



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 150 OF 2016

EMILLY KERUBO OMWANZA.....CLAIMANT

VERSUS

RADAR SECURITY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th November, 2021)

JUDGMENT

The claimants filed the memorandum of claim on 24.02.2016 through Mwaure & Mwaure Waihiga Advocates. The claimant's case is that she was employed by the respondent effective 01.02.2013 as a Guard Staff No. 6378 at Kshs.14, 000.00 per month and assigned at KRA Nyerere Quarters. She states that she worked until 12.10.2015 when she was terminated with no good reason and the respondent recruited another employee to replace her without regard to her service, expertise, dedication and exemplary performance in her position and a family that depended on her. It is her case she took her normal days off but the following day her in-charge one Mulongo called her to say she had been given only one day off and upon reporting she was put on 14 days' suspension without pay. While on suspension she fell sick and reported back to work on 12.10.2015 and asked for proof of her sickness and she did. Thereafter, she was send home and promised to be called back to work but she was never recalled and it is her case she discovered she had been terminated in breach of section 45(1) and (2) of the Employment Act, 2007. She alleges breach of Articles 41 and 47(1) of the Constitution of Kenya, 2010 and ILO Convention 158 on termination of employment. She pleaded that she was not paid terminal dues and claimed for judgment against the respondent for:

- a) One-month salary in lieu of notice Kshs. 14, 000.00.
- b) Leave for 2 years 7 months Kshs. 29, 212.00.
- c) Service pay for 2 years 7 months Kshs. 20, 886.00.
- d) Unfair termination Kshs. 168, 000.00.
- e) Total Kshs. 232, 078.00.

A demand notice was served but the respondent failed to pay up. She prayed for:

- 1) Payment of Kshs. 232, 078.00.
- 2) Costs of the suit plus interest at Court rates.
- 3) A declaration the termination was unfair and unjust.
- 4) Any other relief that the Court may deem just and fit to grant.

The respondent filed the response to the memorandum of claim on 13.07.2016. The respondent denied that the claimant was terminated on 12.10.2015 and stated as follows:

- a) The claimant failed to report at work for three days without lawful authority and contrary to respondent's code of conduct.
- b) She was put on 14 days' suspension and instructed to attend a refresher training during the suspension in line with the

respondent's policy.

c) The claimant failed to attend the refresher course and upon lapsing of the 14 days' suspension period, failed to report at work as expected.

d) The respondent denied dismissing the claimant as alleged and further denied the alleged breaches of the Act, Constitution and ILO Convention as alleged by the claimant.

e) The respondent denied claims for notice pay, leave days, service pay and compensation and further that the claimant was paid 3 months' salary for October, November and December 2015 being Kshs. 45, 064.00 but a period she was not at work; she took all her leave days while in service; and she was not terminated but she deserted work.

f) The respondent never received a demand notice as alleged for the claimant.

The respondent prayed for:

a) The claimant to refund the 3 months' salaries erroneously paid to her Kshs. 45, 064.00.

b) The suit be dismissed with costs to the respondent.

The claimant testified to support her case. Despite service of the hearing notice, the respondent failed to attend and the respondent's case was closed without the witnesses giving evidence. The final submissions were filed for the claimant and no submissions were filed for the respondent. The Court has considered all the material on record.

To answer the **1st issue**, the Court returns that there is no dispute that the parties were in a contract of service. The respondent employed the claimant as a guard effective 01.02.2013 and her last day at work was on 05.09.2013 as per her testimony when she was given an off.

The **2nd issue** for determination is whether the respondent terminated the claimant when the claimant was told to go away and to be recalled as alleged for the claimant or while on suspension, the claimant failed to continue with the training and failed to return at work as pleaded for the respondent. The claimant did not plead the specific date she was given an off by her supervisor. In her evidence she stated it was on 05.09.2015. She did not plead that she fell sick while on suspension and that while on suspension she was required to attend training. That information is introduced in her witness statement. She does not plead that the off given on 05.09.2015 was for four days effective 06.09.2015 but that information is introduced in her written statement. The suspension letter was dated 10.09.2015 and the suspension was for 14 days (lapsing on or about 24.09.2015). The claimant signed the letter without protest and the Court finds that it was true per the letter that the claimant had extended the one day off to four days without authority – and she voluntarily accepted the terms of the suspension letter. She says in her witness statement that she sent an SMS to one Mr. Winji about her ill-health while on suspension but the same was not exhibited. The 14 days lapsed on or about 24.09.2015 but the claimant states in her statement that she reported back at work on 12.10.2015 after full recovery. The exhibited treatment notes are dated 23.09.2015, 26.09.2015 and it is on 02.10.2015 she was put on 7 days of rest effective 02.10.2015. The Court finds that the medical record shows that she was treated long after or just before the suspension lapsed on 24.09.2015 so that the ill-health she may have suffered cannot be an explanation for the failure to attend the refresher course in issue and imposed during the suspension period. The claimant did not testify on the number of days she may have attended the training and the Court finds she did not attend the training at all.

The Court finds that the claimant extended her one day off to four days without permission. Second, she was emplaced on suspension with a refresher training but which she failed to fully attend and resurfaced long after the lapsing of the suspension period. The Court further finds that there was no evidence that the claimant had been sick during the 14 days of the suspension. The Court finds that the claimant fully contributed to her predicament and there is no evidence that the claimant was dismissed. She must have walked away from duty in what appears to have been rebellion against the unpaid suspension with imposed refresher training. Even if she may have reported back long after the lapsing of the suspension and told to go home to be recalled, the claimant then acceded to that arrangement and clearly she was not terminated but she had 100% contributed to her predicament when she extended the off to four days and then failed to attend the refresher training as was imposed. The claim for unfair termination will collapse.

To answer the **3rd issue**, the Court finds as follows on the remedies prayed for. Compensation as claimed does not arise because there was no termination. The claimant was not terminated and is not entitled to notice pay as prayed for. As testified she was not given annual leave except four days of unpaid leave when she attended her brother's funeral. She is awarded **Kshs. 29, 212.00** for leave as prayed for. She is not entitled to service pay as per section 35 (6) of the Employment Act, 2007 because the pay slips show she was a member of NSSF.

The Court has considered the margins of success and the respondent's failure to comply with Court's directions and the respondent will pay 50% claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) Payment of **Kshs. 29, 212.00** by 01.12.2021 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.

b) The respondent to pay **50%** costs of the claimant's costs of the suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 5th November, 2021.

BYRAM ONGAYA,

JUDGE