



**Cherobon v Doinyo Lessos Creameries (Cause 180 of 2017)
[2022] KEELRC 13128 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13128 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 180 OF 2017
NJ ABUODHA, J
NOVEMBER 1, 2022**

BETWEEN

JULIA CHEROBON CLAIMANT

AND

DOINYO LESSOS CREAMERIES RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 10th July 2017 and filed in court on 20th July 2017, the Claimant sought the following orders:-
 - a. A declaration that the termination process as carried out by the Respondent is unlawful and that during her employment with Respondent, she was not remunerated as required by law.
 - b. Payment of sums of money of Kshs. 513,556.
 - c. Costs and interests
 - d. Any other relief that the court may deem fit to grant.
2. It is the Claimant's case that she worked for the Respondent as a General labourer from 12th June 2013 until on 14th March 2017 when the Respondent unlawfully terminated her service and refused to pay her dues.
3. In response, the Respondent filed a Memorandum of Response dated 21st August 2017 where it denied the Claimant's averments and stated that the Claimant was terminated as a result of gross misconduct and breach of terms of employment.
4. The matter was set down for hearing and the Claimant testified on 9th October 2019 and stated that she was employed by the Respondent on 12th June 2013 as a General laborer and that she used to report to work at 8 am and work until 8pm and this included the weekends and public holidays; that on 12th



- March 2017, she was called by the supervisor and accused of stealing milk which milk was alleged to have been found in her bag. She maintained that the next day, which was on 13th March 2017, she was summoned at the Production Manager's office where she was dismissed and issued with a show cause letter. She averred that she was never called to any disciplinary hearing nor arrested over the alleged theft.
5. During cross examination the Claimant told the court that she was issued with a termination letter and later a show cause letter but that she did not respond to the show cause letter. She averred that she was suspended on 14th March 2017 and issued a dismissal letter dated 20th March 2017. CW1 contended that when they were being suspended, they were not given a chance to talk.
 6. In re-examination the Claimant told the court that she was terminated first then given the show cause letter.
 7. The Respondent's witness, one Emily Lukaka testified on 16th March 2022 as RW1. She introduced herself as the Human Resource Officer for the Respondent and that she has served in that position for 20 years. She relied on her witness statement dated 9th November 2017 as her evidence in chief. According to RW1, the Claimant entered into a contract on 2nd December 2016 for 3 months. RW1 maintained that the Respondent followed the laid down procedure before dismissing the Claimant from employment and that the Claimant never responded to the show cause letter. RW1 further stated that the contract was terminated prematurely for integrity issues and that there was a disciplinary hearing before the dismissal. It was averred that the proceedings of the said disciplinary meeting were recorded but were not filed in court. RW1 contended that she verbally informed the Claimant to attend the meeting with a representative of her choice and that she, RW1 chaired the said meeting. It was RW1's testimony that the Claimant was issued with a show cause letter which she was required to respond to within 48 hours but no response was made. RW1 stated that the Claimant used to work from 8 am to 6 pm and that the company has a clocking system where overtime was recorded. She conceded that the company works from Monday to Sunday and an employee is entitled to 2 days off every week. RW1 told the court that the Claimant was paid her dues.
 8. In reexamination, she admitted to not showing the court any documentation to show that the Claimant went on her leave days nor a payslip to show that the claimant was paid overtime.
 9. The court gave directions for parties to file submissions. The Claimant filed hers on 21st March 2022 whereas the Respondent filed its submissions on 9th May 2022.

Determination

10. I have considered the pleadings before me, the evidence of the parties as well as the submissions filed by the counsels for the respective parties and I find that the main issues for my determination are ;
 - i. Whether the Claimant's dismissal from employment by the Respondent was lawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
11. From the evidence of the parties and particularly the Claimant's Contract of employment dated 2nd September 2016 which points that the Claimant at the time of termination of her employment was on a one year renewable contract.
12. The law on termination of contracts of service in Kenya is governed by sections 41,43,44,45 and 47 of the [Employment Act](#), 2007.
13. Section 41 of the [Employment Act](#) demands that prior to terminating an employee, the employer must explain to the employee in a language the employee understands, the reasons for which termination



was being considered. This provision obligates an employer to hear representation by the employee before making a decision to terminate an employment relationship.

14. Section 45 of the *Employment Act*, 2007, provides that;
 - ..No employer shall terminate an employee unfairly. The employer must prove both the validity and fairness of reasons for terminating an employee.
15. A reading of the above provisions of the law shows that there is a criteria or procedure that must be followed before an employee's employment is terminated.
16. In the instant case, according to the Respondent the reasons for the dismissal of the Claimant's employment were contained in the show cause letter addressed by the Respondent to the Claimant dated 20th March 2017 which was to the effect that the Claimant took away company products without the supervisor's permission and further failed to respond to the show cause letter.
17. This in the Court's view was not a valid reason since no evidence was adduced or led by an eye witness to confirm the said allegation.
18. As regards the procedure followed, the Claimant was categorical that she was never called for a disciplinary hearing. The Respondent on the other hand through its witness RW1 maintained that a disciplinary hearing was conducted. However on cross examination, RW1 conceded to not producing any evidence in Court to show that indeed a disciplinary hearing took place. It is my view then that the Claimant's dismissal was not in accordance with fair procedure.
19. Having found that the dismissal of the Claimant from employment was unfair, the next issue that I must deal with is what reliefs the Claimant is entitled to.
20. The Claimant seeks one month pay in lieu of notice, pending leave of the year 2016, overtime dues, severance pay and compensation for unfair termination.
 - i. One month pay in lieu
21. A perusal of the Respondent's letter terminating the services of the Claimant dated 20th March 2017, reveals that the termination was to take effect immediately. No notice was given as required under the Claimant's employment contract which stipulated a one month notice to be given. The Claimant is therefore awarded 30 days salary in lieu of termination notice.
 - ii. Pending leave of the year 2016
22. Section 28 of the *Employment Act*, 2007 that provides that an employee shall be entitled to leave of 21 days after twelve consecutive months of service. In her testimony, the Claimant maintained that she never went for her leave while RW1 on the other hand stated that the Claimant had utilized all her leave days. No documentary evidence was tendered before court to prove this position. So whose duty was it to prove that indeed the Claimant had been given leave days? The court in the case of *Mesback Kiiu Ikulume v Prime Fuels Kenya Limited* (2013) eKLR held that it is the employer's duty to keep employee records including annual leave taken and leave due and produce the same in legal proceedings. It therefore follows that the Claimant is entitled to leave pay. It is worth noting that the Claimant worked for 6 months under the new contract that was effective as from 2nd September 2016. This therefore means that she would be entitled to 21 days divided by 2 making it 11 days as leave days. The award under this head is Kshs 6,444
 - iii. Overtime dues



23. The Claimant stated that she worked between 8am to 8pm on a daily basis. The Respondent on the other hand through its witness stated that the Claimant worked between 8am and 6pm and would get two days off in a week. In the absence of any documentary evidence, then this court cannot ascertain this claim and I therefore decline to grant the reliefs sought under this head.

iii. Severance Pay

24. Section 40(1)(f) of the *Employment Act* provides that severance pay is only payable in cases where an employment is terminated on account of redundancy. The claimant was not declared redundant hence this claim has no basis.

iii. Compensation for unfair termination

25. Having established that the termination was unfair, the Claimant is entitled to compensation under this head. Since she was 6 months into her 1 year contract, an award the Claimant three months salary as compensation for unfair termination will be reasonable in the circumstances. That is to say the sum of Kshs. 36,906.

26. In the end, the court makes the Judgment in favour of the Claimant as against the respondent in the following terms;

- i. One month's pay in lieu of notice.....Kshs. 12,302
 - ii. Pending leave of the year 2016.....Kshs. 6,444
 - iii. Compensation for unfair termination.....Kshs.36,906
- 55652

27. The Claimant is also awarded costs and interest at Court rates from the date of this Judgment until settlement in full.

28. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF NOVEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

