



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2554 OF 2016

ANN MWENDE MUTHEE.....CLAIMANT

VERSUS

SURVO GENERAL WORKS.....RESPONDENT

JUDGMENT

1. The Claimant instituted the suit vide a Memorandum of Claim filed on 13 December 2016 against Respondent Survo General Works. She avers that by a contract of employment, the Respondent employed her in June 2008 as a Pump Attendant and at a monthly basic salary of Kshs. 16,800/- and she performed her duties diligently and enthusiastically. The Claimant avers that on or about 16th August 2016 the Respondent by its directors, supervisor and/or agents, unlawfully terminated her employment which she particularises as follows:

- a. Failure and/or refusal by the Respondent to explain orally or in writing and in a language understandable to the Claimant, the reasons for which it was considering termination of the employment of the Claimant on the purported grounds of summary dismissal.
- b. Failure and/or refusal by the Respondent to allow another employee of the Claimant's choice to be present at the meeting where the explanations in (a) above were tendered, if at all.
- c. Failure and/or refusal by the Respondent to allow or accept any representations to be made by the Claimant, if at all, on the reasons in (a) above, made in connection with the purported grounds of summary dismissal.

2. The Claimant further avers that the Respondent has refused and/or neglected to pay her dues consisting of salary in lieu of notice, 16 days worked in August 2016, unremitted NSSF contributions, leave days earned and not paid, overtime pay, house allowance and 12 months' salary as compensation for unlawful termination. She thus prays for judgment against the Respondent for the sum of Kenya Shillings One Million Fifty Seven Thousand Six Hundred and Twenty – Kshs. 1,057,620/- as enumerated in her Claim; interest and costs incidental to this suit; certificate of service; and any such other or further relief as this Honourable Court may deem fit and just to grant. The Claimant further states in her Written Statement that she used to work for long hours i.e. from 7:30am to 5:30pm in the day shift and from 5:30pm to 7:30am in the night shift. The Claimant avers that on 16th August 2016 at around 11:00am, she was summoned to the Human Resource office where she was informed that she had failed the company after she served a customer but declined to thank the said customer. She stated that she was not aware of the issue and she further states that she was then served with a summary dismissal letter and informed that her services to the company had been terminated as per the contents of the dismissal letter. She believes that due process for termination was not adhered to before termination of her employment which should thus be deemed unfair and unlawful.

3. In opposition, the Respondent filed a Response dated 20th November 2019 averring that the Memorandum of Claim as drawn and filed is bad in law, *ex-facie* incompetent without any merits and is an abuse of the court process. It denies employing and dismissing the Claimant as pleaded and avers that the Claimant was summarily dismissed from her employment by her employer Peak Twenty Four Investment Co. Limited because of wilful neglect and refusal to carry out lawful and reasonable instruction that was clear and consistent with her contract of employment. The Respondent avers that it has never had any contractual relationship whatsoever with the Claimant and that the cause herein does not disclose any reasonable cause of action against the Respondent. It prays the Claimant's claim against it be dismissed with costs to it. The Respondent also filed a witness statement made by the Human Resource Manager at Peak Twenty Four Investment Co. Limited, Michael Karanja Mwendia. He states that he is the Group Human Resource Manager at the Respondent Company which is a sister company to Peak Twenty Four Investment Co. Limited and that the two companies are different and separate legal entities. He confirms that the Claimant was an employee of Peak Twenty Four working as a Pump Attendant and based at Shell Petrol Station, Mlolongo-Mombasa Road and that the Claim herein against the Respondent is an abuse of the court process. He states that on 8th August 2016, a mysterious motorist from Vivo Energy visited Shell Mlolongo-Mombasa road to rate the performance of the staff in what is called Reality Check-MMP normally done by checking uniforms, hello greeting, offers and saying thank you to customers after service, commonly referred to as (UHOT). He states that the said mysterious motorist was served by the Claimant and when the results of the Reality Check were posted online on 12th

August 2016, they realised the whole petrol station had failed the test for failure to give motorists the necessary services especially on aspects that the Claimant was well acquainted. He states that such failure of an entire petrol station had the consequence of cancellation of the contract by Vivo Energy to the detriment of the company. He states that he thus called the Claimant into his office on 16th August 2016 and went through the report received from Vivo Energy with her and when he asked her to explain, she walked out of the office and asked him to do as he wished. He states that he consulted the top management and directors of Peak Twenty Four and they agreed to give her a termination letter for her act of gross misconduct. He states that they computed her final dues but she demanded that the same include house allowance in her basic salary yet her monthly salary was inclusive of the house allowance and also denies that the Claimant worked for any overtime as alleged.

4. The Claimant filed a Reply to the Response on 2nd December 2019 denying the Respondent's assertions and averring that she was at all times an employee of the Respondent and not Peak Twenty Four, as it was the Respondent who paid her salary and statutory deductions. She further denies that she refused to carry out any instructions or was insubordinate at any one time and asserts that she was never involved in arriving at the grounds of terminating her employment or given an opportunity to defend herself. She prays that the Response to the Statement of Claim be dismissed.

5. The Claimant and the Respondent's witness Michael Karanja Mwendia testified and the Claimant stated that she was employed by the Respondent but did not receive a contract of employment. She testified that she was not paid by Peak Twenty Four and that she worked from 7:00am to 6:30pm for the day shift and report at 6:30pm and leave at 7:30pm for night shift. She stated the Human Resources was in charge of muster roll and she never got the pay for overtime as she was told that only Government pays overtime. She testified that she was paid Kshs. 16,800/- a month and that she was terminated on 16th August 2016. She states that she was not given a show cause or called for a disciplinary meeting. She stated that there were unpaid leave days – 62 days as well as salary for August. She denied serving the alleged mysterious customer. In cross-examination she stated that she was not dismissed by the Respondent and that on receipt of the termination letter she asked why she was being dismissed by Peak Twenty Four. She stated that the first shift ended at 5:30pm and that there was no lunch break. She said one could even eat while at the pump and that they would only take a soda. She stated that they were so busy one could not leave the pump. She said the night shift was from 5:30pm to 7:30am. She testified that one would work on rotation – one week day and then one week night shift. She said the off day was half a day. She stated that she was accused of not saying “thank you” to a customer. She confirmed that of the three ladies at the station she was the only one named Ann. She stated that Mlolongo is in Mavoko Municipality. She testified that the months without any indication of NSSF payments are only 11 months.

6. The Respondent's witness on his part testified that the Claimant was employed by Peak Twenty Four Investments Limited. He stated that Survo General Works deals with hotels, shops and restaurants and that Peak Twenty Four has petrol stations in Mlolongo and Chuka. He said that the Claimant worked at Shell Petrol Station under Vivo Energy as the Shell brand is under Vivo Energy. He testified that the Claimant served a customer who was to rate the petrol station and that when the Claimant served him she did not say the obligatory ‘thank you’ which is part of the requirements of UHOT – uniform, hello, offer, thank you. He stated that the company was given a fail as she never greeted the motorist and never told him thank you. He said that he called Nixon the Claimant's supervisor and requested that she hands over the cash to the supervisor and comes to the office to see him. He testified that he told her the reasons for the termination because of what she had been told to do. He stated that she never handed over the uniform or the name tag. He testified that she was dismissed by Peak Twenty Four her employer. He stated that Survo General Works is a sister company. He said he was the group HR for both companies. He said the directors are the same and that the Claimant's salary was channelled through a suspense account and that is why salary came from Survo General Works. He testified that the day shift is from 7:30am to 4:30pm and the night shift is 4:30pm to 7:30am and that there was a lunch break where the pump attendants would relieve each other for 1 hour to allow for lunch to be consumed. He said there was no overtime as the hours from 7:30am to 4:30pm is 8 hours and that during his tenure there was a rule that no lady would work at night. He stated that the Claimant was paid Kshs. 16,800/- while the minimum wage for Mlolongo was Kshs. 13,259/-. In relation to the NSSF dues he stated that the Claimant never brought a remittance form from NSSF for him to confirm the months paid in and correct the gaps if any. He stated that the Claimant went on leave and that if there were any leave balances these were paid. He testified that the conduct of the Claimant was untenable and the employer Peak Twenty Four was justified in dismissing her for gross misconduct as her action could have led to the cancellation of the dealership. In cross-examination he testified that the two companies – Peak Twenty Four and Survo General Works share directors but are distinct entities. He stated that NSSF and NHIF was paid by Peak Twenty Four while salary was by Survo General Works. He said that she was paid through suspense account of Survo General Works and that there were no payslips issued. He testified that the Claimant was called for a disciplinary hearing and there was no show cause letter. He said the Claimant went to his office and they went through the report from the mysterious customer and that the Claimant was not asked to make a written response. He stated that the Claimant was asked to give an explanation and that she was heard prior to dismissal. He said that the Claimant was present as was the supervisor. He stated that there was leave balance of 17 days for the Claimant and that she never worked overtime. He said she got a consolidated salary and that it was above minimum wage.

7. Claimant's Submissions

The Claimant submits that she testified that whereas she was employed by the Respondent, it did not issue her with an employment contract and to prove the same she produced evidence being a Bank Statement and NSSF statement showing that she was paid by Survo General Works Limited with the NSSF statement capturing Survo General Works as the employer. The Claimant submitted that the Respondent's witness on the other hand could not produce any documentation such as the attendance registers and muster rolls for the two companies to prove she was employed by Peak Twenty Four. The Claimant submitted that under Section 73(1) of the Employment Act 2007 an employer is expected to keep a written record of all employees employed by him, with whom he has entered into a contract under the Act. She relies on the case of **Chengo Kitsao Chengo v Umoja Rubber Products Limited [2016] eKLR** where the Court held that the obligation to produce employment records to dispose verbal allegations by an employee in any legal proceedings before the court is vested by Section 10(7) of the Employment Act; which provides that the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. She further submits that the only document linking her with Peak Twenty Four is the summary dismissal letter produced by both parties herein but that a summary dismissal letter is not proof of employment and she also had no control in the manner in which such a letter was issued or drafted. It is her submission that the Respondent has failed to prove that Survo General Works Ltd was sued wrongly and that there is enough and compelling evidence to prove she was indeed employed by the Respondent herein. The Claimant submits that the Respondent's witness confirmed in his statement that he consulted with the management in the absence of the Claimant and proceeded to issue a summary dismissal. She cited the case of **Fredrick Odongo Owegi v CFC Life Assurance Limited [2014] eKLR**, where the Court held that the law now requires that upon an enquiry by an employer of the misconduct, poor performance or capacity questions against an

employee, fair procedure as outlined under Section 41 and 43 of the Employment Act must be followed before their termination. She cited the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** also held that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee and the employee has a right to a proper opportunity to prepare and to be heard in defence in person, writing or through a representative or shop floor union representative if possible. Further, the employer is obliged to hear and consider any representations by the employee before making the decision to dismiss or give other sanction. The Claimant submitted that the Reality Check- MMP produced as Respondent's Exhibit 1 indicated that the said mysterious motorist gave the Claimant a 90% recommendation which the Claimant submits to be a high performance in any standards and that the same should not have warranted a summary dismissal but a warning considering her length of service and general good conduct. The Claimant submitted that the Respondent's witness confirmed in his testimony no notice to show cause was issued to the Claimant, no disciplinary hearing meeting was held and she was not paid her terminal dues. She submits that she was therefore unfairly and unlawfully dismissed by want of a valid ground for dismissal and procedural fairness. The Claimant submits that having found her dismissal was unfair and unlawful she is entitled to notice pay and her August salary which are also conceded by the Respondent's witness in his statement and maximum compensation in terms of Section 49(1)(c) of the Employment Act having worked for the Respondent for over 8 years. The Claimant submitted that she had produced her NSSF statement proving the Respondent withheld NSSF deductions of 11 months from February 2010 to December 2010 and that whereas the Respondent pleads that only 47 leave days were pending, it did not produce any leave application forms to prove the same. The Claimant submitted that she is also entitled to overtime as the Respondent failed to rebut the same and that she abandons the claim for house allowance as there was no contract showing a house allowance was agreed upon. The Claimant submits that she should be awarded costs of the suit and interest as costs follow event.

8. Respondent's Submissions

The Respondent submits that the Claimant has failed to discharge her duty as provided by Section 107 of the Evidence Act which provides that whoever desires any court to give judgment as to any legal right or liability dependant on existence of facts which he asserts must prove those facts exist. That the Claimant failed to discharge this duty as provided in Section 109 of the Evidence Act. It further submits that its witness stated that all employees of Peak Twenty Four and Survo General Works Limited were paid through a suspense salary account held in the names of Survo General Works Limited from where all salaries were drawn and that any cause of action disclosed in the termination letter ought to thus be against Peak Twenty Four Investment Co. Limited and Survo General Works. The Respondent submits that no reasonable cause of action against it can stand and that the suit is not meritorious and urges the Court to find that the Claimant did not tender any document to prove that Survo General Works Limited terminated her services. The Respondent further submits that it is trite law that a party is bound by their pleading and a departure thereof would mean that that party's claim is not proved. The Respondent submitted that since the suit herein is instituted against a business entity Survo General Works instead of Survo General Works Limited, the Claimant failed to institute proceedings against an entity known in law and that the suit should be dismissed on that ground alone. The Respondent submitted that no orders can issue against a wrong party as this would defeat justice and which was asserted by the Court in **George Orito Okuya v Vegi Vegi Restaurant [2013] eKLR**. The Respondent also relies on the case of **Stephen Maina Githaiga v ACK Diocese of Mount Kenya West Registered Trustees & Another [2020] eKLR** where the Court dismissed the suit against the 1st Respondent with no order as to costs as the suit had been instituted against an entity that was not the Claimant's employer and observing that the suit against the 1st Respondent was a non-starter. The Respondent submits that an employee who makes a claim for unfair termination of employment or wrongful dismissal has a statutory burden to prove occurrence of unfair termination as under Section 47(5) of the Employment Act. The Respondent submits that it has pleaded that the Claimant was taken through the report from Vivo Energy by her supervisor and the Claimant cannot thus turn around and claim she was not heard or afforded an opportunity to defend herself especially since she walked out of the meeting. The Respondent submits that the Claimant has thus failed to discharge her statutory burden under Section 47(5) and is not entitled to the reliefs sought. The Claimant submitted that in the letter of summary dismissal, Peak Twenty Four had nonetheless offered to pay her one month salary in lieu of notice purely on humanitarian grounds and that Peak Twenty Four had also stated it would pay for the days worked up to and including 16th August 2016, for leave balance and service, on presentation of a duly signed clearance form but the Claimant never made appropriate clearance. It further submits that in the absence of evidence for example unapproved leave application forms from the Claimant substantiating her claim for unpaid leave days earned, the same must fail further because the prayer was not detailed in terms of which years. The Respondent submits that the claim for overtime does not factor the days the Claimant would proceed for annual leave, sick leave or off days and therefore farfetched and unfounded and that it should fail. On the issue of NSSF deductions, the Respondent submits that the same are payable to the statutory body and not the Claimant and that if there were unremitted contributions, the Claimant ought to have made appropriate follow up with her employer and with the Fund so as to enjoy the full benefit of her N.S.S.F membership. It is the Respondent's submission that the Claimant having failed to demonstrate that termination of her employment by Peak Twenty Four was unfair and wrongful she is not entitled to 12 months' salary compensation and that her case should be dismissed with costs.

9. The Claimant was employed by Survo General Works Ltd as shown in her NSSF Statement. She instead sued Survo General Works instead of her employer. She was dismissed by an entity unknown to her – Peak Twenty Four Investments Limited. Were it not for the misnaming of the Respondent she would have been entitled to recompense for the unfair and unlawful dismissal which would have been for 6 months salary as compensation for the egregious dismissal as she was never heard prior to said dismissal. The Respondent's witness confirmed that the Claimant was called from the pump, shown the email sent by the mysterious customer and subsequently summarily dismissed by Peak Twenty Four. It would seem the Respondent operated in an opaque manner since the directors were crosscutting and would pay from one suspense account while having employees in the two companies. She would also have been entitled to the unpaid leave days. I did not believe her when she said that there was no lunch break and that employees would have lunch at the pump stations and would often just have only a soda. This is a lie and it is clear she hoped to benefit from an alleged overtime for the extra hour over lunch and the extra hour she padded on to the day shift. Had she worked on night shift she would have been entitled to recompense as the night shift staff of the Respondent and Peak Twenty Four serve customers from 4:30pm till 7:30am a whopping 15 hours straight much of which is at night. As the claim was against the wrong entity and granted the Respondent was culpable by not giving her a contract of employment I will order that the suit be dismissed but with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2021

NZIOKI WA MAKAU

JUDGE