



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 470 OF 2017

ROSE MATUNDA.....CLAIMANT

-VERSUS-

HI-TECH OPTICIANSRESPONDENT

JUDGMENT

1. The Claimant sued the defendant for underpayment, Unfair termination and for compensation of the unfair termination, payment of public holidays worked, off days worked together with annual leave.

2. It is the claimants case that he was employed by the Respondent on 5th October, 2015 as a sales manager at agreed monthly salary of Kshs 35,000/- however throughout the entire period she worked for the Respondent, it paid the claimant at fluctuating rates between 7,500 to 9,500 each month.

3. The claimant stated that she reported to work every day at 9 am and clocked out at 7 pm in the evening from Monday to Saturday with Sunday as their rest day.

4. She stated that she worked for the respondent on public holidays commencing 10 am to 3 pm with a stipend of Kshs, 200.

5. On 9th September, 2017 the claimant received a show cause letter dated 1st September, 2017 with ten issue which the Respondent required the claimant to explain in relation to collected money and not accounted for.

6. The claimant stated that she reported to work as usual on 11th September, 2017, and before the claimant could respond to the show cause letter, she found someone else had occupied her work station forcing her to look for the director for an explanation to no avail.

7. The claimant stated that she kept on seeking for an explanation as she was not able to work, since her work station had been occupied by someone but her efforts to meet the director of the respondent did not bear any fruits. Subsequently, the claimant was removed from the Respondents WhatsApp group on 12th September, 2017.

8. The claimant also stated that the Respondent deducted her NSSF and NHIF but failed to remit the same to the respective bodies causing her to pay for penalty which she paid together with the said dues.

9. The claimant then realized that her services were no longer needed and the Respondent failed to inform her in writing of the said termination or subject her to disciplinary hearing. Therefore the claimant filed this suit seeking for judgment against the respondent for;-

a) A declaration be made to the effect that the claimant's termination was unlawful and unjustified as the same was not within the ambits of the Employment Act.

b) Claimant be awarded 12 month compensation for the unlawful and unjustified termination of her employment.

c) One-month salary in lieu of Notice.

d) The Respondent pay the claimant for underpayment from 5th October, 2015 to 9th September, 2017.

e) Pay of 4 off days earned each month.

f) Pay for the annual leave for the 2 years worked.

g) Pay for the 18 public holidays worked during her employment at the Respondent.

h) Reimbursement of NSSF and NHIF deduction not remitted.

i) Certificate of service.

j) Cost of this claim and interests therein.

k) Any other relief that the Court might deem fit to grant.

10. The Respondent entered Appearance on the 22nd December, 2017 however failed to file any response. The suit then proceeded for hearing in absence of the Respondent on the 15th October, 2018, where the claimant testified and before cross examination, Mr Kamau, Advocate for the Respondent, who was now in Court sought for an adjournment and leave to file an application seeking that its response to claim and all other accompanying documents that were filed on the 10th August, 2018 be adopted by the Court. The Court after consideration allowed the application and gave the Respondent 7 days to put its house in order and to pay the Claimant Kshs 5,000/- as throw away costs.

11. The application was then filed, then parties took direction and the same proceeded for hearing before this Court which was allowed as prayed on the 21st July, 2021.

12. Subsequently, the matter was mentioned on the 21st September, 2021 for compliance. However the Respondent was absent despite being served and a return of service filed.

13. The Claimant's Advocate sought to proceed with the claim as undefended which Court agreed and directed that the matter shall proceed as undefended. Since the claimant had already testified the Court directed the claimant to file file submissions.

14. During hearing conducted on the 15th October, 2018, the claimant testified that she joined the Respondent on 5th October, 2015 and was not issued with any employment Contract. She stated that the agreed salary was Kshs 35,000/- per month working from 9am to 7 pm from Monday to Saturday. She stated that she also worked during public holiday and was paid Kshs 200. Her duties as a sales manager were to take daily stock, order for lenses and spectacles, compute stock etc.

15. Prior to her termination, she testified that he was issued with a Notice to show cause letter dated 1st September, 2017 on the 9th September, 2017. That on the following week on Monday the 11th September, 2017 she reported to work as usual only to find a new person at her desk. She stated that the director was not in the premises that day and her efforts to seek explanation was in vain. On subsequent days she reported to work to talk to the director but was informed the director had travelled and therefore her employment came to an abrupt end.

16. She further testified that she was paid between Kshs. 7,000 and Kshs. 9,000 which monies was remitted to the bank. On NSSF and NHIF she stated that the said statutory deduction were retained by the Respondent and only learned of the same when her NHIF card was rejected at a clinic she visited. She then prayed to be compensated and the claim be allowed as prayed.

Submissions.

17. The claimant submitted on three issue; whether the claimant was an employee of the respondent, whether she was unfairly terminated from employment and whether she is entitled to the reliefs sought.

18. On the first issue, it was submitted that claimant submitted that she was an employee of the Respondent and the letter of 15th July, 2016 introduces her as a sales manager at the Respondent earning a salary of Kshs.35,000/= which information is uncontroverted.

19. On the second issue, it was submitted that the action of the Respondent led to her termination. She submitted that she was issue with a show cause letter on 9th September, 2017 and on Monday 11th September, 2017, a new person had occupied her desk at work forcing her to seek an explanation which she did not get and on the next day on 12th September, 2012, she was removed from the Respondent's WhatsApp group. She thus argued that she was constructively dismissed from employment.

20. It was also argued that the claimant was not subjected to due process as envisioned by the Employment Act which will therefore make the termination of her employment unfair. In this she cited the case of **Daniel Kipkirui Keter v Securex Agencies (K) Limited [2018] eKLR** and the case of **David Gichana Omuya –v- Mombasa Maize Millers Limited [2014] eKLR**.

21. The Claimant thus prayed for her claim to be allowed as prayed.

22. I have examined the evidence and submissions of the claimant herein. This matter having proceeded undefended, the claimant's case remains largely uncontroverted.

23. The claimant was an employee of the respondent as evidenced from the letter from the respondent dated 15/7/2016. The letter also indicated that her gross salary was 35,000/=. The claimant was however never issued with any appointment letter.

24. From the letter to the claimant dated 1/9/2017 the claimant was expected to give some explanation immediately. It is not clear when claimant was served with this letter.

25. The claimant indicated that the letter was served upon her on 9/9/2017 and before she offered any explanation, she was constructively terminated as another person was brought in to occupy her work station and therefore she couldn't work.

26. The evidence of the claimant remains unchallenged. It is not clear what happened to the claimant after the letter of 1/9/2017. There is no evidence that she was taken through any disciplinary process.

27. Indeed the action by the respondent of giving the claimant's work station to another and leaving her without a place to work in amounts to constructive termination.

28. In **Coca Cola East or Central Africa Limited VS Maria Kagai Lugaga (2015) eklr**, the COA observed the following;

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

29. In the instant case the behavior of the respondent was indeed unreasonable and so she could not be expected to stay on. My finding is that the claimant was indeed contractively, unfairly and unlawfully dismissed due to the action of the respondent.

30. Having found that the claimant was unfairly terminated in terms of remedies I award the claimant as follows;

1. 10 month salary as compensation for the unfair and unlawful termination

= 35,000/= x 10 = 350,000/=

2. 1 month's salary in lieu of notice = 35,000/=

3. Underpayment of salaries for October 2015 to 09 September, 2017 as per the bank statement produced by the claimant herein

= 703,200/=

4. Payments to the claimant for working on public holidays as pleaded = 17,406

5. Reimbursement for NSSF & NHIF contribution as pleaded

= 27,600/=

6. Claimant be issued with a Certificate of service.

TOTAL AWARDED = 1,115,800/=

Less statutory deduction

7. The respondent will pay cost with interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 2ND DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ooga for claimant – present

Respondent – absent

Court Assistant - Fred