



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 163 OF 2018**

**JOYCE CHEPNGENO.....CLAIMANT**

**VERSUS**

**LICHI SECURITY SYSTEMS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for the alleged unlawful and dismissal. She averred that she was employed on 1<sup>st</sup> October 2014 as a security guard and was allegedly dismissed in August 2017 by her supervisor Margaret upon return from maternity leave. She averred that she was not paid for the month of July 2017. She claimed one month's salary – Kshs. 7,850/-, one month's salary in lieu of notice – Kshs. 7,850/-, unpaid leave for 2 years – Kshs. 15,750/-, unpaid public holidays – Kshs. 6,288/-, unremitted NSSF dues – Kshs. 13,200/-, compensation for unlawful dismissal up to the maximum 12 months and costs of the suit.

2. The Respondent in its defence averred that the Claimant failed to report back to duty after her maternity leave which commenced in March. The Respondent averred that the Claimant was notified of her absconding duty on 3<sup>rd</sup> July 2017 and subsequently received the suit papers without any demand issuing. The Respondent admitted that the Claimant is owed leave dues of Kshs. 15,700/- and all public holidays at Kshs. 6,288/- but averred that from the date of registration all NSSF dues were remitted and therefore are not due. The Respondent sought the suit to be compromised as per its admissions with no orders as to costs as the suit was filed in haste and without any demand issuing.

3. The Claimant was heard as was the Respondent's witness James Wachira Wambugu. The Claimant testified that she was harassed by her supervisor Margaret on return from maternity leave. She stated that she was paid for only two months and did not receive payment for the third month. She said that she was asked to ask for employment as a new employee on her return from maternity and she wondered why yet she had served the Respondent for 3 years 3 months. She stated she was not reabsorbed after maternity. She thus sought the prayers as per her claim. In cross-examination she testified that she was on maternity leave till June 2017 and the Respondent told her to wait to be called after she went back from maternity leave. She stated that she went back contrary to the assertion in the letter of 3<sup>rd</sup> July 2017. She said that Margaret told her to wait and terminated her services on 30<sup>th</sup> August 2017. On NSSF dues she stated that she got the statement from NSSF and did not get any statement from the Respondent.

4. The Respondent's witness testified that he was an Investigator and that he knew the Claimant. He stated that she was not terminated unlawfully. He said that the Claimant applied for maternity leave on 29<sup>th</sup> March 2017 and was granted 90 days and was expected on 29<sup>th</sup> June 2017 after the 90 days and that she did not report back. He stated that she came back to return the uniform in March 2018 and she was asked to reapply for her position formally as she had already absconded. He testified that the Respondent owed her leave and public holidays and after clearance would be issued with the certificate of service. In cross-examination he confirmed that the dues owed to the Claimant were as stated by the Respondent. He stated that the Claimant on return of the uniform was appraised of the same and she requested to be reinstated. He admitted the Respondent received the demand letter and that the Respondent did not respond to the same. He stated that the Claimant was not called for a hearing and the letter of 3<sup>rd</sup> July was apprising her of her absconding. He testified that the letter was not a show cause letter. In re-exam he stated that they did not receive the demand letter but the suit papers.

5. The submissions by the Claimant were to the effect that the defence admitted owing some of the sums claimed in the plaint and that consequently the Claimant was entitled to an award of the sums. The Claimant submitted that the Respondent never called her for hearing of her case on the alleged absconding and that no proof of the absconding was given. The Claimant submitted that the Respondent did not show the Claimant was accorded a fair hearing under Section 41(2) of the Employment Act. The Claimant submitted that the Respondent did not controvert her evidence. The Claimant sought the award of the prayers sought in the claim against the Respondent.

6. The Respondent submitted that the Claimant knowingly absconded from duty and admitted as much. The Respondent submitted that the Claimant went to the Respondent's office in March 2018 where she requested to be reinstated as a security guard but was requested to reapply formally which she did not. The Respondent submitted that the Claimant was owed Kshs. 15,700/- being unpaid leave for 3 years and public holidays Kshs. 6,280/-. The Respondent urged the dismissal of the suit as being unnecessary and premature.

7. The Claimant was on maternity leave when the Respondent failed to pay her one month's salary. This was not seriously contested as no proof of payment was offered by the Respondent. The letter of 3<sup>rd</sup> July 2017 was not a show cause letter and was far from the essence of show cause. In the letter permitting the Claimant to go on early leave, she was to start her rest from 29<sup>th</sup> March 2017 so as to protect her and her unborn child. It would be therefore disingenuous for the Respondent to assert that her maternity leave was to end on 29<sup>th</sup> June 2017 as the leave she commenced was in advance of her delivery. She was off duty for a known cause and after the 29<sup>th</sup> June 2017 it was incumbent for the employer to ascertain the cause of her absence. A notice should have been sent to her to ascertain if she was ready to resume after the maternity leave. She is admitted to have been owed sums for 3 years leave as well as dues for public holidays. The Claimant issued a demand notice which the Respondent's witness admitted to receiving though he attempted to recant the evidence of receipt in his re-examination. The Claimant has proved her case on a balance of probabilities regarding her dismissal as can be contrived from the Respondent's actions. As the suit was brought to court to compel the Respondent to do what it knew it had to do the following will be the consequence:-

- a. One month's salary as notice – Kshs. 7,850/-
- b. One month unpaid – Kshs. 7,850/-
- c. Kshs. 15,700/- being unpaid leave for 3 years
- d. public holidays Kshs. 6,280/-
- e. compensation for unlawful dismissal 6 months pay – Kshs. 47,100/-
- f. Costs of the suit
- g. Certificate of service in terms of Section 50 of the Employment Act.

8. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16<sup>th</sup> March 2020 and the Kenya Gazette Notice 2357 of 20<sup>th</sup> March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days. On lapse of the 14 days if any execution is to issue it must be sanctioned by the Court.

It is so ordered.

**Dated and delivered at Nyeri this 30<sup>th</sup> day of March 2020**

**Nzioki wa Makau**

**JUDGE**