

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CASE NO. 377 OF 2014

NANCY NJERI MUTURI.....CLAIMANT

VERSUS

KABANSORA MILLERS LIMITED.....RESPONDENT

JUDGMENT

1. The claim herein is in respect of termination of the Claimant's service at the Respondent. She avers that she was employed as a cleaner in the milling section of the factory and that she had served the Respondent for 12 years. She averred that in March 2012 her middle finger was chopped off by a machine in the course of her work and while carrying out her duties on 22nd August 2013 she was dismissed from employment ostensibly so that a male employee could be employed to replace her. She sought salary for days worked in August 2013, one month's salary in lieu of notice, compensation for illegal/unlawful termination, service @ rate of 18 days for each complete year of service, annual leave for 12 years, refund of NHIF and NSSF dues deducted but not remitted, unpaid overtime for the entire period of service, costs of the suit plus interest thereon.

2. The Respondent denies employing the Claimant whose services are said to have been outsourced from Bito Limited which deployed the Claimant to the Respondent's factory as a casual worker. It averred the manner of termination of the Claimant's services was an issue between her and the said Bito Limited which was an independent manpower supplier whose actions the Respondent cannot be responsible for. The Respondent asserts the Claimant is not entitled to any of the demands in the suit.

3. In her reply to defence she denied being employed by the said Bito Limited as averred by the Respondent. She averred that she was told not to report to work by the supervisor of the Respondent after she was involved in an accident in the milling section/department.

4. She testified that she was employed on 10th October 2001 by the Respondent as cleaner. She indicated that she was paid weekly and that the sum varied depending on the number of days worked in a month at the rate of Kshs. 471/- per day. She said she was injured, taken to the hospital and on return after she recovered, she was told to leave the premises as she could no longer pack the flour due to her injury. She said Samson Mutinda and Omwoyo told her to leave and conveyed it as a decision of management. She was cross-examined and testified that she was a casual and was paid for the days worked. She acknowledged the form used to claim her compensation for the injury at the workplace. She said that her funder could not hold the packets of flour properly to pack them. She denied working for Bito Limited and insisted she worked for the Respondent.

5. The Respondent's witness Daniel Mutinda Nganga testified that the Claimant was an employee of the Respondent under Bito Limited outsourced by the Respondent. He testified that the Claimant was hired by Bito in August 2014. He said that he assigned the Claimant to packaging and she failed to work and left employment. He denied dismissing her. He stated that the Claimant declined to take up the new assignment at packaging. He was cross-examined and testified that he found the Claimant working as a cleaner when he joined the Respondent in 2012. He said it was 2012 when he deployed her and that the packing work was easier than the others.

6. The Claimant submitted that the dismissal was without reasons and notice contrary to the law. She relied on the provisions of Section 45(2)(a), (b) and (c) of the Employment Act and cited the case of **Moses Ochieng v Unilever Kenya Limited [2018] eKLR** which cited with approval the decision of **Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR** on the procedure for termination of employment.

7. The Respondent submitted that the Claimant had failed to prove her case. It submitted the Claimant was employed by Bito Limited where she was an outsourced employee. The Respondent argued that under Section 44(4)(e) of the Employment Act, the Respondent was entitled to summarily dismiss an employee who knowingly fails or refuses to obey a lawful and proper command which is within his scope of duty to obey. The Respondent asserts that the pleading that the Claimant was asked to leave so that a man could take her place was unproved as her testimony was that she was instructed to go and work in the packing section which she declined to do as she was injured.

8. The Claimant availed payment sheets in the nature of a muster roll under the name of the Respondent. No evidence was adduced that she was either an outsourced employee or an employee of Bito Limited. She was therefore indisputably an employee of the Respondent as the WIBA form even confirms the name of the employer as the Respondent. She asserts dismissal to pave way for a male employee and in her testimony she stated that she was given work hand packing bales of flour. She was thus told to leave when she could not pack. It did not come through clearly in her testimony as to how she was dismissed since she said she was dismissed by the two supervisors she mentioned – Omwoyo and Mutinda. Mutinda stated he is the one who deployed her and the Claimant declined to work. He also said she was employed by Bito Limited. It defeats the argument advanced by the Respondent how an employee of Bito Limited was directly answerable to him while he was a supervisor of the Respondent. If indeed the Claimant failed to obey a lawful command of the said supervisor then it would prove she was employed by the Respondent. She did not prove her averment about the reasons for dismissal. As she failed to prove the termination I will dismiss the suit but order each party to bear their own costs in the suit.

It is so ordered.

Dated at Nyeri this 27th day of February 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 28th day of February 2019

Radido Stephen

JUDGE