



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E697 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

ESTHER WAMBURA NDEGWA.....CLAIMANT

VERSUS

LABORATORY AND ALLIED LIMITED.....RESPONDENT

JUDGMENT

1. Vide her Memorandum of claim dated 28th October, 2020, the claimant avers that her employment with the Respondent was unfairly and unlawfully terminated in violation of her rights as provided for under Articles 28, 41(1) and 47 of the Constitution of Kenya, 2010.
2. In her Claim the Claimant maintains that she was employed by the Respondent vide its letter dated 1st November, 2016 in the position of an Assistant Sales Administrator earning a monthly salary of Kshs.36,000/-. She averred that her position was permanent and pensionable.
3. The Claimant further maintained that her terms of engagement were as stipulated in her letter of employment dated 1st November, 2016.
4. The Claimant contended that she worked diligently, faithfully and to the Respondent’s satisfaction leading to her confirmation to the above mentioned position on 18th July, 2017 and her salary reviewed upwards to Kshs.41,000/-.
5. The Claimant averred that she was summoned by the Respondent’s Chief Executive Officer on 3rd July 2020 when she was issued with a letter dated 3rd July, 2020 terminating her employment with immediate effect on the ground of **the alleged loss of confidence and trust in her ability to carry out her duties as per the company requirements.**
6. The Claimant maintained that her termination was unlawful and unfair as she was neither informed of any complaints and/or accusations that were levelled against her nor was it done in accordance with the provisions of Sections 41, 43, 44 and 45 of the Employment Act, 2007.
7. Aggrieved by the decision to terminate her employment the Claimant filed the instant claim seeking the following: -
 - a. A declaration that the termination of the Claimant’s employment by the Respondent was unfair and unlawful and in violation of the Claimant’s Constitutional rights provided for under Articles 28, 41(1) and 47 of the Constitution
 - b. Compensation for unfair and unlawful termination, 12 months’ gross salary equivalent..... Kshs.492,000
 - c. Unpaid overtime of 45 minutes for 983 days =
 233 x 983..... Kshs.229,039
 - d. Leave not taken for 2019..... Kshs.41,000
 - e. General damages for breach of constitutional rights
 - f. Costs of the Suit
 - g. Interest on (b), (c), (d) and (f) from the date of Judgment until payment in full.

8. The Respondent despite being properly served with the Summons and the Memorandum of Claim failed to enter appearance or file its defence in this matter. The matter therefore proceeded as an undefended Claim by way of the Claimant filing her Witness Affidavit and written submissions.

Claimant's Case

9. In her Witness affidavit dated 29th June, 2021, the Claimant deposes that her termination was contrary to the provisions of Clause 10.4 of her employment contract that required either party to give Thirty (30) days' notice in writing or equivalent pay before terminating the contract.

10. She further averred that she worked for nine (9) hours a day instead of the statutory eight (8) hours thus necessitating the prayer for overtime pay as none was paid by the Respondent for the additional hours worked.

11. The Claimant posits the purported ground for her termination was ambiguous, lacked justification and no procedure was followed. She maintained that the entire process was flawed and unfair and that she is therefore entitled to the reliefs that she seeks from this Court.

12. In conclusion the Claimant urged this Court to allow the Claim in terms of the reliefs sought therein.

Claimant's Submissions

13. The Claimant submitted that her termination was unlawful and unfair as due process as provided for under Section 41 of the Employment Act, 2007 as read with Article 47 of the Constitution of Kenya, 2010 and her employment letter dated 1st November, 2016 was not complied with. For emphasis she cited and relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where the Court emphasised the need to comply with the mandatory provisions of Section 41 of the Employment Act, 2007 failure to which such a termination is bound to be unfair.

14. The Claimant further submitted that the Respondent in terminating her employment violated the provisions of Section 44(4) and 45 of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the case of **Antony Maina Ruriga v Hilton Hotel Nairobi (2020) eKLR** where the Court emphasised on the need to follow due process in disciplining a grievant.

15. The Claimant urged this Court to find merit in her claim and to allow the same in terms of the reliefs sought therein.

16. On the claim for general damages, the Claimant maintained that an award of Kshs.3,600,000/- would be fair and reasonable. To justify the award the Claimant relied on the Court's findings in the case of **Peris Nyambura Kimani v Dalibit Petroleum Limited (2015) eKLR** where the Petitioner was awarded Kshs.3,600,000/- as damages for constitutional violations.

17. On the claim for damages for unlawful termination, the Claimant maintained that she is entitled to maximum compensation being an equivalent of 12 months' salary.

18. With regards the claim for overtime payment, the Claimant contended that she is entitled to overtime payment having worked for an extra 45 minutes for 983 days bringing the total overtime payment to Kshs.229,039/-. The Claimant relied on the provisions of Rule 6 of the Regulation of Wages (General) Order.

19. The Claimant maintained that she is entitled to the Claim for leave days not taken in the year 2019 by dint of the provisions of Section 28 of the Employment Act, 2007. She urged this Court to award her Kshs.41,000/- as prayed. For emphasis the Claimant cited and relied on the case of **Rajab Barasa & 4 Others v Kenya Meat Commission (2016) eKLR** where the Court held that an employer must ensure each employee takes leave when due or make payment in lieu thereof.

20. In conclusion the Claimant urged this Honourable Court to find merit in her Claim and allow it as prayed.

Determination

21. Having considered the pleadings, evidence, submissions and authorities cited by the Claimant the following are the issues for determination:

- i. Whether there existed an employer-employee relationship between the Claimant and the Respondent herein;
- ii. Whether the termination of the Claimant's employment was valid both procedurally and substantively;
- iii. Whether the Claimant is entitled to the reliefs sought.

22. In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & another (2018) eKLR**, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

23. Further, in the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited (2019) eKLR**, the court noted that the Respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his

employment relationship with the Respondent through bank statements, which fact was not contested by the Respondent. The Court proceeded to make a finding in that case that the claimant had been unfairly terminated.

24. The Claimant herein maintained that she was under the Respondent's employment until 3rd July 2020 when it unfairly and unlawfully terminated her employment. She further maintained that due process was not followed thus making the termination un-procedural and unfair.

25. As proof of her employment the Claimant produced as exhibits a copy of her letter of employment dated 1st November 2016 signed and executed by her on one part and the Respondent's Chief Executive Officer on the other part. She further produced as exhibit a copy of her letter of confirmation to employment dated 18th July, 2017 confirming her appointment to the position of Assistant Sales Administrator following the successful completion of the probation period.

26. The Claimant also produced two pay slips confirming payment of her salary by the Respondent herein and the letter of termination of employment dated 3rd July 2020.

27. In view of the above documents, I find that the Claimant has proved that she was indeed engaged by the Respondent during the period between 1st November 2016 to 3rd July 2020.

Whether the termination of the Claimant's employment was valid both procedurally and substantively

28. Section 41 of the Employment Act provides for the procedure for termination while section 43 of the Employment Act provides that the employer must prove valid reason.

29. The Claimant in her pleadings and submissions maintained that the termination of her services was unfair as the Respondent failed to adhere to the mandatory provisions of Section 41, 43, 44 and 45 of the Employment Act, 2007.

30. As was stated in the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

31. From the foregoing, I find that the termination of the Claimant's services was unfair for the reason that she was not taken through any disciplinary process as set out in Section 41 of the Employment Act, 2007.

Whether the Claimant is entitled to the reliefs sought

32. The Claimant sought the following reliefs:

i. A declaration that the termination of the Claimant's employment by the Respondent was unfair and unlawful and in violation of the Claimant's Constitutional rights provided for under Articles 28, 41(1) and 47 of the Constitution

33. Having found that the Claimant's termination was indeed unfair and unlawful this Court makes a declaration that the Claimant's termination was unfair and unlawful.

ii. Compensation for unfair and unlawful termination, 12 months' gross salary equivalent Kshs.492,000/-

34. This Court having made the finding in i) above notes that the Claimant is entitled to compensation under this head. I have taken into consideration of the factors as outlined in Section 49(4) of the Employment Act, 2007 and award the Claimant six (6) months' salary as compensation under this head. Kshs.41,000/- x 6 months = **Kshs.246,000/-**

iii. Unpaid overtime of 45 minutes for 983 days (233 x 983) Kshs.229,039/-

35. The Claimant in her pleadings and submissions maintained that she is entitled to compensation under this head. No evidence was adduced by the Claimant to support any compensation for overtime worked. This claim therefore **fails** for want of proof.

iv. Leave not taken for 2019 Kshs. 41,000/-

36. The Claimant maintains that she is entitled to payment for leave days earned by not taken in the year 2019. In the absence of any evidence from the Respondent to controvert this assertion I find that the Claimant is entitled to the same. Reference is made to the case of **Meshack Kiio Ikulume v Prime Fuels Kenya Limited (2013) eKLR** where the Court held that it is the employer's duty to keep certain records including annual leave taken and leave due and produce the same in legal proceedings.

v. General damages for breach of constitutional rights

37. The Claimant in her submissions urged this Court to award her Kshs.3,600,000/- as compensation under this head. No particulars of breach were pleaded in the Memorandum of Claim and therefore this Claim **fails** for want of proof.

38. The Respondent shall pay claimant's costs for this suit and interest shall accrue from the date of this Judgment until payment in full.

39. In conclusion the judgment in favour of the Claimant as against the defendant is entered in the following terms:

i. Untaken leave days..... Kshs.41,000

ii. Compensation..... Kshs.246,000

TOTAL..... Kshs.287,000

40. The Claimant is also entitled to costs and interest at Court rates from the date of this Judgment until settlement in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER, 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

MAUREEN ONYANGO

JUDGE