

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.10 OF 2020

(Before D.K.N.Marete)

KENYA UNION OF COMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

MAGUNAS SUPER STORES LIMITED.....RESPONDENT

J U D G M E N T

This matter was originated vide a Statement of Claim dated 17th January, 2020. The issue in dispute is therein cited as;

Unlawful/unfair Termination of Margaret Nyambura Mwangi

The Respondent, in a statement of Response dated 7th September, 2020 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that the grievant, one, Margaret Nyambura Mwangi, is her member and was employed for the Respondent on 20th September, 2016 as a Shop Assistant at a monthly salary of Kshs.16,000.00 per month and without a house allowance.

The Claimant's further case is that her first posting was to Kitui branch where she was promoted to a supervisor of the cashier. Her contract of employment was renewable every six months and the last one was signed in January, 2018.

The Claimant's other case is that on 10th February, 2018, the grievant was issued with a notice of termination of contract for no reason. This was despite there having been no previous warning letters or even a verbal one.

The Claimant's other case is that the grievant's termination of employment was before the expiry of the contract due on 25th June 2018 and she was not paid for days worked in February to March, 2018. All efforts including conciliation have yielded to nought.

In finality, the claimant submits that this termination of the employment of the grievant was unfair, unlawful, inhuman and in bad faith and prays as follows;

- a. The grievant hereby be reinstated back to her position without loss of benefits.
- b. In the alternative and where the reinstatement will not be tenable the grievant to be paid the following as her terminal dues.

		Amount (Kshs)
i.	One month notice	18,515.15
ii.	Off days for 18 months = $\frac{16,102}{26} \times 72$ days	44,592.20
iii.	Prorate leave for 6 months = $\frac{10.5}{26} \times 16,102$	6,503.20
iv.	House allowance for 18 months = $16,102.75 \times 15\% \times 18$	43,477.40
v.	Overtime – 4 hours per day = $\frac{16,102.75}{26} = 77.40$	250,776.00

ii. 21 outstanding leave days for 2017 -Kshs.12,530/=

iii. 5.25 outstanding leave days 2016. -Kshs.2,747/=

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful?
2. Whether the Claimant is entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant submits a case of unlawful termination of employment and posits as follows;

29. That section 43 of Employment Act 2007 state very clearly the remedy for unlawful termination.

30. The Respondent terminated the grievant before the expiry of her contract for no reason which is unlawful and breach of contract.

She further seeks to rely on the authority of **KUCFAW versus Homeafrika Ltd Cause No.955 of 2018** and also in the case of **KUCFAW versus Kassmart Supermarket Cause No.183 of 2017** where the learned judge said “He was at work from 7.30a and worked till store closure at 9.00pm. This was over 131/2 hours a day, taking off the hour for lunch and another for two coffee (tea) breaks, the grievant worked for 12 hours a day which is 4 hours worked each day he worked. He is therefore entitled to overtime”.

She further comes out thus;

31. That the Respondent termination of the grievant contract before its expiry was in bad faith and that is why they bluntly refused to attend to any conciliation meeting before the conciliator.

The Respondent submits as follows;

Section 2 of the employment contract (page 1 of the Respondent’s bundle) clearly provided that either party could terminate the agreement by giving the other party one month’s written notice.

Further,

Section 44 (2) of the Employment Act provides;

44. Summary dismissal

1.

2. Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

Again,

13. Section 35 (1) (c) of the Employment Act provides;

35. Termination notice

c. Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

The Claimant’s case overwhelms that of the Respondent. She comes out clearer on a case of unlawful termination of employment. This is because no reason was offered for the termination of employment. The defence of the clause on termination on notice is no defence at all. There must always be a sustainable reason for termination, even in the event of a contract for wages.

Again, the claimant was not subjected to a hearing on termination. This was blanket and summary. It is not explained by the Respondent. I find this a blatant contravention of Section 41 of the Employment Act, 2007 which provides for substantive and procedural fairness in the process of termination of employment. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. Twelve (12) months compensation for unlawful termination of employment 18,515.15 x 12
.....Kshs.217,813.80

ii. The costs of the claim shall be borne by the Respondent.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MARCH, 2022

D.K.NJAGI MARETE

JUDGE

Appearances

1. Miss Macharia for the Claimant Union.

2. Mrs.Asimwe instructed by Magee Law LLP Advocates for the Respondents.