



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 10 OF 2020

EEDI (K) LIMITED.....APPELLANT

VERSUS

DORRIS ANGILA OYOYA.....RESPONDENT

(Being an Appeal against the judgment and decree of the Hon E. A. Obina (PM))

delivered on 08/07/2020 in the Chief Magistrates Court

at Kisii ELRC Cause No. 20 of 2019)

JUDGMENT

1. In a judgment delivered on 8 July 2020, the Magistrates Court found that Eedi (K) Ltd (the Appellant) had unfairly terminated the employment of Dorris Angila Oyoya and awarded her compensation amounting to Kshs 216,000/- and pay in lieu of notice of Kshs 27,000/-
2. The Appellant was dissatisfied, and it filed a Memorandum of Appeal on 23 July 2020, contending that:
 - (1) The Honourable Subordinate Court erred in law and, in fact, in finding that the Respondent was unlawfully dismissed from employment by the Appellant.
 - (2) The Honourable Subordinate Court erred in law and, in fact, in dismissing the Appellant's case that the Respondent absconded work.
 - (3) The Honourable Court erred in law and fact in finding that the Respondent was on permanent employment and not on probationary contract as pleaded by the Appellant.
 - (4) The Honourable Subordinate Court erred in holding that the Appellant failed to accord the Respondent a fair hearing and dismissing the Appellant's case that it was not possible to conduct a hearing given that the Respondent abruptly disappeared from work.
 - (5) The Honourable Subordinate Court erred in law and, in fact, in holding that the Appellant made no efforts to locate the Respondent, yet the Appellant's evidence pointed otherwise.
 - (6) The Honourable Subordinate Court erred in law and fact by failing to analyse the Appellant's evidence in totality.
 - (7) The Honourable Subordinate Court erred in law and fact in awarding the Respondent Eight (8) months compensation without giving due consideration to the principles applicable in determining compensation for unlawful termination.
 - (8) The Honourable Court erred in awarding the Respondent one (1) month's salary in lieu of notice.
 - (9) The Honourable Court erred in taking into consideration extraneous matters in arriving at its decision.
 - (10) The Honourable Subordinate Court erred in law and, in fact dismissing the Appellant's Counterclaim as it did.

3. The Appellant filed its submissions on 17 February 2020, while the Respondent had filed her submissions on 17 January 2022.
4. The Court has considered the record and submissions.

Nature of employment

5. The Appellant contended that the trial Court erred in finding that the Respondent was on permanent terms of employment and not on a probationary contract.
6. The Respondent was issued with a contract dated 2 April 2018, indicating that the initial 3-months would be probationary. The probation was subject to extension.
7. The Appellant extended the probation on 1 July 2018 for a further 3-months.
8. On 4 April 2019, the Appellant informed the Respondent that her performance was wanting and, therefore, she would be advised on the way forward in due course.
9. The Appellant did not produce any employment records after 4 April 2019 to show how it addressed the confirmation/probation issue.
10. Section 42(2) of the Employment Act, 2007 limits probation to no more than 12 months.
11. In the circumstances, since the Respondent's probation lapsed on or around 1 April 2019 and the Appellant did not formally communicate on its status, the Respondent became confirmed by operation of the law.

Desertion or unfair termination of employment?

12. The Appellant's case before the trial Court was that on 21 August 2019, the Respondent came to work late and drunk and because she was not in the right frame of mind, she was paid her salary for the month, and after that, she never went back to work.
13. Failure to report to work at the appointed time and place is misconduct warranting summary dismissal under section 44 of the Employment Act, 2007.
14. It is also a breach of contract on the part of the employee.
15. Where an employee fails to report to work and considering that it is a misconduct/breach of contract, the employer should attempt to issue a show-cause to the employee in terms of section 35(1) of the Employment Act, 2007 to explain the breach of contract or the failure to turn up for work.
16. The Appellant was operating in the financial sector. It was stated that it had 150 employees.
17. In terms of section 12 of the Employment Act, 2007, it should have had a written disciplinary policy to address the failure to report to work or absence without cause or permission.
18. The Appellant did not disclose how or when it attempted to contact the Respondent. It cannot be that the Appellant did not have the contacts of the Respondent.
19. It should have attempted to know her whereabouts or asked her to explain why she was not reporting to work.
20. The Appellant did not explain why the Respondent was paid her salary upon reporting to work late. There was no disclosure whether the Appellant used to pay wages during that time of the month.
21. In the Court's view, it is more probable that the Appellant terminated the Respondent's employment without giving the written notice envisaged by section 35(1) of the Employment Act, 2007 or the hearing contemplated by section 41 of the Act.
22. The Court finds that the trial Court did not fall into error either of law or fact in concluding that the case was one of unfair termination of employment.

Award of compensation

23. The trial Court did not explain why it awarded compensation of 8-months' salary.
24. The factors to be considered are set out in section 49(4) of the Employment Act, 2007.
25. Since the trial Court did not reveal which factors it considered, it fell into an error of law and fact.
26. The Respondent had only served slightly over 1-year.

27. Considering the length of service and circumstances of termination, this Court will reduce the compensation to the equivalent of 4-months gross salary.

Pay in lieu of notice.

28. The Respondent was paid by the month, and in light of section 35(1)(c) of the Employment Act, 2007, the head of relief was in tandem with the law.

Counterclaim

29. The Appellant counterclaimed for the equivalent of a 1-month salary in lieu of notice, and the head of the claim was hinged on the assertion that the Respondent had absconded from work.

30. The trial Court discounted that narrative, and so has this, Court.

31. The Court, therefore, finds no error of law or fact in dismissing the Counterclaim.

Conclusion and Orders

32. Save for the reduction of compensation to the equivalent of 4-months gross salary totalling Kshs 108,000/-, the Court finds no merit in the Appeal.

33. The award to attract interest from the date of judgment by the trial Court.

34. Each party to bear its own costs of the Appeal. The Respondent to have the costs before the trial Court.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF MARCH 2022.

RADIDO STEPHEN

JUDGE

APPEARANCES

FOR APPELLANT MUUMBI & CO. ADVOCATES

FOR RESPONDENT NYANGACHA & ASSOCIATES ADVOCATES

COURT ASSISTANT CHRISPO AURA