



**Wakesho v Senaca Enterprises Ltd & another (Cause 762 of 2015)
[2022] KEELRC 1269 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1269 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 762 OF 2015
B ONGAYA, J
JULY 22, 2022**

BETWEEN

SUSAN WAKESHO CLAIMANT

AND

SENACA ENTERPRISES LTD 1ST RESPONDENT

BOSSMAN SECURITY SERVICES LTD 2ND RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on 07.10.2015 through M/s. Mathew Nyabena & Co. Advocates. The claimant's case is that she was employed by the respondents in 2004 and worked until 12.03.2014. Her last monthly salary was Kshs. 13,000.00. Her case is that on 12.03.2014, she was informed by the Managing Director of the respondents Mr. George Earnest Chuli to clear and handover never to set foot at the respondents' offices whatsoever.
2. It is her case that the termination of her service was unlawful and discriminative because she was never heard and there was no evidence of her wrong doing. Her further case is that the respondents failed to pay her terminal dues by way of service pay, one month in lieu of notice, unpaid leave and salary for days worked. She also claims compensation for unlawful termination. She claims a sum of Kshs. 252,200.00 made up as follows:
 - a. 12 days worked in March Kshs. 5,200.00.
 - b. 1-year unpaid leave Kshs. 13,000.00.
 - c. Service pay for 10 years Kshs. 65,000.00.
 - d. One month's notice Kshs. 13,000.00.
 - e. 12 Months' compensation Kshs. 156,000.00.



Total Kshs. 252,200.00.

She also prays for costs and interest.

3. The respondents filed the response to the memorandum of claim on 13.11.2015 through A. O. Hamza & Co. Advocates. The respondents denied the claimant's case and prayed that the claim be dismissed with costs.
4. The claimant testified to support her case and the respondents' witness (RW) was the Managing Director George Earnest Chuli.
5. Parties failed to file the final submissions within time as was directed by the Court.
6. The Court has considered all the material on record and makes findings as follows:
 1. The evidence is that the respondents employed the claimant as Secretary and Office Administrator from sometimes in 2004 to the date of separation being 12.03.2014.
 2. The evidence by the claimant and RW is that the claimant was asked to register for NSSF. RW asked the claimant to register for NSSF because it was a requirement of the law. At that point of the request, the claimant testimony was that she asked about payment of service for the 10-years she had already worked. It is her further testimony that at that point, RW asked her to handover to one Linnet and never to return to work. It is the claimant's further testimony that from 2004 to 2006 she worked for the 1st respondent and thereafter RW opened another business operating as the 2nd respondent and she worked for both companies. On his part RW denied terminating the claimant and testified that during the year 2014, he gave a directive that all employees should register for NSSF and NHIF as the same was a statutory requirement. Thereafter, the claimant who was his Office Assistant left and never reported back at work. In her testimony the claimant had stated that she did not storm out of the office on the material day. She also testified that she had asked the respondent to register her for NSSF and when she asked about her service pay for years already served, RW told her to go away because she was no longer an employee. Her further testimony was that she did not blame herself for not registering for NSSF because RW had told her not to register. Her further evidence was that RW and herself went to the Labour Officer for a meeting but the dispute about her previous service was not resolved and could not be resolved even if she went back to work. The Court finds that the contract of service terminated on 12.03.2014 when RW told the claimant to go away after she asked for her service pay for 10 years already served and when she had not been registered for NSSF.
 3. Was the termination of the contract unfair? The Court finds that there is no reason to doubt the claimant's evidence that on 12.03.2014 RW asked her to register for NSSF and when she asked about her pay for previous service of 10-years, RW asked her to handover to Linnet. The Court therefore finds that the claimant's contract of service was terminated on account of her legitimate grievance about her payment of 10-years of service. Under Section 46(h) of the *Employment Act* an employee's initiation or proposed initiation of a complaint against the employer is not a fair reason for dismissal or imposing any other penalty except where the complaint is shown to be irresponsible and without foundation. The Court finds that the claimant raised a responsible and well-founded grievance. The termination was therefore based on unlawful and unfair reason. It was not a genuine reason as envisaged in Section 43 of the Act. Further the reason was not related to the claimant's conduct, compatibility or capacity, and, was not based on the respondents' operational requirements as per Section 45 of the Act. It was unfair reason for terminating the contract of service.



4. On the remedies the Court finds as follows:
 - a. The claimant is entitled to Kshs. 5,200.00 for the 12 days worked in March, 2014.
 - b. In absence of any other material and on a balance of probability she is entitled to Kshs. 13,000.00 in lieu of the annual leave for the last year served.
 - c. The claimant and the respondents mutually testified that the claimant had served for 10 years. The further undisputed evidence is that the claimant had not been registered for NSSF throughout that period of service. The claimant has prayed for Kshs. 65,000.00 being service pay for the 10 years served. Considering that the claimant earned Kshs. 13,000.00 per month, about half monthly salary for each year served is found reasonable service pay under Section 35(5) of the Act. The amount as claimed is therefore awarded as reasonable service pay for the 10-years served.
 - d. She is awarded Kshs. 13,000.00 being payment for 1 month in lieu of the termination notice under Section 35 of the Act.
 - e. The claimant claims for 12 months' compensation, Kshs. 156,000.00 for the unfair and unlawful termination. The Court has considered the factors in Section 49 of the Act. The claimant had served with a clean record for 10 years. She desired to continue in employment. She had a valid grievance against the respondents which constituted an unfair and unlawful reason. The only mitigating factor in favour of the respondents is that RW belatedly offered the claimant to resume duty at the conciliation meeting before the Labour Officer. Nevertheless, it also appears that resumption of duty would not resolve the grievance so that the parties' positions would not have changed in any manner as prevailing as at termination on 12.03.2014.

In the circumstances, the Court awards the claimant Kshs. 117,000.00 being 9 months' compensation for the unfair termination.
 - f. The claimant has succeeded in her claims and is awarded costs of the suit.
7. In conclusion, judgment is hereby entered for the claimant against the respondent for:
 1. The respondents to pay the claimant a sum of Kshs. 213,200.00 by 01.10.2022 failing interest to be payable thereon at Court rates from the date of this Judgment until full payment.
 2. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND JULY, 2022.

BYRAM ONGAYA

JUDGE

