



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 453 OF 2016

CATHERINE MUMBI MBUTHIA.....CLAIMANT

-VERSUS-

PERFECT TOUCH DRYCLEANERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd July, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 22.03.2016 through Muchoki, Kangáta, Njenga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's termination was unfair.
- b) Unpaid dues totaling to Kshs. 608, 100.00 made up as follows:
 - i. 3 months' salary in lieu of notice Kshs.75, 000.00.
 - ii. 5 years' house allowance Kshs. 150,000.00.
 - iii. Overtime worked Kshs. 83, 600.00.
 - iv. Compensation for unfair termination Kshs. 300, 000.00
- c) Certificate of service.
- d) Costs of the suit.
- e) Interest on (b) and (d) above at Court rates.

The claimant's case is pleaded as follows. On 21.05.2010 the respondent employed her as a Front Office and Marketing Assistant effective 02.06.2010 at a gross pay of Kshs. 10,000.00 per month. The claimant was promoted to Acting Supervisor at a gross monthly salary of Kshs.22, 000.00. On 01.06.2014 she was confirmed as Supervisor at Kshs.25, 000.00 gross monthly salary. The other terms of employment remained per letter of 21.05.2010. He further case is that in November 2015 the respondent through its Director verbally terminated her employment and termination was wrongful, unfair, and unlawful because it was without notice or cause as no reason for termination was given and the respondent did not act in good faith. She further alleges that throughout the service she worked 2 hours of daily overtime but which the respondent never compensated for.

The respondent filed the memorandum of reply on 17.05.2016 through Nyaudi Tuiyott & Company Advocates. The respondent changed its advocates to Mokaya & Anyambu Advocates. The respondent admitted that it employed the claimant in the positions, tenure and terms of service as pleaded for the claimant. The respondent denied that it ever terminated the claimant's employment and that the alleged wrongful, unfair and unlawful termination was unfounded. Instead the respondent pleaded that the claimant ceased employment at her own volition on 30.11.2015 immediately after she had collected her monthly salary. Further she terminated her employment with the respondent without serving the required and agreed notice of termination. The alleged unfair termination was therefore an afterthought. The respondent further pleaded as follows:

a) In September 2015 the claimant sent a message by short message service (SMS) to one Mureithi, one of the respondent's directors that she was considering quitting her job.

b) On 30.11.2015 was the last day the claimant was at work. At 1.15pm the respondent's director one Lucy Muriithi went to the business and after making salary payments to the claimant and other workers, the claimant informed the director that she had decided to leave her job and she promised to prepare and present her resignation letter by close of the day as requested. The director left the claimant on duty handling cash and serving customers and supervising other staff and when the director returned on the evening of that day, the claimant was on duty. The claimant prepared accounts for the day and wrote hand-over notes and left the shop in the company of one Rachel, a co-employee. The claimant informed the said Rachel that she had quit her job.

c) The claimant continued to do business with the respondent thereafter by giving positive referrals to potential customers and continued to patronize the respondent as per CCTV footage and phone calls to the shop. Such behavior is inconsistent with a person who was wrongfully, unfairly and unlawfully terminated. The claimant continued to bring second-hand clothes for cleaning as she was engaged in the enterprise of selling secondhand clothes.

d) The claimant had earlier attempted to resign and the respondent believes that on 30.11.2015 she hoped to arm-twist the respondent for a promotion but her resignation was not contested this time round.

e) Any overtime hours were compensated by off-days or off-time. She earned the agreed consolidated or gross pay and she was not entitled to the house allowance as claimed. All her claims and prayers should therefore be declined.

The claimant testified to support her case and the respondent's witnesses were respondent's machine operator Justus Abuko (RW1), claimant's co-employee Rachel Ngugi (RW2) and respondent's director Lucy Muriithi (RW3). The Court has considered their respective evidence.

Submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows.

To answer the **1st issue** for determination the Court returns that there is no dispute that parties were in a contract of service. The terms of service were contained in the letters exhibited for the claimant.

The **2nd issue** for determination is whether the respondent terminated the claimant's employment on 30.11.2015 without notice and reason as alleged for the claimant.

The claimant testified that on 30.11.2015 RW3 dismissed her between 1.15pm and 1.45pm and she had never told RW3 that she wished to leave employment but RW3 requested that the claimant leaves immediately. The claimant further testified that RW3 was called by one Roba (at 1.15pm) who told RW3 that the claimant was the one working on late shift and RW3 then asked her to work till evening. The Court finds that the claimant was not clear if the RW3 telephoned her to convey such information to work till evening. Further the Court finds that the claimant cannot be trusted in that account because the clear evidence was that RW3 arrived at 1.15pm as was her routine. The Court further finds the claimant's evidence was contradictory of her case because while pleading that no reason was given for her alleged termination, the claimant testified thus, **"...She verbally terminated me. She said I leave employment because I had started working backwards not helping her..."** In re-examination, the claimant testified that RW3 told her to leave the shop and also told her to do handover notes. The Court finds that the evidence that she was dismissed and then asked to continue working till evening is clearly inconsistent with the fact of being dismissed and the evidence that she was asked to leave.

RW3 testified that the claimant was always an exemplary employee and was consistently the employee of the year so that she could not have had any reason or cause whatsoever to dismiss her. She testified that she never dismissed the claimant on 30.11.2015. On 30.11.2015 she left the claimant with the salaries for all the employees including the claimant's November pay. Further, RW3 testified that on 30.11.2015 the claimant requested to leave employment as pleaded for the respondent and after that the claimant introduced one Brian who brought secondhand clothes to the respondent for cleaning. RW3's account was as follows, **"On 30.11.2015 I came to the shop at 1.15pm. Claimant was there. I visited machine room. I checked CCTV. At 1.45pm as I was leaving the claimant called and said she was sorry she wanted to leave work. She said I had introduced changes. I told her to handover to Roba if she wanted to leave. I left. At 5.00pm I went to the gym. 7.15pm I found her at shop with Rachel who had brought in clothes. Claimant was leaving. She promised to bring resignation letter. She never did."**

The Court has considered the inconsistencies in the claimant's evidence and variance with her pleadings as already found earlier in this judgment. The Court has considered the respondent's evidence and finds that it is coherent and there is no reason to doubt the account by RW3 on the circumstances of the separation. Accordingly, as per the respondent's evidence and submissions the Court returns that the claimant voluntarily and orally resigned from employment. She has failed to establish the alleged wrongful, unfair and unlawful dismissal. In view of the resignation, she is not entitled to compensation and to pay in lieu of three months' termination notice as claimed. As was held in **David Njuguna Mungai –Versus- Registered Trustees of Sisters of Mercy t/a Mater Hospital [2015] eKLR** (per Nduma J), resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance and further, **"...The question whether the termination of the Applicant's services was fair and reasonable does not arise in circumstances where the Applicant has resigned and no case for constructive dismissal has been pleaded or established."**

The evidence is that parties agreed on a gross salary. As submitted for the respondent, the Court of Appeal in **Postal Corporation of Kenya –Versus- Andrew K. Tanui [2019] eKLR** (Waki, Musinga, and Kiage, JJ.A) held that gross salary would then be the amount calculated by adding up ones basic and allowances, before deduction of taxes and other deductions and further, **"... We are not persuaded by the appellant's argument that 'gross wages' or 'gross salary' does not include any allowances and that it is the same as the 'basic wage'..."** The Court therefore returns that as submitted for the respondent the pay was gross and therefore consolidated and the claim of 15% house allowance (and whose statutory or contractual basis was not pleaded or established) will collapse as the gross pay had a reasonable element of house allowance in terms of section 31 of the Employment Act, 2007.

The respondent has filed leave request forms which show that the claimant was granted leave or off days on account of overtime served. The Court returns that there is no reason to doubt RW3's evidence that whenever the claimant worked overtime, the same was compensated by off days or leave days accordingly. Thus the prayer for overtime pay as claimed will fail as not justified at all.

As costs follow the event and no material are before the Court for exercise of discretion to deny the costs, the claimant will pay the respondent's costs of the suit.

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, 3rd July, 2020.

BYRAM ONGAYA

JUDGE