



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1442 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JUDITH ATIENO OWUOR.....CLAIMANT

VERSUS

SAMEER AGRICULTURE AND LIVESTOCK LIMITED.....1ST RESPONDENT

JUDGMENT

Vide her statement of claim dated 13th August 2015 and filed in Court on 18th August 2015, the claimant avers that her employment was unfairly and unlawfully terminated by the respondent, a registered limited liability company and that the Respondent failed to pay her terminal dues at the time of separation.

Her case is that she was employed by the Respondent by a letter of appointment dated 20th February, 2012 on a contractual basis for a period of fifteen months effective 3rd March, 2012 in the position of Assistant Manager. That her contract was subject to renewal by mutual agreement.

The Claimant maintained that she performed her duties diligently and to the Respondent's satisfaction and as a result the Respondent renewed her employment contract for a further period of fifteen months effective 1st June, 2013 and increased her salary to Kshs.90,000 as communicated in the Respondent's letter dated 24th June, 2013.

The Claimant stated that on 20th March, 2014 her services were suspended by the Respondent on allegation that she had presented fraudulent cheques to the Respondent. She further stated that she was on suspension until 28th March 2014 to pave way for investigations. That on 17th April, 2014 she received a letter from the Respondent summarily dismissing her on grounds of absconding duty.

The Claimant maintains that the allegations levelled against her were not true.

The Claimant contends that the Respondent's actions were unfair and in gross violation of the provisions of Sections 45, 49 and 50 of the Employment Act, 2007 and Sections 11 and 12 of the Labour Institutions Act, 2007.

In her Statement of Claim the Claimant seeks the following reliefs:

1. The principal sum of Kshs.1,800,000 comprising of the following:-

- i. Salary for March, 2014 Kshs.90,000
- ii. Salary for the period between April and 31st August 2014 when the contract of employment was due to expire Kshs.450,000
- iii. Payment in lieu of leave earned but not taken Kshs.90,000
- iv. Payment in lieu of notice equivalent to 1 month's salary Kshs.90,000
- v. Compensation for wrongful termination equivalent to 12 months' gross salary Kshs.1,080,000

Total

KShs.1,800,000

2. An Order compelling the Respondent to issue the Claimant with a Certificate of Service
3. Costs and incidentals to this suit.
4. Interest on (1) and (3) above at Court rates.
5. Any other or further relief that this Court may deem fit to grant.

The Respondent in its Memorandum of Reply to the Claim dated 2nd September, 2015 and filed in Court on 10th September 2015 denied that the Claimant performed her duties diligently, honestly and religiously as contended maintaining that the Claimant was not an honest employee and was involved in operational irregularities.

The Respondent further avers that the Claimant was given an opportunity to make her representation on the allegation of the issuance of fraudulent cheques but failed to satisfactorily explain the same leading to her suspension in March, 2014.

The Respondent maintains that the Claimant's suspension was in line with set guidelines and was as a result of her misconduct and misuse of the Respondent's resources. The Respondent further maintained that the Claimant's subsequent termination was for a valid and fair reason and that it complied with the provisions of the Employment Act, 2007 in terminating her employment.

It is on this basis that the Respondent avers that the Claimant's Claim as against it is void of merit and therefore urged this Court to dismiss the same with costs to the Respondent.

The claim was heard on 8th October, 2019 and 28th November, 2019 with the Claimant testifying on her behalf and Mr. Cedrick Lumidi, the Human Resource Manager of the Respondent testifying on behalf of the Respondent. Parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant adopted her witness statement dated and filed in Court on 11th May, 2018 as her evidence in chief. In her statement the Claimant reiterates the averments made in her Statement of Claim.

The claimant testified that she received a notice to show cause letter on email on 20th March 2014. She further stated that she refused to accept the letter suspending her from employment and that she believed that her suspension was occasioned by that omission.

She testified that the assertion by the Respondent that she absconded duty was not true as she was directed not to report back to duty until investigations were concluded. She further testified that she was subsequently terminated vide the Respondent's letter dated 17th April 2014 and that the reason for termination was absconding duties.

The claimant stated that the allegations levelled against her for attempting to defraud the Respondent was not true. Further that despite the letter of termination indicating that her terminal dues would be paid she did not receive any such payments.

She stated that she was not accorded a fair disciplinary hearing prior to her termination. That she had not been issued with any warning letters prior to the termination. She therefore urged this Court to allow her Claim as prayed.

On cross examination, the claimant confirmed that prior to her suspension she was invited for a meeting by the Respondent who explained the details of the letter of suspension on 20th March 2014.

She averred that the termination was unlawful and unfair as she was not accorded a hearing prior to termination.

Respondent's Case

RW1, CEDRIC LUMIDI, the Respondent's Human Resource Manager, adopted his witness statement filed in Court on 21st November, 2019 as his evidence in chief. In the statement RW1 reiterates the averments made in the Memorandum of Reply. He further adopted a total of 13 documents as itemized in the list of documents dated 2nd September, 2015 and filed in Court on 10th September, 2015.

On cross examination RW1 testified that the Claimant walked out of a meeting held on 21st March 2014 and failed to report back to work. That she indeed absconded duty.

RW1 further testified that there was no disciplinary hearing that was conducted prior to the Claimant's alleged termination as the Claimant had absconded duty. He stated that the Claimant was not paid any dues at the time of separation.

Submissions by the Parties

The Claimant submitted that her termination was unlawful and unfair as the Respondent failed to comply with the provisions of Sections 41 and 45 of the Employment Act, 2007.

She further submitted that allegation that she absconded lawful duties are not true as she was lawfully out of duty following her suspension from duty. She further submitted the Respondent has failed to demonstrate any efforts to contact her during the period it is alleged that she had absconded duties. The Claimant relied on the authorities of **Simon Mbithi Mbane v Inter Security Services Limited (2018) eKLR** and **Joseph Nzioka v Smart Coatings Limited (2017) eKLR**.

The Claimant maintained that she is entitled to the reliefs sought in her Statement of Claim and urged this Court to allow the same as prayed.

Respondent's Submissions

The Respondent submitted that the Claimant's employment was lawfully and procedurally terminated on account of absconding duty without prior authorization or reasonable explanation.

On the reliefs sought the Respondent submitted that for unpaid March 2014 salary, the Claimant is only entitled to 21 days being the number of days that she had worked prior to her desertion.

On the claim for payment of the reminder of salary for the contract period amounting to Kshs.450,000 the respondent submitted it is untenable as her contract was terminable by either party giving notice and further that there is no legitimate expectation for employment. That the Court cannot rewrite the contract for the parties. The Respondent relied upon the case of **Alphonse Maghanga Mwachanya v Operation 680 Limited (2013) eKLR** where the Court held that the Employment Act, 2007 and the Industrial Court Act have not opened an avenue for the Court to grant damages equivalent to the unserved term of an employment contract.

The Respondent further submitted that it would be greatly prejudiced if it were forced to pay the Claimant her salary for services not rendered to it. The Respondent relied on the case of **James Mugeru Igati v The Public Service Commission of Kenya (2014) eKLR**.

The Respondent further submitted that the Claimant having absconded duty is not entitled to any compensation under Section 49 of the Employment Act, 2007.

In conclusion the Respondent urged this Court to dismiss the Claim in its entirety with costs to the Respondent.

Analysis and Determination

Having considered the facts of this cause, evidence, submissions and authorities cited the parties hereto, the issues for determination are: -

1. Whether the Claimant was unlawfully terminated or she deserted duty;
2. Whether the Claimant is entitled to the remedies sought.

Unfair termination

The Claimant contended that her services were wrongfully and unfairly terminated by the Respondent and that the allegation that she had absconded duties is not supported by evidence maintaining that her absence from duty followed her suspension from duty.

The Respondent on the other hand contended that it rightfully and lawfully terminated the Claimant's employment for absconding duties and/or desertion of lawful duty.

Black's Law Dictionary (Ninth Edition) defines desertion as:

"The wilful and unjustified abandonment of a person's duties or obligations."

In the South African case of **Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** the Court sought to distinguish desertion from unauthorized absence from duty as follows:

"...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return."

Was the Claimant guilty of desertion as contended by the Respondent?

From the evidence adduced in this matter the Claimant maintains that the Respondent had suspended her from duty to pave way for investigations a fact that is not disputed by the Respondent. It therefore cannot now purport to claim that the Claimant is guilty of desertion.

Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act, 2007. No evidence was availed to the Court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent to show this Court it did accord the Claimant a fair hearing prior to her termination. In the case of **Felistas Acheha**

Ikatwa v Charles Peter Otieno (2018) eKLR it was held:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In the present case, I find no evidence of either desertion of duty or fair termination by the respondent. I thus return a finding that the termination of the claimant’s employment was unfair both substantively and procedurally.

Whether the Claimant is entitled to the reliefs sought

The Claimant is entitled to the following:

(i) Salary for March 2014 – Kshs.90,000

It is maintained by the Claimant that despite working in the month of March 2014. She was not paid her salary, a fact that is not disputed by the Respondent albeit the contention by the Respondent that she had worked for 21 days.

I award the claimant salary for March 2014 in the sum of **Kshs.90,000**.

(ii) Salary in lieu of notice – Kshs.90,000

The Claimant is entitled to one (1) month’s salary in lieu of notice by dint of Section 36 of the Employment Act, 2007 which I accordingly award her as prayed in the sum of **Kshs.90,000**.

(iii) Salary for the period between April and 31st August, 2014 when the Contract of employment was due to expire

This prayer is untenable. The Claimant cannot be awarded remuneration for the unserved period as she cannot enjoy remuneration for services not rendered as was held in the cases of **Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] eKLR** and **D.K. Njagi Marete v. Teachers Service Commission [2013] eKLR**.

(iv) Payment in lieu of leave earned but not taken Kshs.90,000

The Claimant is entitled to relief under this head as the Respondent failed to avail records to ascertain whether or not the Claimant is entitled to leave days being the custodian of records pertaining to the Claimant’s employment. I award the claimant the sum **Kshs.90,000** as payment in lieu of leave as prayed since the respondent did not contest the amount claimed in the statement of claim.

(v) Compensation for unfair termination – Kshs.1,080,000

Having found that the Claimant’s termination was unlawful and unfair I find that she is entitled to compensation by dint of Section 49 of the Employment Act, 2007. In view of the circumstances under which she was dismissed, the fact that she was not paid her terminal benefits, the length of service and the value of the total compensation payable to the claimant, I award her 6 months’ salary as compensation in the sum of **Kshs.540,000**.

(vi) Certificate of Service

The Claimant is entitled to a Certificate of Service by dint of Section 51 of the Employment Act, 2007.

In conclusion judgment is entered in favour of the claimant against the respondent **in the total sum of Kshs.810,000**. Interest shall accrue at court rates from date of judgment till payment in full. The respondent shall pay the claimant’s costs of this Suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE