



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT
AT MOMBASA -
CAUSE NUMBER 142 OF 2017
BETWEEN
ELIZABETH WANZA KISULULU.....CLAIMANT
VERSUS
CHANGAMWE SERVICE STATION.....ESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

Nabwana Nabwana & Company Advocates for the Claimant

Gachiri Kariuki & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 17th February 2017. She states, she was employed by the Respondent as a Pump Attendant, between December 1999 and 1st August 2016. Her salary was Kshs. 14,000 monthly. All through, she was not issued a written contract. She was never given a pay slip, and did not know details of her salary. She was denied house allowance and annual leave. The Respondent alleged that the Claimant was sickly and unproductive. She was placed on compulsory leave, and upon return to work on 7th August 2016, had her contract terminated by Respondent's Director Abdul Nooran. There was no notice, or reason given to her by the Respondent.

2. The Claimant prays the Court to declare that termination was unfair and unlawful, and in addition grant her the following prayers:-

- a. 1 month salary in lieu of notice at Kshs. 16,100.
- b. House allowance, August 2012 to August 2016, at Kshs. 75,600.
- c. Unpaid travel allowance for 3 years at Kshs. 13,200.
- d. Annual leave at Kshs. 218,464.
- e. Certificate of Service to issue.
- f. Compensation at Kshs. 193,200.
- g. Any other suitable relief.
- h. Costs.
- i. Interest.

3. The Respondent filed its Statement of Response on 28th June 2017. The Claimant was not employed by the Respondent as a Pump Attendant in 1999; she was employed in January 2003. She was issued a written contract. Details of her contract were communicated to her. She was paid house allowance. The Respondent denies the assertion that the Claimant's contract was terminated on account of being sickly. She was involved in fraudulent transaction on or about 22nd July 2016. She received an order for oil worth Kshs. 16,000. She invoiced for only Kshs. 10,000 and kept to herself, the balance of Kshs. 6,000. This amounted to an act of gross misconduct under Section 44 [4] of the Employment Act 2007, warranting summary dismissal. The Respondent urges the Court to dismiss the Claim with costs.

4. The Claimant gave evidence, and rested her case on 25th September 2019. Respondent's Human Resource Officer, Abdallah Rashid Abdallah, gave evidence for the Respondent on 12th February 2020, closing the hearing.

5. The Claimant told the Court that the Respondent, a petroleum business, employed her as a Pump Attendant in 1999. She was paid Kshs. 14,000. She was made to sign a voucher on payment. The voucher did not have the name of the Respondent. She was not paid house allowance. She was denied annual leave,

6. Her legs were paining and she did not report for duty on 1st August 2016. She returned on 3rd August 2016. She was told by her Manager that the Director had instructed she ceases working. She went home. She went back to the workplace on 7th August 2016. Abdul told her there was no more work for her. She was not given any letter to show cause. She was not given reason justifying termination. Everything was communicated to her orally. She did not leave employment of her own volition. She did not misappropriate Respondent's resources. She was not charged with any criminal offence.

7. On cross-examination, the Claimant told the Court she was employed by the Respondent as a Pump Attendant, in 1999. She was not in casual employment. She did not sign any contract initially. She did not have any document showing she was employed in 1999. She could not recall what her first salary was. She recalled she earned Kshs. 8,000 monthly, then Kshs. 10,000, Kshs. 12,000 and eventually Kshs. 14,500. She would not tell when increments were made. She never received a monthly salary of Kshs. 16,000. She was not able to say what statutory deductions were made from her salary. She did not sign the letter of offer, exhibited by the Respondent.

8. She did not steal from the Respondent, by invoicing a Customer Kshs. 10,000, while retaining Kshs. 6,000. She wrote a letter of apology to the Respondent. The invoice was for Kshs. 10,000 for 200 litres. She wrote in the apology letter that she retained Kshs. 6,000, which she shared with her colleague. The incident took place on 22nd July 2016. She wrote the apology letter on 5th August 2016. She conceded she was involved in the incident. She agreed that the Respondent could have lodged a criminal complaint. She did not recall if she wrote the letter while at work. She did not write and then disappear for some days. She did not run away on 1st August 2016 for fear of arrest. She returned to work on 7th August 2016. It was not usual for an Employee to absent herself without the leave of her Employer. She gave the Respondent nothing to show she was unwell. She signed a letter in September 2016, confirming she received terminal dues from the Respondent. She discharged the Respondent. She signed discharge voluntarily, in the presence of a witness, Kenneth. The Claimant did not come to Court to pursue a false Claim. Petty cash vouchers show she was paid pro rata leave. She signed the vouchers. She signed them while they were blank. She received salary of Kshs. 14,174. House allowance is indicated on the voucher at Kshs. 2,126. Statutory deductions for N.S.S.F, N.H.I.F and P.A.Y.E, are captured.

9. On redirection, the Claimant denied that she ran away fearing she would be arrested. She could have made an error with respect to the date of her letter of apology. The Respondent did not ask her for medical records to show she was sick. She signed blank vouchers. Some show she received house allowance. Others do not.

10. Abdallah confirmed that the Claimant was employed by the Respondent as a Pump Attendant, in January 2003. She signed a contract. Her gross monthly salary was Kshs. 16,300. She earned the same salary on exit. She abandoned her work without notice to the Respondent. She did not return to duty after disappearing. The Respondent reached out, called the Claimant, but she did not report back. She showed up sometime in September 2016 and was paid pending leave days.

11. She was implicated in a fraudulent transaction relating to sale of fuel. A customer placed an order for fuel worth Kshs. 16,000. She gave a receipt of Kshs. 10,000, understating the order by Kshs. 6,000. She retained Kshs. 6,000. She pleaded with Abdallah to pardon her. She stole from the Respondent, then ran away. She feared that the Respondent would make a report to the Police. She was paid her salary up to August 2016. N.S.S.F contributions were remitted in full. She was paid her terminal benefits, acknowledged receipt and discharged the Respondent. Petty cash vouchers show she was paid house allowance and annual leave. She signed the vouchers. Abdallah issued the Claimant the contract of 2003 personally.

12. Cross-examined, Abdallah told the Court he is Respondent's Human Resource Manager, although he did not have any document showing that he is. Abdul Nooran is the Managing Director. It is not true that Mrs. Nooran is the Human Resource Manager. Abdallah managed staff. The Claimant was never in casual employment. She was placed on contract from the outset. She signed the contract in Abdallah's presence. She did not issue notice of termination to the Respondent.

13. She wrote an apology letter. Discharge letter does not indicate how much was paid to the Claimant. Discharge was executed on 10th September 2016. The Claimant was not issued a letter to show cause. She went to Abdallah's office and issued apology. Abdallah heard the Claimant. He suspected that she feared she would be arrested. The Respondent did not report theft to the Police. There were no vouchers from 2003. There are some on record, without house allowance. It is not true that the Respondent made the Claimant sign blank vouchers, and filled in details later. Redirected, Abdallah told the Court that the Claimant signed the contract of 2003, accepting the terms and conditions of service. She similarly signed discharge voluntarily, upon receipt of her terminal benefits.

The Court Finds:-

14. The Claimant states she was employed by the Respondent in December 1999. She states she was at first employed on casual basis. The

Respondent denies employing her in 1999, or at any other time, on casual basis. According to the Respondent, it employed the Claimant first, in January 2003 as a Pump Attendant.

15. There is on record, a contract executed between the Parties in January 2003. The Claimant was offered employment for 12 months. The Respondent also exhibits Claimant's N.S.S.F Provisional Member Statement of Account. The Employer in this document is identified to be the Respondent herein. The date of employment is shown as 1st December 1998. The Claimant pleads and testifies, she was first employed in 1999.

16. Her oral evidence does not have the support of the documents on record. The Respondent has exhibited the contract of 2003. In line with Section 10[7] of the Employment Act 2007, the Respondent has disproved the oral evidence given by the Claimant, that she was employed in December 1999. The correct date of employment is January 2003, shown in the contract executed by the Parties.

17. She signed vouchers showing annual leave and house allowance paid. Her claim that she was not paid annual leave for the entire period of employment, cannot be correct. She states she was not paid house allowance, which is claimed for 3 years, between August 2012 and August 2016. The salary vouchers exhibited by the Respondent for 2015 and 2016 show house allowance was paid at the rate of Kshs. 2,126 monthly. In her evidence, she simply stated she was not paid house allowance, without saying over what period. She does not plead any for the period from 2003 to August 2012. There is evidence of payment especially for 2015 and 2016. The prayers for house allowance and annual leave have no merit.

18. She pleads travel allowance of 3 years at Kshs. 4,400 a year. There is no provision for this in her contract. She has not cited any wage order, law, policy or labour instrument, granting her travel allowance of any amount. The prayer is declined.

19. She prays for declaration that termination was unfair; that she is paid compensation for unfair termination; and she is paid notice. Was termination unfair?

20. There is no evidence that the Claimant's contract was terminated by the Respondent. She was involved in theft from the Respondent. She received an order for fuel worth Kshs. 16,000. She understated the order at Kshs. 10,000, retaining the balance of Kshs. 6,000. She wrote a letter of confession and apology, disclosing that she shared Kshs. 6,000 with a colleague. She then disappeared from the workplace for fear of being criminally prosecuted. She alleged she was ill, but no medical evidence was forthcoming from her. The Court is persuaded she stole from her Employer, the Respondent herein, and fearing arrest and prosecution, abandoned her post. She showed up later with an apology, was paid her dues, acknowledged payment and discharged the Respondent.

21. Termination was not instigated by the Respondent. The Claimant absconded, endeavouring to place herself away, from the arm of the law. The Respondent cannot be faulted for not asking her to show cause, or taking her through a disciplinary hearing. She placed herself beyond these processes, having at any rate, conceded the offence of theft. She admitted having committed an employment offence, which the Court agrees amounted to an act of gross misconduct, warranting summary dismissal.

22. She does not merit prayers for a declaration that termination was unfair; compensation; and notice. She has not discharged her evidential burden under Section 47[5] of the Employment Act, to show that an unfair or wrongful dismissal took place. There would be no need under the same provision, to have the Respondent give reasons justifying why the Claimant left employment.

23. In sum, the Claim has no merit, save for the prayer for Certificate of Service. The Respondent shall release to the Claimant her Certificate of Service forthwith. The rest of the Claim is declined with no order on the costs.

Dated and delivered at Mombasa this 8th day of **October**, 2020.

James Rika

Judge