



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 150 OF 2018

JACQUELINE KATUKU KASINGA.....CLAIMANT

VERSUS

KENYA FRESH PRODUCE EXPORTERS LTD....RESPONDENT

JUDGMENT

1. The Claimant was an employee of the Respondent and she has sued the Respondent for sacking her arbitrarily. She claims that the sacking was unjustified, unlawful, and illegal and in breach of a contract of employment between her and the Respondent and that the dismissal was contrary to the Employment laws of this country and in breach of the rules of natural justice. The Claimant avers that she was permanently employed by the Respondent from October 2007 to 20th February 2018 when she was dismissed. She states that she worked as a quality controller with a basic salary of Kshs. 16,250 per month. She averred that she was dismissed without any reasonable cause or justification unilaterally. She averred that she was dismissed without being afforded any chance and/or opportunity to defend herself. She prayed for a declaration that the Respondent's action of sacking her is illegal and unlawful and that she is entitled to 3 months in lieu of notice – Kshs. 56,062.50, unpaid leave – Kshs. 43,750/-, NSSF dues for the years 2009-2012 – Kshs. 19,200/-, house allowance for 120 months – Kshs. 292,500/-, compensation for wrongful dismissal – Kshs. 224,250/- making a grand total of Kshs. 635,762.50. She also sought payment of general damages for the dismissal, costs of the suit and interest thereon.

2. In its defence and counterclaim, the Respondent denied unilaterally terminating the Claimant's employment on 20th February 2018 as claimed. The Respondent averred that the Claimant unequivocally stated that she would no longer be bound by the employment contract and she conducted herself in a manner that reasonably indicated that she would not perform the employment contract, thus repudiating it on 5th February 2018. The Respondent asserts that following her conduct it accepted the Claimant's repudiation by terminating her employment. The Respondent further averred that the Claimant discharged her duties in an unsatisfactory manner and in breach of the implied term of trust and confidence, thus giving the Respondent a right to terminate the employment by summary dismissal. It stated that the Claimant was invariably disrespectful to her superiors and had chronic insubordination. It was asserted that she refused to obey instructions and failed to follow the operational and human resource arrangements. By way of counterclaim, the Respondent sought three month's salary in lieu of notice in for the termination.

3. The Claimant stated that she reported to work on 5th February 2018 after an off day on 4th February 2018 when she was told that her off days have been switched from Monday to Friday. She then sought to have her off day to remain on Monday because that is when she used to take her dad who is a diabetic patient to hospital. She testified that her manager informed her that it seemed she did want to work and she was then ordered to leave and that she would be called. She stated that she was informed that there was no possibility of a change. She said that she went home and waited to be called and after waiting for two weeks without a call forthcoming she went back on 19th February 2018 to check what was going on. She testified that she was allowed into the premises but was not allowed to access the office and she was advised to report the following day. On 20th February 2018 she went back to the office and that was when she was handed the dismissal letter. She testified that she tried to get an explanation about the letter but no one was willing to listen and stated that she signed the letter under duress. She stated that she never refused to report to work and that she was told to go home. She further stated that she was never served with a notice to show cause letter or any request for an explanation. She told the court that she is aggrieved for being forced to sign the letter and the manner in which the termination was carried out. In cross-examination she denied having a dispute with the Respondent but confirmed that she was suspended in February 2015. She also confirmed that she had an issue with some of her colleagues, had sick offs and also had cases of absenteeism. She stated that she went to work on 7th and 8th February 2018 but was not allowed access. She denied storming out of the premises saying that her off days could not be changed.

4. The Respondent called Joe Kinyua an administration manager of the Respondent adopted his statement recorded on 31st May 2018 as his evidence. In the statement he stated that the Claimant's off days were reshuffled as this was a periodic exercise and the other staff accepted the changes except for the Claimant. In cross-examination he confirmed that the management changed off days on rotation and that the Claimant wanted her off day to remain on a Monday because of her dad who was unwell. He confirmed that each pack house had its own schedule based on the orders and needs of other employees. He testified that if her dad's schedule did not allow then she could have sought

for a change on duty from the management. He stated that he was not aware of any conversation where the Claimant was told to go home. He also confirmed that they paid her dues for the unpaid days. He denied that there was a ploy to dismiss her. He testified that she was supposed to be at work from 6th to 12th February 2018 but she absconded for no reason hence the summary dismissal.

5. The Claimant filed her submissions on 7th February 2019 though they were unsigned. She argued that the Respondent violated Section 41 of the Employment Act by failing to give her a notice to show cause and afford her an opportunity to give explanation in a language that she understood. She faulted it for failure to give her a hearing before terminating her from employment. She submitted that the summary dismissal was unfair and that she had discharged her burden of proving that the termination was unlawful and with no valid reasons. She submitted that the Respondent was not entitled to a three month's salary as claimed, as there was nothing to guide the court on the same since the Respondent did not show the court that there was such a clause in any contract. She thus prayed that the court grants her prayers and dismisses the Respondent's counterclaim in its entirety.

6. The Respondent submitted that the Claimant's summary dismissal was an account of her abandonment of her duties and refusal to work on Mondays as required by the new work system introduced by the Respondent. It submitted that by so acting the Claimant had expressed her wish not to be bound by the employment contract, thereby repudiating the same. The Respondent accepted the attendant repudiation and treated the contract as having been brought to an end. The Respondent submitted that it acted within the law by adjusting the Claimant's working hours and her refusal of the change gave the Respondent reasonable cause for the dismissal. It cited the case of **Western Excavating (ECC) Ltd v Sharp (1978) ALL ER 713** as well as the case of **Wilf Gilbert (Staffs) Limited v Mr. P Bunn UKEAT/0547** and that of **RDF Media Group PLC & Another v Clements (2007) EWHC 2892** for the arguments advanced above.

7. From the foregoing evidence and submissions of parties, the following issues fall for determination:-

- a. Whether the claimant's summary dismissal was fair or unfair.
- b. Whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.

The law permits summary dismissal under Section 44 of the Employment Act. It is justifiable grounds for dismissal if an employee without leave or other lawful cause absents himself or herself from the place appointed for the performance of duty. Section 27(1) of the Employment Act give an employer the leeway to regulate the working hours of each employee in accordance with the law. The employer was therefore within the law when it changed the working schedule and the Claimant had no reason to complain. If she felt aggrieved she had a window to seek the amendment but not the luxury of walking out as she did. The Claimant did deny going to the office on the 13th February 2018 and demanding her unpaid dues. In the case of **Joseph Njoroge Kiama v Summer Limited [2014] eKLR** the Court held that:

Although the law does not prescribe a specific period an employer must wait to deem the employee to have absconded, the employee ought to have left the place of work and does not appear to have any intention of returning to the workplace. Generally the employee has an obligation to inform the employer of any reason why he or she is unable to be at work. For instance illness or having to attend to a family crisis. Where the employee does not contact the employer, the employer has an obligation to try to contact the employee. The purpose is to warn the employee of the possible consequences of not being at work without permission. This obligation on the part of the employer is however not a rule of law but is out of best practice and the broader principle of fair labour practice. Since an employee may not be able to contact an employer as soon as practicable under certain circumstances such as where such employee may be sick or injured and is unconscious in hospital."

8. The Claimant herein contradicted herself by stating in her testimony that she waited for a call which was not forthcoming after which she decided to go and check on the position on the 19th February 2018. However, she had stated in her statement that she was called on 19th February 2018 and told to report to work the following day 20th February 2018. Further she told the court that she reported to work on the 7th and 8th February 2018 but she was denied access. This contradicts her earlier testimony that she went home as was instructed and waited for a call for two weeks after which she went to check why she was not called. The Claimant lied to the court that she was denied access on the 7th and 8th February 2018 but allowed access on the 19th February 2018. Was the sanction of summary dismissal too harsh in the circumstances? In my opinion the answer would be in the negative. The Claimant failed to prove her claim and because she absconded her employment she did not give the Respondent notice. She thus is to pay the sum of Kshs. 16,250/- to the Respondent in lieu of notice. Each party however will bear their own costs for the suit. In the final analysis I enter judgment for the Respondent against the Claimant for:-

- a. Kshs. 16,250/- in lieu of notice.
- b. Each party however will bear their own costs for the suit.

It is so ordered.

Dated and delivered at Nyeri this 26th day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar