



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.72 OF 2018**

**DINNAH NAMALWA SIMIYU..... CLAIMANT**

**VERSUS**

**MICROSOFT AFRICA LIMITED..... RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent as a store keeper from 26<sup>th</sup> March, 2011 and on 3<sup>rd</sup> May, 2017 the employment was terminated on the grounds that the claimant had failed to obey lawful instructions from the respondent.

The claim is that the reasons given for termination of employment were not valid. There was no notice or hearing and the claimant is seeking terminal dues;

- a) Salary for April ksh.20,000;
- b) Notice pay Ksh.20,000;
- c) 4 days worked in May ksh.2,667;
- d) Annual leave from 2011 to 2017 ksh.140,000;
- e) Overtime for public holidays Ksh.74,667;
- f) Salary deduction in November, 2016 Ksh.6,000;
- g) Transport one way Ksh.3,000;
- h) Compensation.

The claimant testified that she was employed by the respondent as a storekeeper in Naivasha as the respondent's head office was in Karen, Nairobi.

Upon employment the claimant had been promised a wage of ksh.15,00 and upon confirmation was paid ksh.20,000 per month and would be at work from 8am to 5pm but on 3<sup>rd</sup> May, 2017 the boss Martin Ng'ang'a called and directed her to surrender office keys without notice or a hearing and this resulted in termination of employment.

The claimant also testified that while with the respondent she was allowed to go to school and would be paid for such time. In November, 2016 she attended school but there was a salary deduction despite having alerted the respondent that she would be at Laikipia Campus for her examinations. She sent an email but there was no reply. Upon return she was treated as having been absent.

The claimant also testified that the defence that the letter terminating employment was withdrawn is not true as she never received such letter. The alleged meeting with the pastor on 17<sup>th</sup> May, 2017 there was no agreement for her to return to work.

**Defence**

The defence is that the claimant was retained in the position of store manager at the respondent's construction site of construction until completion of the project the respondent was working on. The claimant's employment was terminated vide letter dated 13<sup>th</sup> May, 2017 but

such letter was later cancelled when the claimant challenged it and a meeting scheduled for 17<sup>th</sup> May, 2017 during which the claimant was given a hearing and present was her pastor. At the hearing the claimant was given a chance to state why her employment should be terminated after which she left and demanded compensation.

The defence is also that there is no case of wrongful termination.

The claim for salary for April, 2017 is already paid.

The claimant did not work in May, 2017.

The claimant took her annual leave as and when she wanted to.

The claim for salary deduction in November, 2016 is not due as the claimant was absent from work without permissions.

The claim for transport refund is without merit and the claim should be dismissed with costs.

Martin Kanyingo testified that he employed the claimant who declined to sign her service level agreement as a stoke keeper. During the course of employment the claimant was issued with warnings on her conduct and work performance.

In May, 2017 he visited the Naivasha office site and found the claimant absent without permission. The offices were dirty and unkempt and it was apparent the claimant had not been doing her duties. The casual labourers under the claimant's supervision were sleeping outside for lack of supervisor. The claimant was dismissed vide letter of 2<sup>nd</sup> May, 2017 to which there were objections and upon holding a meeting with the claimant's representative, this letter was withdrawn but the claimant failed to attend work. The claimant instructed the union to make demands for her terminal dues.

The claims made are without justification and should be dismissed with costs.

Both parties filed written submissions.

The claimant was issued with letter of summary dismissal dated 2<sup>nd</sup> May, 2017 on the 3<sup>rd</sup> of May, 2017 and upon a meeting held on 17<sup>th</sup> May, 2017 which both parties admitted to having participated the letter was withdrawn.

The claimant asserted that she did not receive the communication with regard to the withdrawal of the termination notice. there was however agreement that she attended the meeting on 17<sup>th</sup> May, 2017.

In the demand letter sent to the respondent by the claimant's advocate on 15<sup>th</sup> September, 2017 the claimant is seeking terminal dues including pay for 4 days worked in May, 2017. Despite attending the meeting held on 17<sup>th</sup> May, 2017 the claimant cuts off her service with the respondent on 4<sup>th</sup> May, 2017.

The respondent is equally not without blame. Where the claimant's letter of summary dismissal dated 2<sup>nd</sup> May, 2017 was withdrawn/cancelled after being challenged, where the claimant failed and refused to attend work thereafter, there was inaction as regards the provisions of section 44(4)(a) read together with 41(2) of the Employment Act, 2007 (the Act). An employee who fails to attend work without due cause is subject to summary dismissal upon notice and failure to attend. **The respondent as the employer had the right to dismiss the claimant summarily upon her failure to attend work after the 17th of May, 2017.**

To leave the claimant at large to do as she wished, the respondent only invited a claim for unfair termination against itself as herein done. Termination of employment for any reasons must be for a fair reasons and based on the due process. Where the respondent failed to abide the provisions of the law, this resulted in unfair termination of employment under the provisions of section 45(2) of the Act.

On the finding of unfair termination of employment, compensation is due under the provisions of section 49 of the Act. the court is however required to address itself to the provisions of section 45(5) of the Act where the employee has a record of indiscipline. The claimant did not challenge the issuance of various warning letters from the respondent with regard to her work performance and conduct.

By letter dated 3<sup>rd</sup> February, 2014 he claimant was issued with warning for non-performance of her duties.

By letter dated 15<sup>th</sup> May, 2015 the claimant was issued with warning for failing to address the taking of off days and leave days.

By letter dated 21<sup>st</sup> November, 2016 the claimant was issued with warning for taking leave without prior permission.

The above litany of warnings taken into account, to award compensation would be to reward gross misconduct. no compensation shall be awarded by application of section 45(5) of the Act.

On the claims made the respondent as the employer has the duty in law and under section 10(6) and (7) to keep work records. Without the work records to confirm the claimant taking leave in accordance with section 28 of the Act, being paid the due salary in accordance with section 20 and 19 of the Act, these claims shall be addressed on the merits.

On the claim for salary due for April, 2017 the respondent's witness testified that this has since been paid but there is no proof. If such wage was paid, there is no record of it. Section 20 of the Act provides as follows;

**20. Itemised pay statement**

*(1) An employer shall give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.*

*(2) The statement specified in subsection (1) shall contain particulars of—*

*(a) the gross amount of the wages or salary of the employee;*

*(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and*

*(c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.*

Without proof of payment, this wage is due at ksh.20,000.

On the claim for work for 4 days worked in May, 2017 the claimant was issued with letter dated 2<sup>nd</sup> May, 2017 on the 3<sup>rd</sup> May, 2017 and after such date she testified that she did not attend work. Without proof of payment for the 3 days the claimant is entitled to ksh.2,000.

On the claim for pay for annual leave for 7 years, employment was on 26<sup>th</sup> March, 2011 to 3<sup>rd</sup> May, 2017 a period of 6 years.

Part of the reasons the claimant was issued with warning letter dated 21<sup>st</sup> November, 2016 is her taking annual leave without prior permission by the respondent. this notice is not challenged. The claimant took her annual leave for this year, 2016.

What is due is pay for 5 years annual leave as there is nothing to show the respondent allowed the claimant to take such annual leave in accordance with section 28 of the Act. a storekeeper in Naivasha in May, 2017 was entitled to a basic wage of ksh.15,59.95 and 21 leave days each calendar year. For the 5 years the claimant is entitled to pay in lieu of taking leave at ksh.54,316.50.

On the claim for overtime for public holidays, the claimant left these claims bare and without setting out what such days comprised of. this is declined.

On the claim for salary deduction in November, 2016 the claimant admitted that she sent an email to the respondent to attend at Laikipia University for examinations but there was no response. She did not get permission to be absent from work for such time. Section 19 (c ) of the Act allow an employer to lawfully make a deduction from the wages of an employee who is absent from work without permissions;

*(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;*

The deduction from the claimant's wage for days not at work without the permission of the employer is justified.

On the claim for transport one way pay, there is no foundation given to this claim such is declined.

**Accordingly judgement is hereby entered for the claimant against the respondent in the following terms;**

**a) Wage for April, 2017 ksh.20,000;**

**b) Wage for May, 2017 ksh.2,000;**

**c) Unpaid leave ksh.54,316.50;**

**d) Each party to bear own costs.**

**Delivered at Nakuru this 23<sup>rd</sup> day of January, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....