



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1207 OF 2016

LEAH NZEMBI NZYOKA.....CLAIMANT

-VERSUS-

RILEY SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th June, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 20.06.2016 through Charles Gomba & Company Advocates. The claimant claimed against the respondent overtime claims for 2007 to 2014 amounting to Kshs. 677, 514.24. The claimant also claimed one month pay in lieu of notice Kshs. 11, 896.00 and 12 months' salary for unfair termination being Kshs. 11, 869.00 x 12 making Kshs. 142, 752.00. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action in dismissing the claimant from employment was unlawful and unfair.
- b) A declaration that the claimant was entitled to a contract of service.
- c) The sum of Kshs. 832, 162.24 as particularised in the claims.
- d) Costs of the suit.
- e) Interest on amount awarded at Court rates.

The claimant alleged that the respondent employed her as a security guard on 12.10.2007 initially at Kshs. 6, 500.00 per month exclusive house allowance. She worked from 6.00am to 6.00pm without a break and overtime pay. She worked without annual leave until 2014 when the same was accorded. The claimant's further case is that on 09.01.2016 while travelling from work at about 6.50pm she was involved in a road traffic accident when she fell from a moving vehicle and broke her right leg. She had 4 days off duty and resumed work on 14.01.2016. She requested for a sick-off but it was declined and she was assigned to guard at Eco-Bank ATM on Ojijo Road. On 24.01.2016 while on duty she placed her handbag behind the ATM door as there was nowhere else to place it. It was a bright hot day and she decided to sit on the shade next to the ATM lobby adjacent to the M-pesa shop. In the process the Chief Security Manager arrived and asked the claimant whether the bag in the ATM lobby belonged to her. On 26.01.2016 while on duty at about 9.00am the deployment vehicle arrived and another guard was assigned in her place while the claimant was instructed to return the uniform to the store. She was given a show cause notice and on 30.01.2016 she was referred to the Human Resource Manager and she was told to come back on 01.02.2016 for disciplinary hearing. On 01.02.2016 she was advised to come back on 02.02.2016 and when she did she was advised that the Human Resource Manager was not ready to see her and that she was to wait. She was later seen at 3.30pm in presence of the shop steward. The letter to show cause had alleged that the claimant had been absent from the assignment at the ATM on Ojijo Road and had placed her bag at the ATM lobby contrary to standing policy not to do so. At the hearing the claimant explained that she placed the bag at the lobby because it contained her medicines and she had nowhere else to place it. Further she explained that she had sheltered at the nearby M-pesa Shop in view of the hot sun. It is her case that she was asked by the Human Resource Manager to make a written explanation and put it in writing acknowledging her mistakes so as to protect her job and the claimant complied. She delivered her letter on 03.02.2016 at 8.00am. Later that day at 2.30pm the Human Resource Officer informed the claimant that her employment had been terminated.

The claimant's further case is that she had a clean record of service and the termination was malicious and unfair for want of notice and disciplinary hearing.

The respondent filed the memorandum of response on 12.09.2017 through Obura Mbeche & Company Advocates. The respondent prayed that the suit be dismissed with costs. It was pleaded for the respondent that the claimant was dismissed for keeping her personal belongings

in the ATM lobby and abandoning her assigned ATM area when she went to the M-pesa shop. Her misconducts were reported by the Eco-Bank Manager on routine spot check of the Bank's ATM lobbies. The claimant was given a show cause notice, she was heard and put her explanation in writing on 02.02.2016. Her explanation was not satisfactory and she was summarily dismissed from employment.

The Court has considered the evidence for both parties and their respective pleadings and submissions. The Court makes findings as follows:

- 1) There is no dispute that the parties were in a contract of employment as pleaded for the claimant and admitted for the respondent.
- 2) There is no dispute that the claimant was summarily dismissed on account of placing her handbag in the ATM lobby and for keeping a distance from the ATM lobby when she took shelter at the M-pesa Shop. The claimant's and respondent's evidence is in unison that the claimant engaged in the two limbs of allegations as was levelled and reported by the Bank's Manager. The claimant substantially admitted her misconduct in her statement of 02.02.2016. The Court finds that as at termination the respondent had a valid reason to dismiss the claimant as per sections 43 and 45 of the Employment Act, 2007 as the reasons related to the claimant's conduct and the respondent's operational requirements. Further the claimant's and respondent's evidence is that the claimant was given a show cause notice and was accorded disciplinary hearing in accordance with section 41 of the Act so that the procedure for termination was not unfair. The Court returns that the termination was not unfair both in substance and procedure. Accordingly, the Court returns that the claimant is not entitled to compensation, notice pay and a declaration as prayed for.
- 3) The Court has considered the prayer for overtime and it will fail because the claimant's and respondent's evidence was that the consolidated pay included overtime. In any event the overtime is claimed for several years ending December 2014 whereas the suit was filed on 20.06.2016 long after the lapsing of 12 months prescribed in section 90 of the Employment Act, 2007 as the time of limitation for a cause of action for a continuing injury such as the present claim for overtime. The cessation of the continuing injury being December 2014 the claim ought to have been filed by end of December 2015 and the Court returns that the cause of action was time barred.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

Signed, dated and delivered in court at Nairobi this Friday, 12th June, 2020.

BYRAM ONGAYA

JUDGE