



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

CAUSE NO 442 OF 2017

ESTHER ACHWO WANJOHI CLAIMANT

VERSUS

ATHINAI ESTATE LIMITEDRESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondents on 1st October, 1990 as a sisal cutter on verbal contract and at a monthly wage of Ksh.14,000.

On 26th July, 2017 employment was terminated by the estate manager, Moses Kabargei when the claimant was told not to report to work as work had reduced, meaning there was unlawful redundancy. There was no notice given.

The claimant is claiming for the following dues;

- a) 3 months' notice pay ksh.42,000;
- b) Leave for one year ksh.13,066.70;
- c) Unpaid salaries for May and June, 2017 ksh.28,000;
- d) Severance pay for 28 years ksh.264,600; and
- e) Compensation.

The claimant testified that upon employment by the respondent in the year 1990 she worked continuously until 26th July, 2017 when the manager directed her not to report to work the next day on the grounds that work had reduced. At the time she was housed by the respondent and these houses were demolished. At the time she was earning ksh.14,000 per month.

The claimant also testified that she was not issued with redundancy notice or paid her terminal dues. the respondent was paying NSSF contributions.

The defence that there was work desertion is not true as the manager stopped her from attending work. She had not taken annual leave for the year. The white card filed was kept by the respondent. the supervisor would take the work records. In July, 2017 the manager told her together with others that work had reduced.

The defence is that the claims made are without merit, there was payment of salaries due to the claimant through her account with Skyline Saco Society Limited. There is no pending leave the claimant having taken her last annual leave from 4th May, 2017.

The defence is also that on 26th July, 2017 the claimant left work and has never returned since. There was no explanation for absconding work. The claimant's employment was regulated under the Collective Agreement that dictated that if an employee remained absent from work without permission for 3 consecutive days they would be subject to summary dismissal. Without prejudice, the defence is also that where there was termination of employment it would never be verbal. The claims therefore made should be dismissed with costs.

Moses Kabergei testified the estate manager with the respondent since the year 2008 and where the claimant worked as a sisal leaf cutter

from the year 1990 until the year 1995 when she was on and off when she left and resumed duty in November, 2006. The respondent kept a log in a white card. All employees of the respondent had a card kept keeping a monthly record of work attendance.

The claimant worked until the 26th July, 2017 when she deserted. At the time the respondent had a water crisis due to a long period of draught. The workers were moved to another farm to continue with work. There was a CBA with the union and it was agreed to keep the employees by transferring sisal leaf cutting employees to Lomolo estate but the claimant deserted work before the transfers could be effected. The union had agreed to these proposals.

The claimant was paid all her dues through her Sacco and nothing is owing. The CBA regulated work relations and where there was a dispute the union did not lodge a complaint.

Following the agreement to transfer employees those who failed to attend had an amnesty period but still declined to attend. The claimant was housed by the respondent was thus aware of the on goings as she was unionised and a shop steward.

The respondent also filed work records.

At the close of the hearing both parties filed written submissions.

The claimant's case that she was verbally dismissed by the respondent from her employment was that she was told there was reduced work and should not return the next days after the 26th July, 2017. This evidence was challenged in defence on the basis that the claimant was a long serving employee of the respondent, she was unionised and a shop steward where it was agreed that due to a long draught employees be moved and or transferred to another estate. The claimant was also housed by the respondent and was aware of the on goings within the estate and need to address shortage of water and have employees transferred.

Under the provisions of section 45(2)(b) of the Employment Act, 2007 where an employee's employment is terminated due to operational reasons, this does not amount to unfairness. See **Gerrishom Mukhutsi Obayo versus Dsv Air and Sea Limited [2018] eKLR** and in **Daniel Onoro versus Christ The King Academy St. Mary's Café [2018] eKLR** where the court held that;

... employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.

... Effectively, employment terminated following the due process of the law the same relating to operational reasons and notice to the claimant. There was no unfairness in such process.

In this case, the claimant confirmed there was reduced work. There was no lay off of the affected employees following an understanding between the employer and the union where the claimant was covered. To avoid termination of employment the employees were transferred to another estate.

In this regard, where the claimant failed to attend as required under the agreement between her trade union and the employer, she cannot turn around and alleged there was unfair termination of employment.

Failure to attend work even where the claimant was granted amnesty to offer her labour to avoid termination of employment led to frustration of her own employment. This cannot be at the instance of the employer.

Accordingly, there is no compensation or notice pay due. severance pay does not arise as upon shortage of work, this was addressed by transfer of employee from the respondent to Lomolo estate and the union agreed to the same and hence there were no lay off of employees.

The claimant admitted she was a member of Skyline Sacco Society Limited and where all her wages were remitted for her collection. She also admitted there was a white card where all work attendances were recorded each month and this was used to make payments.

The records of wage payments submitted by the respondent were not challenged in any material way. The payment schedule is that in May and June, 2017 the claimant was at work for 21 and 25 days respectively. In July, 2017 she worked to 26 days. There are wage deposits with Skyline Sacco Society Limited in this regard.

The records are also that from 4th May, 2017 the claimant took her annual leave.

The claims made hence addressed, there is nothing outstanding.

Accordingly, the claim is hereby dismissed. Costs to the respondent.

Delivered at Nakuru this 13th day of February, 2020.

M. MBARU

JUDGE

In the presence of: