



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 749 OF 2017

NAOMY OSIEMOCLAIMANT

VERSUS

GEOFFREY NYANG'AU T/A MAVUNO

MINI SUPERMARKET ...RESPONDENT

JUDGMENT

1. The claim herein was filed on 20.4.2017 and it seeks the following reliefs:

a. A declaration that the Respondent pays the claimant all the dues that are unpaid as follows:-

- i. One months' salary in lieu of noticeKshs. 9,000.00
- ii. Part of off days not takenKshs.16,912.50
- iii. OvertimeKshs.183,412.50
- iv. Monthly DeductionsKshs. 31,650.00
- v. Service ChargeKshs. 4,500.00
- vi. Accrued Annual Leave of 1 year
6 months and 26 daysKshs. 9,450.00
- vii. Compensation for unfair dismissal Kshs. 108,000.00

b. Costs of this suit

c. Interest on (a) and (b) at Court's rate

d. Any other relief that this Honourable Court may deem fit to award.

2. The Respondent filed his defence on 23.6.2017 admitting that he employed the claimant in January 2015 but denied ever dismissing the claimant as alleged. She averred that it is the claimant who terminated her services when she absconded duty without prior notice, never to be seen again until she resurfaced with this suit. He further denied the claim for the reliefs sought and prayed for the suit to be dismissed.

Evidence

3. The Claimant testified as Cw1 and basically adopted her written statement and documents filed with the claim. In brief, she stated that the respondent employed her in January 2015 in his supermarket for a monthly salary of Kshs.9000/- per month. She was, however, not given any written contract by the respondent. She was working from 7.00 a.m. to 9.00 p.m daily from Monday to Sunday including public holidays but on Saturdays, she used to work from 6.15 p.m. to 9 p.m.

4. She further stated that on 26.7.2016, she received an SMS from the respondent telling her not to report to work. When she called him, he refused to pick her calls so she sent an SMS enquiring on why she was dismissed but again, he never responded. Thereafter she was paid Kshs. 5500/- by Mpesa as salary for July 2016 yet she had worked for 26 days. She contended that the respondent deducted Kshs. 4650/- from her salary allegedly for six (6) days not worked plus missing items. She stated that she was advanced Kshs. 1000/- by the respondent's wife to enable her visit her grandfather and the only other debt was Kshs. 110 for wheatflour. She contended that the respondent had the habit of deducting Kshs. 1500/- every month alleging lost items. She contended that she never went for any annual leave except the day she went to see her grandfather. She further contended that she also missed work for 5 days when the respondent told her not to report to work.

5. She further stated that the respondent never registered her for NSSF and prayed for the reliefs set out in the claim.

6. In cross-examination, CW1 maintained that she was dismissed by the respondent for no valid reason. She contended that the employer never complained of poor performance in her discharge of duties and never served her with any warning letters. She denied ever absenting herself from work until the day she was dismissed. She contended that nothing went missing in the course of her employment with the respondent. She, however, contended that she used to work overtime and prayed for payment in terms of the overtime claim computed in the claim.

7. She contended that there were many other people working in the supermarket.

8. The respondent did not call any witnesses but after hearing both parties filed written submissions.

Claimant's submissions

9. The Claimant filed her written submissions on 15.10.2019 wherein she reiterated the averments in her pleadings and witness statement. In brief, she submitted that the respondent admitted in his defence that she was his employee and that he never paid any NSSF contributions for her. She further contended that she was never given any written contract and she never went for leave except for one day when she was given permission to visit her grandfather.

10. She further contended that the respondent never provided any evidence of the days he accused her of absenteeism. She also accused the respondent of persistent deduction of Kshs. 1500/- every month for alleged lost items for which he did provide particulars. Finally, she contended that she used to work for many hours and prayed for overtime plus other reliefs totalling to Kshs. 362,925.00.

Respondent's submission

11. The respondent filed his written submissions on 14.11.2019 admitting that he employed the claimant in January 2015 as a shop attendant for a monthly pay of Kshs.8000/- and in October 2015, he increased it to Kshs. 9000/-. He submitted that the claimant was employed in a unique position of trust and confidence but the same was lost when he found out that she was stealing items from the stock she was meant, to sell for which he warned her severally. He, however, submitted that instead of heeding the warnings, the claimant deserted work only to resurface after filing this suit. Nevertheless, the respondent maintained that there was a genuine and valid reason for dismissal as required under section 43 (2) of the Employment Act and as such, the termination was justified. The respondent denied that the claimant was entitled to the reliefs sought and prayed for the suit to be dismissed with costs. He relied on **Naqvi Syed Omar v Paramount Bank Limited & Another [2015]eKLR** where the court held that an employer has the right under section 44 (4) of the Employment Act to summarily dismiss his employee if he suspects him of theft or improper performance of his role.

12. He further denied the alleged salary deductions and contended that no evidence was adduced to prove the same. However, he further contended that even if indeed money was deducted, the same was done in line with section 19(1) (b) of the Employment Act which permits salary deduction to compensate the employer for loss of property which was in lawful custody of the employee.

13. As regards the claim for overtime, the respondent denied the same and averred that it was computed without any official records of the claimant's work attendance from the employer. For emphasis, he relied on **Jacob Juma Makokha v Radar Security (K) Ltd. eKLR** where [2018] the court held that without production of employee's records of work hours by the employer, the court cannot make a proper and accurate assessment of overtime.

14. As regards the claim for accrued leave, the respondent submitted that he paid the claimant for the same. In addition he denied the claim for service pay and contended that the claimant frustrated his effort to enrol her. Finally, he denied the claim for compensation for unfair termination and contended that doing so would be to use section 49 of the Employment Act to reward gross misconduct. He relied on **Jacob Makokha v Radar Security (K) Ltd. (Supra)**, where the claimant was caught stealing and the court declined to award compensation for unfair termination.

Issues for determination

15. There is no dispute that the claimant was employed by the respondent as a shop attendant from January 2015 to 26th July 2016. The issues for determination are:

- a. Whether the claimant deserted work or she was dismissed by the respondent.
- b. If the answer to above is dismissal, whether the same was unfair.
- c. Whether the claimant is entitled to the relief sought.

Desertion or dismissal

16. It is trite law that he who alleges bears the burden of proving his or her allegations. In this case, the employer alleged that the claimant deserted work without notice and only resurfaced after filing the instant suit. On the other, hand the claimant contended that she was fired by the respondent on 26.7.2016 via SMS.

17. The Respondent never tendered evidence to substantiate his defence and he never filed any witness statements or documents. The failure to tender evidence further meant that the respondent did not rebut the claimant’s evidence that she was dismissed by SMS on 26.7.2016. It follows therefore that the alleged desertion by the claimant from work has not been proved on balance of probability but the alleged dismissal has been proved by the claimant.

Unfair dismissal

18. Under section 45 (2) of the Employment Act, termination of Employment by the employer is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. In this case, I have already noted above that the respondent did not testify or file any witness statements. He therefore, did not discharge the burden of proving a valid and fair reason related to the claimants misconduct, capacity and compatibility or based on his operational requirements.

19. He further did not prove that he followed a fair procedure before dismissing the claimant including, but not limited, to according her a hearing in the presence of another employee of her choice as required by section 41 of the Employment Act. Consequently, I return that the dismissal of the claimant by the respondent was unfair within the meaning of section 45 of the Act.

Reliefs

20. In view of the foregoing finding the claimant is awarded one months’ salary in lieu of notice plus three (3) months salary for unfair termination under section 49 of the Employment Act. In awarding the said compensation, I have considered that the claimant worked for the respondent for about one and a half years and that no misconduct has been proved against her.

21. The Claim for off days not taken have not been proved by documents or eye witnesses and it is therefore declined. Likewise, the claim for overtime is declined for the same reason. It is not enough for an employee to verbally allege that he/she worked overtime. More effort should be put including adducing documentary evidence and calling eye witnesses.

22. The claim for service charge is dismissed because it was not substantiated by particulars and evidence. However, the claim for leave is allowed at the rate of 21 days per year or 1.75 days per month on prorated basis as per section 28 of the Employment Act. The Claimant worked for one year six months equalling to 18 months. Hence $Kshs.9000 \times 1.75 \times 18/26 = Kshs. 10903.85$.

23. In conclusion, I enter judgment for the claimant in the following terms.

(a) NoticeKshs. 9000.00

(b) CompensationKshs. 27000.00

(c) LeaveKshs. 10,903.85

TOTALKshs. 46903.85

The award is less statutory deduction but in addition to costs and Interest at court rates from the date hereof.

Dated, signed and delivered in open court at Nairobi this 13th day of March, 2020.

ONESMUS N. MAKAU

JUDGE