



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 165 OF 2017**

**CELESTINE CHEMTAI.....CLAIMANT**

**VERSUS**

**KAIMOSI TEA ESTATE LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was filed on 28/4/2017 by the claimant against the Respondent seeking the following reliefs: -

**(a) Declaration that the claimant's termination of Employment was unlawful.**

**(b) Terminal benefits including: -**

**(i) Two months' salary in lieu of notice – Kshs.23,119.60**

**(ii) Unpaid house allowance – Kshs.248,787.00**

**(iii) Unpaid overtime – Kshs.765,498.46**

**(iv) Service pay – Kshs.70,364**

**(v) Prorata Leave – Kshs.5,277.30**

2. The respondent filed a Memorandum of Reply on 1/9/2017 in which the particulars of claim and reliefs sought are denied and puts the claimant to strict proof thereof.

3. C.W.1 Celestine Chemutai testified that she worked for the respondent from the 20<sup>th</sup> December, 2001 up to 8<sup>th</sup> September, 2015.

4. That she attended a funeral with permission from Assistant Field Manager Mr. Isaac Langat and was then dismissed from work for that reason.

5. C.W.1 produced a letter from Assistant Chief showing that she attended a funeral because Mr. Lagat later said he did not believe C.W.1 attended a funeral and sent C.W.1 home to get the letter. C.W.1 adopted a witness statement dated 22/4/2017 as her evidence in chief.

6. C.W.1 stated that she worked as a Tea Plucker /General worker. At the time of dismissal the claimant earned Kshs.10,000 per month. C.W.1 testified that she served the respondent diligently with dedication and had no warning letters until the date of termination without any lawful reason. That she was accused of absconding duty which allegations were false.

7. C.W.1 testified that from 31/8/2015 to 7/9/2015, C.W.1 was not on duty as she had attended a funeral of her mother with permission of Mr. Lagat. That she was summarily dismissed without any hearing and/or any explanation why she was dismissed. That C.W.1 instructed her advocates to issue a demand letter to the respondents which letter was not heeded. C.W.1 produced list of documents marked '1' to '6' in support of her case. C.W.1 said she did not get any show cause letter and was not invited to any disciplinary hearing. That she was not paid any terminal benefits upon dismissal.

8. C.W.1 stated that she worked from 7 am in the morning to 6 p.m. in the evening and was not paid overtime. C.W.1 claims all the reliefs set out in the statement of claim.

9. Under cross-examination the claimant stated that the date of employment in her witness statement being 26/12/2001 was a mistake. That

she did not know how to read and write. She had just put her thumb print on the statement. She corrected that by stating that she was employed on 1/1/2007. However, the Counsel for the respondent stated that the date of employment was not contested and was 20/2/2001 as stated in the witness statement.

10. C.W.1 stated that the Assistant Chief wrote a letter dated 2/9/2015 confirming that the claimant had attended a funeral. C.W.1 returned to work on 7/9/2015. C.W.1 said she had no burial permit before Court. C.W.1 insisted that her mother had died at home at Mt. Elgon area. C.W.1 stated that she had obtained 6 days leave and was to return on the 7/9/2015 which she did. C.W.1 stated that in 2013, she had buried her father and had obtained funeral benefits. That this time around, C.W.1 said she did not get funeral benefits because it was her step mother who had died.

11. C.W.1 testified that she was asked to bring a letter from the District Commissioner and the Chief and was chased away. C.W.1 stated that she got a letter from the Chief and Deputy County Commissioner which she took to the union Branch. C.W.1 denied that she did not get 7 days leave. She said the Collective Bargaining Agreement allowed compassionate leave. C.W.1 stated that the respondent refused to receive the letters she had given to the Union. C.W.1 stated that she was dismissed on 7/9/2015 and got the letter on 8/9/2015. That Mr. Lagat threw the Assistant Chief's letter back to her and chased her away.

12. C.W.1 said the dismissal was unlawful and unfair. C.W.1 said she went to the union on 8/9/2015.

13. R.W.1 Issac Lagat testified for the Respondent. R.W.1 adopted a witness statement dated 10/4/2018 as his evidence in Chief. R.W.1 also produced exhibits '1' to '9' in the list of documents filed. R.W.1 testified that the claimant was granted leave for 16 days from 11/8/2015 to 28/8/2015. That on 22/8/2015 the claimant was re-called back to work to organize and prepare the company choir for the Education day. That the claimant worked on 22/8/2015 and was later released back to resume leave which was extended by 1 day to 29/8/2015. That the claimant did not report to work on 29/8/2015 but came back on 7/9/2015. The claimant claimed that she had been organizing a relative's funeral but had not asked for permission from her supervisor.

14. That on 8/9/2015, a hearing was conducted on the issue of absenteeism. That Issac Origi and Edah Khandi both shop stewards attended the hearing which was chaired by R.W.1. R.W.1 testified that the claimant admitted that she had not asked for leave to be absent from work.

15. Under cross-examination R.W.1 stated he chaired the disciplinary hearing and that termination was after the claimant attended the hearing. R.W.1 stated that a Show cause letter was issued to the claimant on 1/9/2015. R.W.1 denied that the claimant did not receive the letter. R.W.1 denied no disciplinary hearing was held before the termination. R.W.1 stated that the claimant was a member of the Union and was represented by Union member at the hearing. R.W.1 admitted that there was no letter of invitation to the meeting and that minutes of the meeting were not signed.

16. R.W.2 Issac Origi adopted a witness statement dated 10/4/2018 as his evidence in Chief. R.W.2 testified that on 8/9/2015 a hearing was conducted on the issue of the absenteeism of the claimant. R.W.2 stated that he was a shop steward at the respondent Estate. R.W.2 said he represented the claimant at the meeting together with Mr. Edah Khandi also a shop steward. R.W.2 collaborated the testimony of R.W.1 on the issue of leave granted to the claimant on 11/8/2015 up to 28/8/2015. That she was recalled to work on 22/8/2015 and leave was extended for one day to 29/8/2015. That the claimant did not return to work until 7/9/2015. That at the hearing the claimant admitted that she did not obtain permission to extend her leave. That the claimant was dismissed on those grounds.

17. Under cross-examination – R.W.2 admitted that he received a copy of the Show cause letter sent to the claimant before the hearing. R.W.2 said that the claimant was given chance to explain her absenteeism at the disciplinary hearing. R.W.2 said that the claimant was absent for 7 days without permission. That the claimant had explained that her mother had died but had no document to substantiate that. That she had not applied for the welfare cover that applied in respect of funerals for a mother and so her explanation was not good.

18. R.W.3 Joshua Kathini adopted a witness statement dated 10/4/2018 as his evidence in chief. He stated that he was a senior Manager of the respondent. That the claimant was employed on 26/12/2001. That the claimant was granted leave on 11/8/2015 up to 28/8/2015. That the claimant was recalled for one day on 22/8/2015. That the leave period was extended to 29/8/2015. That the claimant did not report back to work until 7/9/2015. That the claimant did not obtain leave to be absent for those 7 extra days. That R.W.2 attended the disciplinary hearing on 8/9/2015 where the claimant was given opportunity to explain her absence. That R.W.2 and Edah Khandi represented her. That the claimant admitted at the hearing that she was absent from work without authority for 7 days.

#### Determination

19. The issues for determination are: -

**(a) Whether the respondent had a valid reason to terminate the employment of the claimant following a fair procedure.**

**(b) Whether the claimant is entitled to the reliefs sought.**

20. The Court has carefully evaluated the evidence by the claimant *vis a vis* that by R.W.1, R.W.2 and R.W.3. The claimant did not deny that she was absent from work from 29/8/2015 up to 7/9/2015 without authority. The claimant instead sought to justify her unauthorized absence by alleging that she had extended her authorized leave that ended on 29/8/2015 to bury her step mother. The claimant was not candid with the Court that she had received a Show cause letter and was invited to a disciplinary hearing which took place on 8/9/2015.

21. The testimony by R.W.1, R.W.2 and R.W.3 on the events that led to the termination of the employment of the claimant is consistent, credible and in the court's considered finding the truth regarding what led to the termination of the employment of the claimant and the procedure followed by the respondent in terminating that employment. The claimant came across as untruthful witness on the material facts regarding her dismissal.

22. It is the Court's finding that the termination of the employment of the Claimant was for a valid reason, being unauthorized absenteeism for 7 days from work without any justifiable reason.

23. The claimant was given opportunity to justify the absence but failed in that respect.

24. R.W.2 and R.W.3, who were her Union representatives at the disciplinary hearing confirmed that they had been served with a Show Cause Letter and that the claimant admitted at the disciplinary hearing that she had absented herself from work for 7 days without authority.

25. R.W.2 and R.W.3 stated that the explanation by the claimant that she had lost her mother who she was burying in those 7 days was not genuine reason because the employer had a funeral welfare which covered burial of parents and the claimant had not applied for the same.

26. The Court finds that the explanation by the claimant for breaching her contract of employment was not reasonable and stood to be rejected.

27. Section 44 (4) authorizes an employer to summarily dismiss an employee if: -

**(a) Without leave or lawful cause, an employee absents himself from the place appointed for the performance of his work."**

28. The respondent has discharged the onus placed on it in terms of Sections 41, 43(1) and (2), 44, 45, and 47(5) of the Employment Act, 2007 by demonstrating that it had a valid reason to terminate the employment of the claimant and that it followed a fair procedure in implementing the termination.

29. The claimant has therefore failed to prove a case of unlawful and unfair termination and the claim is dismissed accordingly.

30. With regard to the claims for terminal benefits R.W.1, R.W.2 and R.W.3 did not rebut the testimony by the claimant set out in the witness statement dated 27<sup>th</sup> April, 2017 that in terms of the Collective Bargaining Agreement, she was entitled upon termination to payment of two (2) months' salary in lieu of notice in the sum of Kshs. 23,119.60.

31. The claimant however did not sufficiently prove that she was entitled to payment of house allowance over and above the salary she had received from the respondent for the period she served. Equally the claimant did not demonstrate that she had worked overtime for the entire period she had served the respondent without payment. The claimant did not also demonstrate that she was entitled to service pay in respect of the 14 years worked. Her testimony lacked facts necessary to prove such payment.

32. The claim for payment of prorata leave days not taken in the year 2015 which she served until 8/9/2015 was adequately proved and is awarded.

33. Therefore the suit by the claimant is dismissed in its entirety except with respect to payment of: -

**(a) Two months' salary in lieu of notice in the sum of Kshs. 23,119.60.**

**And**

**(b) Payment of prorata leave for 2015 in the sum of Kshs. 5,277.30. Total amount Kshs. 28,396.90.**

**(c) Interest at Court rates from date of termination till payment in full.**

**(d) Half the costs of the suit.**

**DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2021**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Kirwa for claimant

M/s Wachira for Respondent

Chrispo: Court clerk