



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 72 OF 2018**

**GRACE ACHIENG OKEYO.....CLAIMANT**

**VERSUS**

**LAKE FILL STATION.....RESPONDENT**

**JUDGMENT**

1. Grace Achieng Okeyo (the Claimant) sued Lake Fill Station (the Respondent) on 23 March 2018, alleging unfair termination of contract and failure to pay terminal dues.
2. The Respondent filed a Response on 20 April 2018.
3. On 19 September 2018, upon the application of Mr Ouma for the Claimant, the Court directed that this Cause be consolidated with Kisumu Cause No. 69 of 2018, *Fred Namwami Mola v Lake Fill Station*, Kisumu Cause No. 70 of 2018, *Rael Namasa Likhayo v Lake Fill Station* and Kisumu Cause No. 71 of 2018, *Omar Cheruiyot Kipkemboi v Lake Fill Station* (Cause 69 of 2018, *Fred Namwami Mola v Lake Fill Station* was to be the lead file).
4. When the consolidated Causes came up for hearing on 25 April 2019, Mr. Ouma for the Claimant proposed without any objection from the Respondent that the evidence of Fred Namwami Mola in the lead file be applied in this Cause and other related Causes (Kisumu Cause No. 71 of 2018 and Kisumu Cause no. 70 of 2018, *Rael Namasa Likhayo v Lake Fill Station*). Counsel further sought that the Claimant's witness statements be admitted into evidence.
5. The Claimant filed her submissions on 15 January 2021, while the Respondent filed its submissions on 10 August 2021.
6. The Court has considered the record and the submissions.

**Failure by the Claimant to attend Court during the hearing**

7. When the consolidated Causes came for hearing on 25 April 2019, this Claimant was absent. The Court was informed that she was pregnant and could not attend the hearing.
8. The Respondent has therefore submitted that her case should be dismissed.
9. The Respondent acquiesced to the consolidation of the Causes and did not object when Me. Ouma proposed that only one of the Claimants be called to testify and that the witness statements be admitted/adopted.
10. The Court therefore declines to dismiss the Cause on account that the Claimant was not present in Court.

**Employment relationship**

11. The Claimant contended that she was employed by the Respondent on 12 July 2013 as a cashier, but she did not produce any documentary evidence to support the contention.
12. The Respondent denied in its pleadings that the Claimant was its employee as a cashier but during oral testimony the Respondent's Managing Director admitted that the claimant was an employee.

13. The question of employment relationship is therefore a moot one.

#### **Unfair termination of employment**

14. In the Response, the Respondent contended that the Claimant had a pending criminal case before the Magistrates Court in Maseno and because the case had not been finalised, she could not be cleared.

15. The same assertions were repeated in the witness statement.

16. The Claimant's case was that on 28 November 2017, she was informed by the Respondent that her services were no longer required and that no prior notice was issued. She also alleged that she was not afforded an opportunity to be heard.

17. There is material on record showing that the Claimant and others were arrested by the Police and charged with the offence of stealing from the Respondent between 1 November 2017 and 28 November 2017.

18. The charge sheet, in the view of the Court corroborates the Claimant's testimony that she was dismissed on 28 November 2017. The Respondent action must have been prompted by the discovery or allegations of the theft.

19. Section 35(1) of the Employment Act, 2007 requires written notice of termination of employment. Section 41 of the Act contemplates affording the employee an opportunity to be heard.

20. The Court finds it more probable that the Respondent terminated the Claimant's employment without written notice and before affording her a chance to make representations.

21. The decision was unfair.

#### **Compensation**

22. The Claimant served the Respondent for about 4-years. By the time of hearing, she was facing a criminal charge on the same facts which led to the separation, and in consideration of these factors, the Court is of the view that the equivalent of 3-months gross wages as compensation would be appropriate (gross wage was Kshs 9,900/-).

#### **Pay in lieu of notice**

23. Since the Respondent did not issue written notice, the Court will award the Claimant the equivalent of 1-month pay in lieu of notice.

#### **Breach of contract**

24. The Claimant sought Kshs 148,500/- on account of leave accrued over 15 years of employment.

25. The Claimant did not disclose whether she applied for leave and was denied or whether the leave was accrued with the approval of the Respondent.

26. Without a proper evidential foundation and in consideration of section 28(4) of the Employment Act, 2007, the Court declines to allow this head of the claim.

#### **Conclusion and Orders**

27. From the foregoing, the Court finds and declares that the Respondent unfairly terminated the Claimant's employment and awards her:

(a) Compensation	Kshs 29,700/-
(b) Pay in lieu of notice	Kshs. 9,900/-
<b>TOTAL</b>	<b>Kshs 39,600/-</b>

28. Claimant to have costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9<sup>TH</sup> DAY OF MARCH, 2022**

**RADIDO STEPHEN**

**JUDGE**

**Appearances**

For Claimant Odhiambo Ouma & Co. Advocates

For Respondent Odhiambo B.F.O. & Co. Advocates

Court Assistant Chrispo Aura