



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2216 OF 2015**

**CHRISTINE SARAH MUHANDE.....CLAIMANT**

**VERSUS**

**NANLHANG FOREIGN ENGINEERING**

**COMPANY (K) LTD.....RESPONDENT**

**J U D G E M E N T**

1. The Claimant averred that she was employed by the respondent as a cleaner at a monthly salary of Kshs. 9,100/= . She used to work from 7.30 am until 5.30 pm everyday including weekends and public holidays. She further claimed she was neither housed or paid housing allowance.
2. On 8<sup>th</sup> September, 2015 while at work a huge timber fell on her thereby injuring her back. She was rushed to hospital where she was treated and recommended for several days' bed rest.
3. On 12<sup>th</sup> October, 2015 when she resumed work, she was verbally terminated without notice or reasons. She was further not paid for the month of September, 2015.
4. The respondent on its part denied that it engaged the Claimant's service in July, 2014 but averred that the Claimant's service was engaged from 9<sup>th</sup> August, 2015 to 8<sup>th</sup> September, 2015. The respondent further denied that the Claimant worked every day including weekends and stated that the Claimant was entitled to one day off every week and further that during the period between 9<sup>th</sup> August, 2015 and 8<sup>th</sup> September 2015 when the Claimant was in their employment there were no public holidays.
5. Concerning house allowance, the respondent stated that the salary of Kshs. 9,100/= was inclusive of house allowance.
6. The respondent admitted that the Claimant was injured while at work and was given bed rest for 7 days and was expected back to work on 18<sup>th</sup> September, 2015 however on the said date the Claimant produced another sick sheet which showed she had been given ten more days off duty and was expected back on or about 26<sup>th</sup> September, 2015.
7. The Claimant according to the respondent did not resume work, thereafter and the respondent therefore averred that she absconded duty and only appeared again on 12<sup>th</sup> October, 2015.
8. According to the respondent, the Claimant was paid through Mpesa and was paid for days worked in August and September, 2015.
9. In her oral evidence the Claimant repeated the averments in the statement of claim and further stated that she was terminated because of the injuries and that there was no prior notice nor was she taken through a disciplinary hearing.
10. According to her she worked for 14 months. She further stated that she was registered with NSSF and deductions were made from her salary on account of NSSF.
11. In cross examination she stated that she used to provide cleaning services for the respondent at a residential house and that there was an attendance sheet which she used to sign wherever she reported to work.
12. It was her evidence that she reported to work on 26<sup>th</sup> September, 2015 and produced another sick-sheet which stated that she was still not

feeling well and needed more money for treatment.

13. On 12<sup>th</sup> October, 2015 she went to look for work though she was not yet fully recovered. She denied going on offs and stated that she worked even on Sundays.

14. The respondent's witness Mr. Feng Leilin stated that he was the respondent's accountant and that he relied on his witness statement recorded on 1.4.2019 as his evidence in Chief.

15. According to him he was employed in 2014 and the Claimant on 9<sup>th</sup> September, 2015. Tax information for the Claimant commenced from 6<sup>th</sup> August, 2015 and her NSSF card also commences from 18<sup>th</sup> September, 2015.

16. According to him the Claimant never came back to work after her injuries. She came back on 12<sup>th</sup> October, 2015 to ask for money. She wanted three months' salary and Kshs. 100,000/=. It was his evidence that the Claimant was paid for September and that her services were never terminated.

17. According to him the respondent paid the Claimant's hospital bills and wanted her back to work but she refused. It was further his evidence that the Claimant worked for only one month.

18. In cross-examination he stated that the Claimant was issued with a job card. Further that when the Claimant got injured, he was the one who took him to hospital and that the doctor said she only need one week off work.

19. It was further his evidence that they never issued the Claimant with a show cause letter.

20. In cross -examination he said that the job card was to assist in work attendance and calculating salaries. He further stated that the Claimant never communicated until 12<sup>th</sup> October, 2015 when she came to demand payments.

21. The respondent claimed that the claimant was employed between 9<sup>th</sup> August, 2015 and 8<sup>th</sup> August, 2015, a period of one month before she got injured and after her injuries she never came back to work. The respondent produced the Claimant's NHIF card, KRA PIN registration, NSSF registration and Claimant's attendance sheet. None of these showed any period before August, 2015.

22. The Claimant alleged that before she got injured, she had worked for the respondent for 14 months. That is from July,2014. She however did not produce any document or evidence showing any employment relationship with the respondent prior to August, 2015. The Claimant stated that she used to receive her salary through Mpesa , production of at least one or two Mpesa payment messages from the respondent would have at least supported her claim that she was in respondents employment prior to August, 2015.

23. It is settled rule of evidence that he who alleges must prove. To this extent, the Claimant did not prove her allegation that she was employed by the respondent prior to August, 2015.

24. It was common ground that the Claimant was injured in the course of her duties on 8<sup>th</sup> September, 2015. She was hospitalized and given sick off until 15<sup>th</sup> September,2015 however on that day she produced another sick off for 10 days meaning she was to return to work around 26<sup>th</sup> September, 2015, she never did but returned on 12<sup>th</sup> October, 2015. She however, did not produce any sick off for the period between 26<sup>th</sup> September, 2015 and 12<sup>th</sup> October, 2015.

25. The respondent alleged she absconded work however did not show any evidence that they sought the Claimant's whereabouts after 26<sup>th</sup> September, 2016. The respondent's witness stated that the Claimant was not issued with a show cause letter.

26. Absence from work without lawful cause or authority is a valid ground for summary dismissal however before such dismissal is done, the employee must undergo the due process provided for under section 41(2) of the Employment Act. The Claimant herein was injured in the course her work and hospitalized she was initially away on lawful sick off. This was to end on 15<sup>th</sup> September, 2015 but was extended to 26<sup>th</sup> September, 2015. the Claimant never returned to work nor produced and further extension of the sick-off, this was a valid ground for dismissal but the respondent never took the Claimant through the required disciplinary process as per the Act. It claimed the Claimant absconded duty and only showed up on 12<sup>th</sup> October, 2015 to demand three months' salary and Kshs. 100,000/=. The respondent ought to have issued the Claimant with a show cause letter or notice to explain her unauthorized absence.

27. From the foregoing, the Court takes the view that the separation between the Claimant and the respondent was not in accordance with the provisions of the Employment Act however the Claimant's conduct mitigates the omission by the respondent. The Court therefore awards the Claimant as follows: -

**Kshs**

- |  |       |
|--|-------|
| (a) One month's salary in lieu of notice   | 9,100 |
| (b) Two month's salary as compensation for |       |

Unfair termination **19,200**

(c) Each party to bear their own costs

28. It is so ordered.

Dated at Nairobi this 13<sup>th</sup> day of March, 2020

**Abuodha Jorum Nelson**

**Judge**

Delivered this 13<sup>th</sup> day of March, 2020

**Byram Ongaya**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.