



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.12 OF 2020

(Before D.K.N.Marete)

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

ASPENDOS DAIRY LIMITEDRESPONDENT

JUDGMENT

This matter comes to court by way of a Memorandum of Claim dated 18th February, 2020. The issue in dispute is therein cited as

“Failure to pay terminal dues to Mr.Paul Kariuki Ndungu”

The Respondent in a Respondent’s Memorandum of Response dated 26th August, 2020 denies the claim and prays that the same be dismissed with costs.

The Claimant’s case is that the grievant, her member, was employed vide a verbal contract and was not issued with a formal letter of appointment. He was however issued with pay advice slips.

The grievant started as a loader at the factory in Kangema before his promotion to a supervisor. Here he earned Kshs.7800.00. He also was registered as an NSSF member.

The Claimant’s other case is that the grievant worked for the Respondent until 10th May, 2018 when he was issued with a suspension letter.

The Claimant’s further case is that on 1st May, 2018, the grievant was granted some nine (9) day compassionate leave following the death of his mother. Upon return, he was issued with the suspension letter.

He prays as follows;

i) One month’s notice		15,455.00
ii) Accrued Annual Leave	$13,431.30/26 \times 37$	19,113.50
iii) Public holidays	$25 \text{ days} = 13,431.30/26 \times 25$	12,914.70
iv) Overtime	$1508 \text{ hrs} \times 1.5 (96.85)$	146,049.80
v) Underpayment of wages:-		
Dec 2015 to April 2017	$12,466.60 - 8,500 = 3966.60 \times 16$	63,465.60
May 2017 to April	$14,710.45 - 8,500 = 6210 \times 12 \text{ months}$	74,524.80
May 2018 salary for 18		

Days	15,446x18/26	<u>10,693.40</u>
Total		<u>342,206.80</u>

vi) *Cost of the suit in favour of the claimant.*

The Respondent *in toto* denies the claim. This is as follows;

19. *Without prejudice to what is hereinabove denied, the Respondent states as follows:-*

a) *That claimant was employed as a cleaner by the Respondent and resigned from employment out of her own volition as per the resignation letter dated 16th April 2018, signed by the Claimant herself. The claimant wilfully and voluntarily terminated her services with the Respondent by tendering her said resignation letter upon the Respondent who forwarded the same to the District Labour Office at Muranga who acknowledge receipt of the claimant's resignation letter on 8.5.2018.*

b) *That upon receiving the Claimant's letter of resignation dated 10th April 2019, the Respondent tabulated Claimant's terminal dues to her but has never come back to collect even after being called upon to do so.*

c) *The Respondent further avers that the tabulation of wages under the Order is based on the location of the work premises, which qualifies it under Column 4 of the Order as the Respondent is not located in a city, town or municipality.*

d) *That the Claimant upon resigning from employment the following were prepared for issuance to the claimant:*

I. Certificate of service

II. Salary for the month of March

III. All payments and or allowance due until the last date of month worked

e) *The Respondent further avers that the resignation letter was done by the Claimant under no form of duress or misrepresentation.*

f) *The Respondent avers that the Claimant, upon issuing her resignation notice and upon clearing from the Respondent, exited from the service of the Respondent.*

g) *Claimant's terminal dues remain to be collected pursuant to her resignation and clearance from the Respondent and therefore the suit herein lacks a basis in law and ought to be dismissed with costs to the Respondent.*

The matter came to court variously until 10th March, 2021 when the parties agreed on a disposal and determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the Claimant wrongful, unfair and unlawful?
2. Is the Claimant entitled to the relief sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether the termination of the employment of the Claimant was wrongful, unfair and unlawful. The Respondent did not furnish any written submissions in support of his case.

The Claimant in her written submissions dated 30th March, 2021 reiterates and submits a case of unlawful termination of employment. It is her case that this matter was thrashed and finalised at conciliation level and therefore should not have resurfaced at this level, or at all.

The respondent's case and submission is that the reconciliation agreement is not agreeable to the parties and therefore should not pass a test for the claim.

Further, the respondent denies the claim and particularly that the claimant was ever promoted to the position of a sales person and in any event was involved in misconduct at his place of work.

The claimant's case in the circumstances overwhelms that of the respondent. On the onset, the respondent seeks to rely on a case and letter of resignation by the claimant. However, she is unable to rebut the resounding case of unlawful termination of employment as is demonstrated and submitted by the claimant.

The Respondent is also disabled in controverting the claimant's case of a settlement of the matter at conciliation where the amount payable was agreed on. She merely skirts this in what comes out as a mere denial. This is unacceptable.

To me, this matter tilts in favour of the claim. On a balance of probabilities and preponderance of evidence the matter sways in favour of the claimant. I therefore find a case of unlawful termination of employment and hold as such. This answers the 1st issue for determination.

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

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

i) One month's salary in lieu of notice	15,455.00
ii) Compensation of Accrued and untaken	
Annual Leave 13,431.30/26 x 37.....	19,113,50
iii) Compensation for Public holidays worked	
25 days =13,431.30/26x25	12,914.70
iv) Overtime 1508 hrs x 1.5 (96.85)	146,049.80
v) Underpayment of wages:-	
Dec 2015 to April 2017	
12,466.60-8,500=3966.60 x 16	63,465.60
May 2017 to April 14,710.45-8,500=6210x12 months	74,524.80
May 2018 salary for 18	
Days 15,446x18/26	<u>10,693.40</u>
Total	<u>342,206.80</u>

Dated and delivered at Nyeri this 30th day of June, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Macharia for the Claimant/Union
2. Mr. Mwenda instructed by Mahinda & Maina Company Advocates for the Respondent.