



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO. 72 OF 2017**

**TABITHA OWATE OPIYO.....CLAIMANT**

**VERSUS**

**GILANIS SUPERMARKET LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant through the firm of Magatta and associates Advocates lodged this memorandum of claim dated 20<sup>th</sup> February, 2017, seeking for the following reliefs;

- a) Pro-rate leave for 10 months of Kshs.5,904.**
- b) Unpaid off duty from August, 1997 to 22<sup>nd</sup> October, 2016 amounting to Kshs.618,116.80.**
- c) Unpaid public holidays worked from August 1997 to 22<sup>nd</sup> October, 2016 of Kshs.128,212.**
- d) Compensation for unfair termination under Section 49(c) of the Employment Act of Kshs.121,464.00.**
- e) Certificate of service.**
- f) Costs of this claim.**

2. The summary of the claimant case is that she was employed by the Respondent in August, 1997 as a general labourer at a monthly salary of Kshs.10,122/=, a position which she held until her termination.

3. The claimant states that she worked for the Respondent throughout without taking her leave or receiving compensation thereof.

4. The circumstances leading to her termination, is that the claimant reported to work as usual on the 19<sup>th</sup> September, 2016 and worked till about 3pm when she received a call from the Assistant Human Resource Officer who summoned her to their office and served her with a Notice for Disciplinary Hearing dated 19.9.2016 for a hearing to be held in 3 days which was on 22.9.2016.

5. Despite the short notice, the disciplinary hearing proceeded as scheduled however that the claimant's representative was turned away. Later that day the claimant received the one-month termination notice which was to lapse on 22<sup>nd</sup> October, 2016 and on the 22.10.2016 the claimant's services were terminated and as a parting package she was given Kshs.14,000.

6. The Respondent entered appearance on the 3<sup>rd</sup> March, 2017 and filed a response to claim on the 9<sup>th</sup> March, 2017 admitting to employing the claimant from August, 1997 to 22<sup>nd</sup> October, 2016 at a basic salary of Kshs.9,750 inclusive of House allowance.

7. The Respondent avers that it terminated the claimant's services for breaking rules and regulations at the Respondent employ and receiving three warning letters in a span of one year for various offenses.

8. It contends that disciplinary hearing was carried out and the claimant could not explain why she had failed to improve her behavior forcing the Respondent to issue her with one-month termination notice before the termination.

9. It is the Respondent's case that during disciplinary hearing the claimant failed to bring an employee/ representative of her choice and the allegation that her representative was rejected is false.

10. The Respondent then avers that the claimant did not work during public holidays or off duty and any engagement during such days were duly paid for. Further that the claimant utilized all her leave days.

#### **Hearing.**

11. The claimant testified as CW-1 and adopted her witness statement filed on 21.2.2017 that basically reiterated the claim herein.

12. Upon cross examination, CW-1 testified that she was issued with employment contract which provided for the terms of employment and among the conditions therein was that one could be dismissed if they were issued with three warning letters in a year. She admitted that she received three warning letters one for idling and two for reporting to work late. She affirmed that she was issued with show cause letter before the disciplinary hearing and during the date of hearing her college failed to accompany her for the disciplinary hearing for fear of being fired as well.

13. Upon further cross examination, the claimant testified that she applied for leave whenever due. She also testified that upon termination she was paid Kshs.14,000 however she did not receive her salary for the month.

14. In re-examination, the witness contents that she does not know how to read and write therefore could not properly defend herself during the disciplinary hearing.

15. The Respondent called one witness, **Wycliffe Ndubi**, the Human resource manager as RW-1. He adopted his witness statement of 9.3.2017 and produced the documents as Respondent's Exhibits. In summary he testified that the claimant was employed by the Respondent on 10.5.2012 and in 2016 she was issued with 3 warning letter informing the respondent decision to issue her with a notice to show cause and the subsequent disciplinary hearing. Following the disciplinary hearing the claimant's services were terminated and she was given 14,000 as her terminal dues then she signed a discharge voucher against the Respondent.

16. RW-1 further testified that the claimant never worked during public holidays and with regard to her leave days, the witness testified that the claimant utilized all her leave and off days.

17. Upon cross examination, RW-1 testified that the claimant was issued with three warning letter on the 14.7.2016, 30.7.2016 and 30.9.2016 however that the letter of 30.9.2016 is not before Court.

18. Upon further cross examination the witness testified that the claimant was fired for receiving the 3 warning letters; for poor performance and poor attendance however when shown the attendance records he confirmed that its only on one incident in August, 2016 that the claimant lost 8 seconds and in July and August, 2016 it shows that the claimant left work at 6pm. He stated that he was not aware that the claimant was illiterate.

19. In re-examination the witness testified that the claimant was a habitual late comer. Further that, the Respondent's employees left work at 6-6:15 in the evening and duly paid for the overtime and if not paid the hours are carried forward to be utilized in off days.

#### **Claimant's Submissions.**

20. The claimant submitted that she was unfairly terminated from employment. It was argued that the reason for termination was based on two reason that is poor performance and receiving the three warning letters.

21. On the poor performance as a ground for termination, it was argued that the employer is mandated under section 8 of the Employment Act to put in place policy or practice on how performance was to be measured. This was reiterated in the case of **Peter Kamau Mwaura and another v National Bank of Kenya [2020] eKLR**. it was then argued that the claim by the Respondent that they had Performance Improvement plan was not backed with any evidence as provided for under section 107 and 108 of the Evidence Act, therefore that they cannot claim to terminated the claimant's services on the basis of poor performance when there was no evidence of performance appraisal done on the claimant's performance before the dismissal.

22. On termination based on issuance of the three warning letters, it was submitted that indeed the contract provides for termination of contract of an employee who was served with three warning letter, however that the Respondent produced in evidence two warning letter and the alleged third warning letter was never produced, therefore that the claim that the claimant was issued with 3 warning letter cannot lie without production of all the 3 warning letters. In light of the foregoing the Claimant submitted that the Respondent has failed to demonstrate the reason for terminating her services as provided for under section 43 of the Employment Act.

23. On whether due procedure was followed before termination, it was submitted that the claimant is an illiterate person and the minutes of the disciplinary meeting does not indicate whether the Respondent explained to the claimant the purpose of the summons and the response thereof. It was argued that the disciplinary hearing was a sham which did not pass the fairness test.

24. Accordingly, the claimant submitted that the termination did not pass the substantive and procedural fairness and therefore unfair within the meaning of section 45 of the Employment Act and urged this Court to allow the claim as prayed.

#### **Respondent's Submissions.**

25. The Respondent submitted on one issue, whether the summary dismissal was lawful and justifiable. It then submitted that the Respondent fully complied with the provisions of section 41 of the Employment Act, in that the Respondent first issued warning letters to the claimant and later on summoned her through a show cause letter for disciplinary hearing which culminated to her termination. In this the Respondent relied on the case of **Anthony Mkala Chitavi V Malindi Water and sewage Company Ltd [2013] eKLR**.

26. It was further submitted that upon termination the claimant received her terminal dues which she acknowledged receipt and signed a discharge voucher baring the Respondent from any further liability. Accordingly, it was argued that the claimant's case is without basis and the same ought to be dismissed with costs.

27. I have examined the evidence and submissions of the parties herein. From the evidence on record the claimant was employed by the respondent vide a letter dated 10<sup>th</sup> May, 2012.

28. According to the appointment letter, the claimant was expected to work from Monday to Saturday 8.15am to 5.55pm or 9.15pm as required and on Sunday and Holiday from 10am to 6.30pm.

29. The employment could be terminated for gross misconduct and if an employee received 3 warning letters in a year.

30. From the documents produced before court and which the claimant admitted to she had received 3 warning letter in one year preceding her termination.

31. This prompted the respondent to summon the claimant for disciplinary hearing which she attended and was thereafter dismissed.

32. It is my finding that the respondents had valid reasons to terminate the services of the claimant.

33. It is also my finding that the claimant was subjected to a fair disciplinary process before her termination.

34. It is therefore my finding that the claim by the claimant against the respondent is not merited and is therefore dismissed accordingly.

**DATED AND DELIVERED IN OPEN COURT THIS 31<sup>ST</sup> DAY OF MARCH, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Magatta for Claimant - present

Munyiri holding brief for Murimi for Respondent – present

Court Assistant - Fred