



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.221 OF 2017

RAHAB NJERI KAGUTHI.....CLAIMANT

VERSUS

MEAS AGRICULTURAL CENTRE LIMITED.....RESPONDENT

JUDGEMENT

On 18th May, 2017 the claimant filed the Memorandum of Claim. The respondent entered appearance and filed defence on 21st June, 2017.

The respondent was invited for taking hearing dates but failed to attend. The matter was mentioned for taking hearing direction on 17th December, 2018 when the respondent was absent. A hearing date was allocated for 30th January, 2019 the respondent was served with hearing notice and returns filed to confirm service. the respondent remained absent at the hearing.

The court heard the claimant in the absence of the respondent upon confirmation the respondent had been served with notice and opted to remain absent.

The claimant was employed by the respondent as Cashier on 17th May, 2008 and issued with an appointment letter with terms and conditions of employment. The claimant was paid Ksh.9,500.00 per month which was increased to ksh.12,500.00 from 1st April, 2013 to 1st June, 2013 when there was an increase to ksh.14,000.00 and the last paid salary was Ksh.17,000.00 as at 1st April, 2015.

The claimant applied for her annual leave of four (4) days which was approved and proceeded to take the same. While on leave, the respondent's accountant called her and advised that she should take all her pending leave days all being 13 days, which she did.

Upon resuming duty after the end of the annual leave the claimant was issued with letter terminating her employment with the respondent.. such was without notice, reasons or an opportunity for a hearing. The respondent did not explain to the claimant why such action was necessary noting she had been of diligent service without any record of indiscipline.

The claimant is claimant the underpayment over the years based on the due wage under the Wage Orders for the position held as follows;

Underpayment from 17th May, 2013 Ksh.738,660.00; Underpayment from 1st April, 2013 to 1st June, 2013 ksh.18,622.00; Underpayment from 1st June, 2013 to 1st April, 2015 ksh.171,842.00; Underpayment from 1st April, 2015 to 17th November, 2016 Ksh.91,409.00;

Unpaid house allowance at 20% salary Ksh.449,286.00;

3 months' notice pay ksh.65,433.00;

General damages for unlawful and wrongful termination Ksh.261,732.00

The claimant testified in support of her claims.

The defence is comprised of mere denials save that the claimant was not an employee of the respondent as claimed and on without prejudice asserts that the claimant was employed in various capacities with her last position being that of Cashier. The claimant was not diligent in her employment and failed to conduct herself with dignity and misconducted herself by being rude, unruly, argumentative, bad example to other employee, failed to respect the directors and was unruly in the view of customers.

The defence is also that there was no unfair termination of employment as alleged and the claims made are without merit and should be dismissed with costs.

There are no work records filed by the respondent.

No evidence was called to support the defence as set out above.

By letter dated 17thh November, 2016 the respondent summarily dismissed the claimant on the grounds of gross misconduct set out as follows;

Following your bad behaviour towards one of the directors on 1st November instant, you are hereby dismissed from the company service with effect from the date of this letter.

In your letter of appointment dated 17th May, 2008 which you signed "accepted", item No.4 reads you can take leave "as and when it suits the company".

It was a compete disgust that you acted/talked back. You conducted yourself in a manner that is completely wanting. Indeed dishonourable. It is good to respect those in authority.

Your services have been therefore terminated.

The claimant testified that upon returning from her leave on 17th November, 2017 she was directed not to enter her office and proceed to the director's office where she was handed the letter of summary dismissal from her employment with the respondent.

Section 44(3) and (4) of the Employment Act, 2007 allow an employer to dismiss an employee subject to adherence to the provisions of section 41(2) of the Act. the employee must be given a hearing in the presence of another employee of her choice. Even where the subject matter resulting in summary dismissal is gross and dismissal is instant, the safeguard to the employee is to ensure that there is a hearing before such summary action is taken.

From the letter of summary dismissal dated 17th November, 2016 it is apparent that by the time the claimant took her annual leave there were underlying issues with her conduct. Where she was rude, unruly, failed to respect the director and customers, such was material in the respondent's possession before the date of summary dismissal.

Such matter(s) should have been addressed with the claimant before summary dismissal and pursuant to section 41(2) of the Act;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The summary dismissal of the claimant without due process resulted in unfair termination of employment. The court shall assess the claims made on their merits and the applicable law.

On the claim for underpayments, the claimant testified that she was appointed as Cashier and issued with letter of appointment to this effect. The defence that the claimant was not the employee of the claimant is unfounded and of no value on the face of the issued letter of appointment.

Under the Wage Orders in the year 2008 a Cashier was entitled to a minimum wage of ksh.9,205.00 per month and the claimant was paid ksh.9,500.00 per month.

The Minimum Wage due for the period of 2009/2010 was Ksh.14,319.00 and which graduated over time until May, 2015 when the minimum wage was ksh.23,262.00 per month.

The claims for underpayment as tabulated by the claimant requires a detailed analysis and the office of the County Labour Officer, Nakuru shall assist the court in this regard.

On the assessed due wage, the assessment of the due house allowance shall also follow based on the rate of 15% and not 20% as claimed.

Notice pay is due to the claimant but at the rate available under section 35 of the employment Act, 2007 all at one month salary as due under the Wage Orders at ksh.23,262.00.

On the claim for general damages for wrongful dismissal from employment, the claim having arisen on 17th November, 2016 with the summary dismissal of the claimant, the pleadings should have addressed the provisions of section 45 read together with section 49 of the Act or be specific as to whether the claim for the payment of general damages is premised on the provisions of section 12 of the Employment and Labour Relations Court Act, 2011.

The claimant is represented by Counsel and I it the pleadings as drawn are deliberate. As this is not a matter premised on the common law claim for wrongful dismissal, the remedy of payment of general damages is not available.

Accordingly, the court finds the claimant is entitled to the due underpayments for the position of Cashier held from 17th May, 2008 to 17th November, 2016 together with the house allowance. The claimant is awarded ksh.23,262.00 in notice pay. Costs are also awarded.

The County labour Officer, Nakuru shall compute the due underpayments and house allowances in 14 days for the adoption by the court as the due award.

Delivered at Nakuru this 14th day of February, 2019.

M. MBARU

JUDGE

In the presence of: