



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1092 OF 2014

(Before D. K. N. Marete)

LUCIA NDUKU NZIOKA.....CLAIMANT

VERSUS

MT. LAVERNA GIRLS SECONDARY SCHOOL.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 30th June, 2014. The issue in dispute is therein cited as;

Unlawful and unlawful dismissal from employment and failure to pay terminal benefits and accrued dues.

The respondent in a Respondent's Response to Statement of Claim dated 15th August, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that sometime in January 2006, she was employed by the respondent. On 31st March, 2011, her contract of employment was renewed as from 1st April, 2011 to 31st December, 2011. At the time of her termination of employment, she earned a consolidated salary of Kshs.14,000.00 per month.

The claimant's further case is that on or sometimes in January, 2012, the respondent dismissed her verbally and without justification and pointed out that she had been replaced and her services were no longer required. This amounted to unfair termination of employment.

Her further case is that the termination was untimely, unlawful and unjustified devoid of any legal process and therefore her claim for compensation. She further submits non compliance/breach of section 41 (2), 43, 3(6), 45 and claims service pay under S.35 (5), Employment Act, 2007.

The claimant's other case is that she was not paid for her leave days, salary in lieu of notice and severance benefits accrued for such employment.

She claims as follows;

- | | |
|---|-----------------|
| a) Arrears for 271 weekend hours worked (Saturday & Sunday) | Kshs.251,730.05 |
| b) Arrears for Public holidays | Kshs.17,230.72 |
| c) Arrears for 5950 extra hours worked | Kshs.400,494.50 |
| d) Arrears for leave | Kshs.56,000.00 |
| e) Arrears for holiday tuition | Kshs.65,963.10 |
| f) Compensation for loss of future earnings | Kshs.168,000 |
| g) Service pay | Kshs.42,000 |
| h) Salary in lieu of notice | Kshs.14,000 |

i) Salary for 18 days worked in January 2012

Kshs.8,400

TOTAL

Kshs.1,023,818.37

She prays as follows;

a) A declaration that the termination was unlawful, untimely and an order that the claimant be paid her dues and benefits of Kshs.1,023,818.37 as aforesaid.

b) Costs of the claim plus the interest herein.

The respondent's case is that the claimant was her employee having been employed as a matron on 31st March, 2006 by a letter of appointment signed on the same date.

Her further case is that the employment contract was reviewed over the years culminating in the material one signed *inter partes* on 1st April, 2011. This is expressed as follows;

4. The terms of engagement of the Claimant in the contract dated 1st April 2011 were *inter alia*:

a) The Claimant would serve as a Matron;

b) The Claimant's basic monthly salary at the time was Kshs.11,000/= and a monthly consolidated salary in the sum of Kshs.14,000/=;

c) The Claimant's contract was terminable by notice, summary dismissal or not availability of the Respondent's income.

d) This contract was legally binding between the parties

The respondent's other case is that on or about 18th January, 2012, the claimant orally requested the respondent to furnish her with all her dues. This was by implication and conduct unilateral termination of her contract with the respondent. Her entitlement therefore is;

a) The Claimant's unpaid salary for the 18 days worked in the month of January 2012 amounting to Ksh.8,400/=;

b) Gratuity owing for the nine (9) months of the last contractual year calculated at basic * 15 days worked/26 which amounts to Kshs.6,057.69/= and

c) Public Holidays for 6 days per year worked.

The respondent's further case and averment is that she also took up all her due Leave. She puts it thus;

12. The Respondent avers that the Claimant went on leave intermittently as the students were on holiday as follows:-

a. For two (2) weeks in April;

b. For two (2) weeks in August.

13. Further to the above, the Claimant went on annual leave for six (6) weeks in the month of December every year during which time the school was closed and students and staff were away for the December holidays.

Further, the respondent avers that the claimant's stint of service was not all together blemish free and was tainted in the following manner;

14. In addition to the foregoing, the Respondent denies the contents of paragraph 12 of the Claimant's Memorandum of Claim and contends that the Claimant was found in gross misconduct whereby it was discovered that she had hidden a bucket filled with stolen rice and sugar each weighing about five kilogram (5Kg) behind the Respondent's kitchen with the intention of leaving the Respondent's compound with the said items. The matter came to the knowledge of the Respondent through the school cateress, who was informed by students in the Respondent school.

15. The Respondent further contends that investigations into the allegation by the Claimant were carried out by the headmistress, Sr. Mary Njane. The said investigations involved stock taking, scrutiny and questioning of students and staff, which investigations resulted in corroboration of the complaint of stealing by the Claimant and the confession of the Claimant's accomplice, one Mr. Mwangi who was the supervisor of the security guards in the Respondent's compound.

16. The Respondent avers that the Claimant confided in Sr. Mary Njane stating that she committed the offence out of pressing needs that faced at her home.

17. The Respondent further avers that two days after the discovery of the stolen items, the Claimant in addition to her previous

confession, stated that since Sr. Mary Njane had found her in grave mistake, the Respondent should pay her all dues, an indication that she, of her own volition was termination her employment by reason of gross misconduct.

24. *By reason of the fact that the Respondent did not terminate the Claimant's employment services in the position of a matron, the Respondent denies the contents of paragraph 18, 19 and 20 and puts the Claimant to strict proof thereof.*

The matter came to court variously until the 18th October, 2018 when directions on a disposal by way of written submissions were issued.

The issues for determination in this cause therefore are;

1. Whether there was termination of the employment of the claimant by the respondent?
2. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful in the circumstances?
3. Whether the claimant is entitled to the relief sought?
4. Whether the claimant is entitled to the costs of the cause?

The 1st issue for determination is whether there was termination of the employment of the claimant by the respondent. The claimant did not file written submissions in support of her case.

The respondent in rebuttal of the claim did file written submissions dated 8th November, 2018. Here, and in support of her case, she sought to rely on the authority of **Jane Mukui Mwini vs. Africa Apparels EPZ Limited [2018]eKLR**, where Abuodha J. N. observed as follows;

“the onus of proof that an unfair termination has taken place is on the employee while the duty to prove that there existed valid reason for termination of service rests on the employer”.

The respondent's case and submission is that indeed, the termination of the employment of the claimant was self imposed. She is the one who entertained the termination by requesting for payment of all her dues on realizing that her misconduct at the workplace was an open secret. She was implicated in theft of rice and sugar from the respondent which she acknowledged and apologized. The request for payment of all her dues, in the respondent's thinking and submission, amounted to unilateral termination of employment with herself (respondent.)

I agree with the respondent. This is a situation where the claimant has failed to proffer a case of termination or unlawful termination of employment. In support of her case, the claimant adduces and annexes the following documents in evidence;

1. *Memorandum of Claim.*
2. *Verifying Affidavit.*
3. *Appendix 1 – copy of NSSF Membership Card.*
4. *Appendix 2 – copy of Claimants National Identity Card.*
5. *Appendix 3 – Demand Letter to Mt. Laverna Girls Secondary School.*
6. *Appendix 4 – Demand Letter to the firm of Messrs Nyiha Mukoma & Co. Advocates.*
7. *Appendix 6 – Letter from Sister Fransisca to Mt. Laverna Girls.*
8. *Appendix 6 – Letter for Renewal of Contract and the Employment Contract therein.*

None of these come out as a display or establishment of a case of termination or even unlawful termination of the claimant's employment.

The claimant's case is an illustration of failure to meet the burden of proof of termination or unlawful termination as required of section 47 (5) of the Employment Act, 2007 which provides as follows;

47 (5) “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”

I therefore find a case of no termination of the employment of the claimant by the respondent. This answers the 1st issue for determination.

On a finding of no termination of employment, the other issues for determination fall by the way side. They dissipate into nothingness. They are not worthy of any consideration or determination.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

Dated and signed this 14th day of February 2019.

D.K. Njagi Marete

JUDGE

Delivered and signed this 22nd day of February 2019.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Kisaka holding brief for Mutisya instructed by Peter Mutisya & Company Advocates.
2. Mr. Owang holding brief for Koech instructed by Nyiha, Mukoma & Company Advocates for respondent.