



REPUBLIC OF KENYA



KENYA LAW
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**Chumba v Toshamatt Supermarket (Cause 250 of 2017)
[2022] KEELRC 73 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 73 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 250 OF 2017
NJ ABUODHA, J
JUNE 8, 2022**

BETWEEN

SHARON JEPKORIR CHUMBA CLAIMANT

AND

TOSHAMATT SUPERMARKET DEFENDANT

JUDGMENT

1. By a memorandum of claim dated June 19, 2014, the claimant pleaded that she was at all material times employed by the respondent and worked from February, 2012 to September, 2013 when the respondent unlawfully terminated her service and refused to pay her dues.
2. The claimant averred that the termination was unlawful because the claimant union was never informed of the intention to declare the claimant redundant, no leave pay was given, no severance pay was made and no pay was offered in lieu of notice.
3. The claimant further averred that during the period she worked, she was grossly underpaid having regard to the prevailing wage order.
4. The respondent on the other hand pleaded that the claimant was a former employee working as general labourer with effect from 25th February, 2012 to May 1, 2013 and thereafter from 1st May, 2013. Her monthly salary was Ksh.10,378.
5. According to the respondent, the claimant was not performing her duties diligently as per her contract of service and was responsible for the loss of respondent's goods worth Ksh.70,000/=. The respondent further averred that the claimant never worked until September, 2013 as alleged but that she deserted/ absconded duty on July 20, 2013 and the respondent therefore denied terminating the claimants service as alleged. The respondent further denied underpaying the claimant and making her work overtime and during public holidays.



6. In her oral evidence, the claimant testified that she was employed by the respondent as a supermarket attendant and that she was employed on February 1, 2012 and worked until September 20, 2013. According to her, she left employment because she was told not to report until she was called. No reason was given to her. She was not called so decided to complain to her union. The union wrote to the respondent's Director on February 25, 2014. She later sought legal services because there was no response to the unions letter.
7. The claimant denied absconding duties and maintained she was stopped from going to work until called. She denied being informed of any loss in the Supermarket. The claimant further stated that she was underpaid and never went on leave during the period she worked. Her salary was Ksh.10,000/= but she expected Ksh.12,194/= per month. She used to report to work at 8.00am and leave at 9.00pm and was working six days in a week and got one day's off in a week.
8. In cross-examination she stated that she was employed in 1st February, 2012 and was issued with an appointment letter which she signed. The contract was effective from February 25, 2012 to April 30, 2013. According to the contract she was a general worker but she applied for the position of a shop assistant.
9. It was her evidence that she was stopped from working by one Irene. She denied being told of any theft in the supermarket. She was in the cosmetics department and was never told cosmetics worth Ksh.70,000/= were lost. The claimant denied absconding duty when investigations commenced. She stated that the address she used was 8088-Eldoret. She acknowledged seeing a show cause letter dated July 31, 2013. It was complaint about absenteeism.
10. The claimant further stated that she was at work in July, 2013 when the Director Vina Sheh instructed the Manager Irene to tell her to stop going to work.
11. Regarding payment of wages, she stated that she was signing for her wages and shown the weekly wages report she stated that the signature on the payment record were not similar and that she did not sign for some payments.
12. The claimant on being shown overtime payment, said it was paid but stated that she was underpaid and there was no house allowance.
13. It was further her evidence that the first contract lapsed and that she signed another one on May 1, 2012. The consolidated wage for the new contract was Ksh.10,378/= per month. It was inclusive of house allowance.
14. Shown the effective Wage Order she confirmed the prescribed minimum wage was Ksh.7,915/= and L.N. 197 of 2012 placed minimum wage at Ksh.9,024/=. The claimant further stated that overtime was paid weekly.
15. The respondent's witness Ms. Irene Seurey informed the Court that she used to work for the respondent as a supervisor. She recorded a statement on April 5, 2016 which she wished to rely on as her evidence in chief.
16. According to her, the claimant was employed by the respondent as a general worker and her salary was Ksh.10,378/= per month. She denied the claimant was ever dismissed but that there was a problem in her area of work. There was loss of hair wigs. As the matter was under investigation the claimant left and never came back. The respondent tried to contract the claimant through her last known postal address but she never responded.



17. In cross examination she stated that the claimant's application for employment indicated what she wished to do and that she was never issued with another letter of appointment different from the one she was first given.
18. It was her evidence that the theft was reported to the police however there was no prosecution.
19. Regarding reporting to work, she stated that the claimant used to sign in and out and that the muster role was before the Court. She however stated that she had nothing to show that the claimant went on leave. The letter to the claimant dated January 31, 2013 was sent through registered post. She said she was not aware of the verbal termination.
20. In a claim for unfair termination the burden of proof that an unfair termination has occurred is on the employee while the responsibility to prove or justify the reason or reasons for termination is on the employer. The claimant herein alleged she was unlawfully terminated because the respondent declared her redundant without notice and further failed to pay her salary in lieu of notice, severance pay and leave dues.
21. According to the claimant she was told by the respondent's manager, one Irene, not to come to work until she was called back but was never called.
22. The respondent however denied the allegation and stated that the claimant absconded duties after the respondent complained about loss of some cosmetics worth about Ksh.70,000/=.
23. In support of this the respondent produced a copy of a letter dated July 31, 2013 addressed to the claimant notifying her of her absence from work contrary to the *Employment Act*. The letter was addressed to and sent to postal address 8088-Eldoret which the claimant confirmed was her postal address and indeed the same postal address she provided when accepting her letter of appointment on February 25, 2012.
24. Absence from work without authority or lawful cause is a valid ground for summary dismissal. The allegation by the claimant that she was unprocedurally declared redundant by the respondent does not sound credible in view of the fact that the respondent produced evidence showing that the claimant absented herself from work without authority and that the respondent made reasonable effort to know her whereabouts by sending the letter dated July 31, 2013 to the postal address provided by the claimant.
25. To this extent the Court finds and holds that the claimant failed to prove that the respondent unfairly terminated her service.
26. On the claims for underpayment and overtime, the claimant was shown and acknowledged that her monthly salary was above recommended minimum wage and that overtime was paid whenever she worked overtime. This heads of claim are therefore rejected.
27. In conclusion the entire claim is found to be without merit and is hereby dismissed with costs.
28. It is so ordered

DATED AT ELDORET THIS 8TH DAY OF JUNE, 2022

DELIVERED THIS 8TH DAY OF JUNE, 2022

ABUODHA J.N

JUDGE

