



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

AT NAKURU

CAUSE NO.140 OF 2017

DORCAS OSIDE SAMWELCLAIMANT

VERSUS

ROSOGA INVESTMENETS LIMITEDRESPONDENT

JUDGEMENT

The claimant was employed by the respondent in October, 2011 as a chef earning ksh.4, 800 and which was increased last earning ksh.9, 950 when employment terminated on 28th January, 2015.

The claim is that on 28th January, 2015 the claimant was dismissed from her employment by the respondent on allegations of lack of respect towards her supervisor. That such allegation was not true. This led to unfair termination of employment contrary to section 41, 43, 44 and 45 of the Employment Act, 2007 (the Act).

The claim is also that the claimant was not given any evidence with regard to the allegations made or given an opportunity to defend herself. The allegations hence made were without evidence, no notice was issued or any witness called. The reason used to terminate employment was not valid and led to unfair termination of employment.

The claimant is seeking for a declaration that her employment terminated unfair and should be compensated; issuance of certificate of service; costs and terminal dues being;

- (a) Notice pay at ksh.12,071.44;
- (b) Compensation;
- (c) House allowance from October, 2011 to January, 2015;
- (d) Overtime dues;
- (e) Underpayments;
- (f) Work during public holidays.

The claimant testified that on 28th January, 2015 she reported to work and cooked until 1pm when her supervisor Tecla called her to go and see the manager, Mr Serem who needed food and also shared that there were complaints that she had mismanaged her work. When the claimant went to see the manager he issued her with a letter terminating employment on the grounds that she had added so much sugar to his tea and so much salt to his food and that she had been using so much food to cook which was not true. Her supervisor Ms tecla had never raised such matters with her and she was not in charge of stores in the removal of foodstuffs and only cooked what was provided.

There was no prior warning or hearing. Where there were missing food items there were no investigations.

The claimant also testified that her work hours were 6am to 4pm each day though her contract provided for work from 8am to 5pm. The overtime hours were not compensated. In the night shift she would be at work until 10pm so as to ensure the employees were catered for. The respondent was running two work shifts and she had to cook for both teams.

The claimant also testified that the respondent sent her to work in the hotel where she would sing in at the gate and clock out as a chef. She

worked for 7 days each week without a break or taking public holidays off.

The respondent's defence that there was payment of late duty allowances was only in October, 2012 which payments were not received.

The claimant also testified that she was employed as a cook. Her contract was with ROCOM, a hotel under the respondent and not under the Sacco. The respondent moved her from the sawmill to the hotel and where Tecla was the supervisor who made a complaint that she was insubordinate.

On 28th January, 2015 the claimant was suspended and then called back by Joseph Muya the manager at the sawmill and also present was Kiplagat, the transport manager. They alleged that the claimant had been disrespectful to Tecla and she gave her defence as this was not true. There was also no case that she had stolen and asked for Tecla to be called to state here case which was not done. She was then issued with letter of summary dismissal.

The defence is that in the course of the claimant's employment, on several occasions the respondent received several reports of pilferage of condiments at the canteen where she was stationed. On inquiry by the supervisor about the consumption of the items, the claimant was disrespectful and displayed open rudeness and bad attitude towards her supervisor.

The defence is also that the claimant failed to perform her duties well or carry out her duties as directed by her supervisor which amounted to insubordination.

The claimant was suspended on 28th January, 2015 to allow for investigations into her conduct. A disciplinary meeting was held on 9th February, 2015 and the claimant had an opportunity to defend herself. A resolution was passed to terminate employment and the reasons given.

The claims made against the respondent have no basis and should be dismissed with costs.

Shadrack Too the manager testified that the claimant was employed as a cleaner and would help the chef under the supervisor of William who left and Tecla took over in an acting capacity. The claimant was found pilferage goods at the canteen and when questioned she became disrespectful. She was suspended and then invited to a hearing where she gave her defence but this was found unsatisfactory and employment terminated.

Mr Too also testified that the claimant was caught at the gate carrying food remnants and in a different occasion was found with sugar she had taken from the stores and it was established that she had been stealing. When the claimant was dismissed, the food consumption went low an indicator that she had been stealing.

The claimant had set work hours an when she worked overtime this was paid for.

The witness also testified that the claimant was distrustful to Tecla but she is not a witness and has not filed any complaint. Tecla was called at the disciplinary hearing but the proceedings do not note her presence. There was evidence before the disciplinary committee that the claimant had been stealing cooking fat and sugar. There was a report by Kiplagat but this was verbal.

Mr Too also testified that the respondent kept work records and on the worked overtime hours such records exist. The claimant was paid overtime when due.

By letter dated 9th February, 2015 the claimant's employment with the respondent was terminated on the grounds that;

... Due to your unsatisfactory performance coupled with pilferage of condiments at the canteen. There was evidence that the utilisation of the canteen inputs improved by a big margin after you were suspended from duty, attesting to the fact that you were directly involved in the theft of these items.

Your attitude towards the supervisor in charge of canteen was found wanting. You were disrespectful to her and failed to carry out her instructions from time to time in complete disregard of her verbal warnings. ...

The grounds leading to termination of employment are that the claimant was not performing her duties well or properly coupled with pilferage of condiments at the canteen and that she was disrespectful to her supervisor.

Where the claimant was not performing her duties properly, there is no record filed that these matters were brought to her attention and she failed to attend. Equally on the alleged pilferage of condiments at the canteen and that upon the claimant's suspension there was improvement by a big margin and that this was a confirmation that she was stealing, this is quite pedestrian, subjective and not based on any scientific evidence.

The respondent as an entity has the advantage of undertaking stock taking or accounts or audit in each department. Where the claimant was in pilferage condiments in the canteen, nothing stopped the respondent from taking measures to arrest the same including criminal action against the claimant.

If such a practice of creating a general perception that one is a thief were to be allowed to take root, then such cannot apply to a single employee whereas the employer has the mechanisms of ensuring workplace policy to address misconduct or gross misconduct of such nature. This part of defence is hence without foundation or evidence.

With regard to allegations that the claimant was found disrespectful of her supervisor, in the case of **Consolata Kemunto Aming'a versus Milimani High School [2019] eKLR** the court held that;

Summary dismissal is allowed under the provisions of section 44(3) and (4) of the Employment Act, 2007 for a fundamental breach of the employment contract and for gross misconduct. Such gross misconduct comprises insubordination and use of abusive language.

The finding that an employee is insubordinate is subjective. The one alleging to have been insubordinate should give evidence for interrogation by the subject employee.

The rationale is that where there is a fair reason for terminating an employee's service fair procedure demands the employer does it in a procedure that conforms with the provisions of the statute. Section 41 of the Employment act, 2007 gives the antecedent procedures

Therefore, In the case of **Standard Group Limited versus Jenny Luesby [2018] eKLR** the Court of Appeal in analysing a case of insubordination held that;

We have examined the proceedings and have noted that one of the editors, who was present at the meeting, gave lengthy evidence on how the respondent happened in the meeting uninvited and how, in the course of his PowerPoint presentation, the respondent made numerous interjections and interruptions of the proceedings, and eventually stormed out before the meeting ended. The Managing Editor, ... gave similar evidence, adding that the respondent 'was unsettled and kept on mattering and fiddling in her chair' and the meeting had to stop at each interruption. The last witness was the HR Director, ... , who was tasked by the CEO to investigate the incident and proceeded to interview some of those present at the meeting as well as the respondent. The cross examination of these witnesses did not break them down.

In this case, the claimant is alleged to have disrespected her supervisor. That the supervisor was called at the disciplinary hearing and gave verbal evidence but the record was not taken. The supervisor reported to the manager but the nature of report was not disclosed. The particulars of what was 'disrespectful' in this case is a blur.

Section 43 of the Act requires the employer to terminate employer for a genuine, valid and fair ground(s). A reason(s) must exist that is not based on extraneous matters or a collusion between employees to remove one of their own from employment over ulterior motives.

Where indeed the claimant was found to have stolen goods at the canteen, the security guard at the gate found her in position of food item, sugar, cooking fat, among others, such being gross misconduct and bordering on criminal conduct, nothing stopped the respondent from taking summary action against the claimant. As otherwise to allege there was theft without proof, to allege there was disrespect of the supervisor without any iota of evidence is a far-fetched ground leading to termination of employment.

In **Magdalene M. Ngea versus National Cereals and Produce Board [2017] eKLR** where the court held that where an employee is alleged to be insubordinate and there is no sufficient evidence, the option is not to dismiss the employee but accord her the due process of the law;

... the Respondent may have had good reasons to subject Claimant to disciplinary process but not to dismiss her. This is in line with Section 43 of Employment Act which states that there must be valid reasons to dismiss an employee which reasons must be established at the time. Establishment of such reasons would ordinarily follow due process during which hearing process as envisaged under Section 41 of Employment Act, the presence or otherwise of these reasons would be adjudicated upon.

Nothing stopped the respondent in this case from having the supervisor be called as its witness for cross-examination by the claimant at the shop floor or in court with regard to the complaint made that there was insubordination. Also under section 41 of the Act, during the disciplinary hearing the claimant was entitled to call a witness of her choice, such right is to be secured by the employer as it is mandatory.

Accordingly, I find the claimant was unfair terminate din her employment by the respondent.

In the letter terminating employment the respondent offered to pay for days worked less what the claimant owed to them.

Notice pay is therefore due.

Equally under the provisions of section 45 and 49 of the Act, compensation is due. in this regard, and noting the claimant was taken through the disciplinary process compensation of one (1) month gross pay is found appropriate all at ksh.12,071.44.

On the claims for house allowance, the claimant was paid a wage of ksh.9,950 inclusive of house allowance. This claim was compromised as settled.

On the claims for underpayment of wages, the claimant as a cook was paid accordingly under the applicable wage orders. This is apparent from the payment statements filed looked at with regard to the Wage Orders applicable.

On the claim for overtime pay, the respondent filed a payment statement which included overtime pay allowance. The claimant contested this and asserted that she was required to work for 7 days each week from 6am to 10pm as the respondent was running two shifts per day. Upon cross-examination the claimant testified that she worked from 7am to 6pm.

On a balance of probabilities, it is not humanly possible to work continuously from October, 2011 to 28th January, 2015 so as to claim for overtime pay upon termination of employment for work for 16 hours or 14 10 hours as claimed. These claims are an exaggeration and do not reflect well of the claimant. Even here the respondent failed to file work records, the hyperbole is obvious.

On the claims for underpayment of wages, the claimant testified that she was a cook. This was confirmed by Mr Too for the respondent that the claimant was employed as a cleaner and then placed as assistant cook.

Under the Wage Orders in October, 2011 the claimant was entitled to ksh.4,676 per month and was paid ksh.4,800 per month and there is no underpayment;

In May, 2012 the minimum wage was ksh.5,288.60 and the claimant was paid ksh.8,000 and there is no underpayment;

In May, 2013 to April, 2015 the minimum wage was Ksh.6,029 and the claimant was paid ksh.9,950 plus house allowance, there is no underpayment.

On the claims for work during public holidays, in this regard the respondent assertions that such time was compensated is without any record. The claims made in this regard are not challenged in any material way. The claims were particularised all due being ksh.10,648.

Accordingly, judgement is herein entered for the claimant against the respondent with a declaration that employment terminated unfairly; compensation awarded at ksh.12,071.44; notice pay Ksh.12,071.44; public holidays pay ksh.10,684; and costs.

Dated and delivered electronically this 21st May, 2020 at 0900 hours

M. MBARU JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15th March, 2020 the Order herein shall be delivered to the parties via emails.

this 21st May, 2020 at 0900 hours

M. MBARU JUDGE