismissed with no order as to costs given the long and admittedly, good service, the claimant had given the respondent.

30. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 17TH DAY OF FEBRUARY, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Wangira for claimant

Mr. Wanyaga for Respondent

Ekale – Court Assistant