



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**CAUSE NO. 39 OF 2019**

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**SUPERIOR HIGHLANDS DAIRY AND FEEDS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent on behalf of the Respondent's former employee, the Grievant herein, Milicent Wawira. It was averred that the Grievant was employed on 26<sup>th</sup> April 2016 as a day watchman earning Kshs. 8,000/- with no house allowance. The Claimant averred that the Grievant's elbow was chopped off and she was admitted in hospital. The Claimant admitted that it had no recognition agreement in place but that the nature of the Respondents business is one that falls within the purview of the Claimant union. The Claimant averred that after the injury, on 27<sup>th</sup> December 2017 the Grievant was assigned alternative duties in the company farm store as she could not pull the gate due to her injury. The Claimant averred that the Grievant was orally dismissed on 20<sup>th</sup> February 2018 without being assigned any reason. The Claimant averred that the Grievant was called on 20<sup>th</sup> February 2018 by the farm manager Mr. Isaac and requested to return her old gumboots and upon returning them she met the accountant named Anthony at the head office and he informed the Grievant that her services had been terminated. The Claimant averred the termination of the Grievant was after service of 1 year 10 months. The Claimant averred that it addressed the Respondent on 19<sup>th</sup> March 2018 and proposed a joint meeting on 29<sup>th</sup> March 2019. The Claimant reported the existence of a trade dispute after denial of access to the Respondent's premises on 29<sup>th</sup> March 2018 for the proposed joint meeting. The Claimant averred on 9<sup>th</sup> July 2018 that the Minister for Labour appointed L. W. Mburu of Embu Labour Office to act as a Conciliator and on 6<sup>th</sup> September 2018 the Conciliator invited parties to a joint conciliation meeting on 20<sup>th</sup> September 2018. The Claimant averred that on 20<sup>th</sup> September 2018 the parties attended at the conciliator's office and the Human Resource Manager of the Respondent stated that the Respondent had nothing to say and that the dispute should be referred to the next level. The Claimant averred that the Conciliator had no other option but to issue a referral certificate thus placing the dispute before the Honourable Court for hearing. The Claimant submitted that the Grievant having been terminated without any reason and without notice she was entitled to reinstatement without loss of benefit; payment of salaries she should have earned from the date of unlawful termination to the date of Judgment and in the alternative to one month's salary in lieu of notice – Kshs. 7,912.70, annual leave for the period served – Kshs. 20,573.10, public holidays – Kshs. Kshs. 7,912.70, underpayment of wages May 2016 to April 2017 – Kshs. 67,478.40 and between May 2017 and February 2018 – Kshs. 77,154/-, maximum compensation for unlawful termination – Kshs. 164,684.80 as well as the costs of the suit.

2. The Respondent averred that indeed there is no recognition agreement with the Claimant and further contends that it did not enter into a permanent and pensionable employment contract with the Grievant. The Respondent averred that if there was a contract with the Grievant, which is denied, then she was a casual worker. The Respondent averred that the Grievant did not provide the qualifications she held in order to serve as a day watchman and store keeper. The Respondent averred that the Grievant quit her job at the Respondent on her own volition without giving any notice. The Respondent averred that it was not bound to retain an employee who had quit employment on her own volition. The Respondent thus sought the dismissal of the Claimant's claim with costs.

3. The Claimant presented the Grievant for hearing on 7<sup>th</sup> October 2020 and the Grievant testified and was cross-examined by Mr. Mwilaria counsel for the Respondent. The Respondent presented Amos Ndegwa a director of the Respondent, Joseph Munene a supervisor at the Respondent and Isaac Mureithi Ileri a farm manager who all testified and were cross-examined by Miss Helena Macharia the representative of the Claimant union. The Grievant testified that upon being employed her salary was subsequently raised to Kshs. 9,000/- a month and that she never got off days. She stated that she was not to take off on public holidays nor was she paid for overtime. She thus sought payment of notice, underpayment and the dues sought in her claim. In cross-examination she testified that the Respondent is an agricultural business and admitted that she did not have any experience in handling cattle. She stated that she was not paid house allowance and after the injury was not paid except for July and August until her return after the injury. She testified that she was moved to the store where she was storekeeper and that there was a lot of work which was difficult as she had one hand. She stated that she was told by the accountant there was no more work. She testified that she was not paid overtime, leave dues and for public holidays.

4. The Respondent's 1<sup>st</sup> witness testified that he employed the Grievant as a gate watchman in January 2015 until when she got an injury in

2016. He stated that the Grievant was on payroll from 12<sup>th</sup> December after the injury and worked till January 2018. He testified that the Grievant was moved to the farm where she was given light duties as she could not pull the gate. He stated that she was paid under the Agricultural Wages Order as the Respondent is a farm dealing with dairy collection. He stated that on 20<sup>th</sup> February 2018 it was reported that the Grievant had stopped working and that when the Grievant went to the office she refused to see him and he was therefore could not give her any dismissal letter. He stated the Grievant was not dismissed as she just left. He stated that the Grievant would take Sunday off and that for public holidays she did not have to work. In cross-exam he admitted that the Grievant had an accident and that after the accident the Grievant did not receive any payment for the days she did not work. He testified that the Grievant was not paid for the injury but that the Respondent paid all the hospital bills. He stated the Grievant deserted work and declined to see him. He stated that the Grievant lived on the farm as she could not live at her place which is over 20 km from the farm. He stated that the Grievant was paid Kshs. 265/- per day and that she earned more than the sum indicated on the wages order. He testified that the Grievant would work from 7.00am to 6.00pm.

5. The Respondent's 2<sup>nd</sup> witness stated he was a supervisor at the Respondent and he confirmed that he knew the Grievant. He testified that he would allocate and move staff according to their skills and that the Grievant was a gateman before he moved her to be a storekeeper. He stated that she left the Respondent in 2018 and that her departure was due to the fact that she said her heart did not give her strength. He was cross examined and stated that he has no evidence the Grievant lived in a company house and that the day she had her injury was her off day. He stated that he was a supervisor and the insurance did not pay as she was not at work on the day of the injury. He testified that he had no evidence of payment between the date of injury to April 2016. He stated that the Grievant left and the Respondent did not have time to write her a letter. In re-examination he testified that it was not his responsibility to know who was paid or not. He stated that he did have the responsibility of giving letters to staff.

6. The final witness for the Respondent was Isaac Mureithi Ireri who stated he was a farm manager and that he knew the Grievant. He stated that he is not the one who transferred the Grievant to the farm. He stated she was to record milking and the food given to the cattle. He testified that he did not know why she left. In cross-examination he stated that he did not tell the Grievant to give in her gumboots. He testified that he got to work and found the Grievant had left. He stated he had given her a house though he did not formalise it in writing. He stated that she lived in a company house for workers and that he did not know how she was paid. He testified that there was no mistake she committed at the farm and that he just found that she left. He stated that he knew where she went after leaving the Respondent and that she worked at Mutunduri Primary where she was employed to clean.

7. The parties were to file submissions and the Claimant's submissions were to the effect that the Grievant was initially employed as a watchman in January 2015 and paid Kshs. 8,000/- and that on 5<sup>th</sup> July 2015 her elbow was chopped off and she was admitted at Embu Level 5 Hospital for 2 weeks. The Claimant submitted the Grievant's wages were based on the Regulation of Wages Order in the Agricultural Industry and that a dispute was referred to the Embu Labour office. It was submitted that the Respondent after being summoned by the Labour Officer promised to reinstate the Grievant back to employment. The Claimant submitted that after recovery from the accident she was called back to employment on 20<sup>th</sup> April 2016 and she continued to work for the Respondent. The Claimant submitted that the Grievant was not provided with accommodation and was not earning house allowance, worked 7 days a week from 7.00am to 6.00pm without any of days or being compensated for the overtime. The Claimant submitted that her work times were confirmed by the supervisor in cross-examination. The Claimant submitted that the Grievant was dismissed without notice after being transferred to the farm as a store keeper. The Claimant submitted that the dismissal was in bad faith as the Grievant was not notified of the reasons for the dismissal. The Claimant submitted that Section 74 of the Employment Act requires an employer to keep a written record of the employee and therefore the burden to prove the claim of annual leave, public holidays, underpayment of wages, overtime and house allowance is on the Respondent's shoulder. The Claimant submitted the Grievant's last pay was far below the wage of a store keeper in the General Order of 2017. The Claimant submitted that the Grievant was unlawfully terminated and Sections 43 and 45 of the Employment Act were not adhered to and she was left with no source of livelihood and was left with a permanent disability. The Claimant submitted the Grievant was entitled to the relief sought in the claim and in the alternative to the monetary reliefs sought together with costs of the claim.

8. The Respondent submitted that the Grievant's discrepancy in her evidence pertaining to her employment and alleged termination raises questions as to the genuineness of the claim. The Respondent submitted that the Grievant was paid via her bank account and that it paid her NHIF cover. The Respondent submitted that the Claimant is a union whose mandate is to represent workers in the commercial and food manufacturing sector whereas the Respondent is an agricultural entity operating in the agricultural sector keeping cattle and producing animal feeds for agricultural purposes. The Respondent submitted that under the Regulation of Wages (Agricultural Industry Wages Council Establishment) Order as well as reading of Section 2 of the Agriculture Act places the operations of the Respondent in the agricultural sector. The Respondent submitted that the Grievant in her testimony admitted the Respondent is an agricultural industry operator and relying on the case of **Kenya Plantations & Agricultural Workers Union v Kenya Chemical and Allied Workers Union & 2 Others [2018] eKLR** submitted that the Claimant does not operate within the agricultural sector and the union is not the appropriate union to represent the Grievant. The Respondent cited Section 54(8) of the Labour Relations Act in support of the submissions on the appropriate union. The Respondent submitted that under the Agricultural Wages Order the Grievant was paid more than the amounts prescribed in the wages order for agricultural employees. The Respondent submitted that it provided the Grievant with housing and therefore did not require to pay house allowance to her. The Respondent submitted that the Grievant admitted in her statement to having taken off days and submitted that the Employment Act provided for weekly rest days which she took. The Respondent submitted the Grievant's employment was not terminated by the Respondent and that she quit all by herself and therefore not entitled to any remedy for the same. The Respondent submitted that however if the Court found she was terminated she would be entitled to one month's salary in lieu of notice being Kshs. 7,779.45.

9. The Grievant was represented by the Claimant who is a registered trade union and whose mandate is to represent interests of workers in the commercial and food manufacturing sector. The Respondent operates in the agricultural sector as indicated by the Grievant and the Respondent's own pleadings and the testimony of its witnesses. The Claimant admitted to not having the mandate to represent the Grievant as it states it does not have a recognition agreement. In my considered view the Claimant is a meddler in the case and its name is struck off and that of the Grievant replaced as the Claimant in the suit.

10. The Claimant Milicent Wawirah indicates she was injured and as a result of the said injury was transferred to the farm since she could not perform the duties of a gateman. The Claimant did not allege any involvement of the Respondent in her injury neither did she suggest the injury was at the workplace. She said she was not paid for the duration she was injured and the Respondent's director confirmed this. She was not at work for 2 months and would be entitled to pay of Kshs. 18,000/- which sum was not paid. Her evidence in regard to overtime

was wanting. There is no legal provision in the Employment Act that shifts the burden of proof in respect to underpayment. She did not prove there was any underpayment or that she did not go for off days as her own statement clearly shows she went for her normal off days. The Claimant was paid in excess of what the Agricultural Wages Order provided for her position. The error in her claim was that she pegged her pay to the General Wages Order which is not applicable to her as she worked in the agricultural industry. The Claimant did not establish dismissal whether unlawful or lawful as her testimony did not accord with the truth. Isaac who is alleged to have asked her to return the boots denied giving her such instructions and she was not able to prove she was fired by the accountant or the manager. The supervisor stated the Claimant told him she could no longer work and she left. The Claimant did not meet the director who indicated he would have met her if there was any reason for her termination.

11. The Claimant failed to prove any other aspect of her claim and is therefore only entitled to the following relief:-

- i. 2 month's salary withheld during her illness/injury – Kshs. 18,000/-
- ii. A certificate of service.

It is so ordered.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of November 2020**

**Nzioki wa Makau**

**JUDGE**