



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1791 OF 2014

**KENYA UNION OF PRINTING, PUBLISHING, PAPER MANUFACTURERS,
PULP AND PACKAGING INDUSTRIES.....CLAIMANT**

v

KENAFRIC DIARIES MANUFACTURERS LTD.....RESPONDENT

JUDGMENT

1. The Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp & Packaging Industries (Union) instituted legal proceedings against Kenafric Diaries Manufacturers Ltd (Respondent) on 13 October 2014 and the Issue in Dispute was stated as Wrongful termination of employment of Ms. Angeline Achieng Wajewa (Grievant).
2. The Respondent filed a *Memorandum of Response* through the law firm of Boniface Masinde & Co. Advocates on 5 February 2015.
3. On 8 March 2019, the Court had directed the parties to file and exchange witness statements and documents before 15 March 2019, ahead of the hearing on 2 April 2019.
4. The *Grievant* filed her witness statement on 15 March 2019 while the Respondent did not file any witness statement, which may suggest that it had no witness to call.
5. According to an affidavit of service filed in Court on 22 March 2019, the Respondent was served with a hearing notice on 14 March 2019. Service was acknowledged (Court notes that the last time the Respondent's advocate appeared in Court was on 10 October 2016).
6. On 21 March 2019, the firm of *Sang Chambers & Partners* wrote to the Union that it had been instructed to take over the Cause on behalf of the *Grievant*. The firm requested the Union to hand over to it the file.
7. When the Cause was called out for hearing on the scheduled date, 2 oral applications were made. The first application was by the Union and it sought to withdraw the Cause.
8. The second application was made by Mr. Sang Advocate who sought to come on record.
9. Since the *Grievant* was in Court, and in consideration of the age of the Cause, the Court allowed the Union to cease from representing the *Grievant*, and also admitted Mr. Sang to come on record.
10. The Court, on account of proof of service of hearing notice allowed the hearing to proceed in the absence of the Respondent.
11. The *Grievant* testified and filed her submissions on 5 April 2019.
12. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as examined herein below.

Unfair termination of employment

Procedural fairness

13. The *Grievant* had more than one employment stint with the Respondent, the relevant employment relationship having commenced on 1 March 2012.
14. According to clause 1.2 of the *offer of employment* letter, the contract was to lapse on 28 February 2014, but could be renewed.
15. The Respondent wrote to the *Grievant* on 9 May 2013 to notify her of the termination of contract.
16. Regarding the circumstances leading to the termination of her employment, the *Grievant* stated that on 9 May 2013, she failed to get her clocking card at the place the cards were kept, and upon inquiring from the Accountant, he directed her to check with one of the Directors.
17. The *Grievant* stated that she located the director in the company of a Mr. Mutune who had worked with the Respondent some time earlier, and that the said Mr. Mutune gave her a letter which turned out to be the termination of employment letter.
18. On why she was contending that the action of the Respondent to terminate her employment was unfair, the *Grievant* testified that she was not given notice of termination of employment.
19. Section 35(1)(c) of the Employment Act, 2007 envisages *written notice of termination* of at least 28 days if the employee is paid by the month.
20. Section 41 of the Act on its part requires the employer to notify an employee of the allegations for the contemplated termination of employment, and to afford the employee an opportunity to make representations.
21. In the present case, there was no evidence either in the *Response* or otherwise that a hearing as required by section 41 of the Act was held or that the *written notice* as contemplated by section 35(1)(c) of the Act was given to the *Grievant*.
22. The Court therefore finds that there was procedural impropriety in the termination of the *Grievant's* contract.

Substantive fairness

23. In terms of sections 43 and 45 of the Employment Act, 2007, an employer is under a statutory obligation to prove the reasons for terminating the contract of an employee, and that the reasons are valid and fair.
24. In so far as the letter informing the *Grievant* of the termination did not give any reasons, and merely cited the *notice* clause in the contract, the action of the Respondent fell short of the statutory requirement.
25. In the *Response*, it was contended that the *Grievant's* employment was terminated because of *absenteeism*, and not because of union activities as asserted by the *Grievant*.
26. *Absence* without permission or lawful cause would constitute valid and fair reason for termination of employment. It is a *misconduct*.
27. The Respondent did not file or produce any attendance records to show that the *Grievant* was absent without permission or lawful cause (*Grievant's* testimony was that there was a clocking system).
28. And even if the attendance records had been made available, the *Grievant's* unchallenged testimony was that her wages were deducted for any *absences* due to ill-health.
29. The Court, on the strength of evidence on record, and in consideration of the failure by the Respondent to attend the hearing to discharge the burden expected of it, finds that there were no valid and fair reasons to terminate the *Grievant's* employment.

Breach of contract

Leave

30. The *Grievant* did not disclose the number of leave days or year to which the leave sought related to.
31. The termination letter however indicated that the *Grievant* had 2012 accrued leave worth Kshs 14,175/-.
32. The Court will accept the computations by the Respondent.

Leave travelling allowance

33. The Union and the Respondent had a *collective bargaining agreement* which provided for leave travelling allowance of Kshs 3,500/-.
34. The Court will allow the head of claim.

Salary deducted during sick leave

35. The *Grievant* only disclosed the amount under this head of claim in the submissions, and the Court will decline to award the same.

Overtime

36. Overtime is a species of *special damage* and proper evidential foundation should be laid. Such evidence would relate to contractually agreed working hours or prescribed minimum working hours beyond which overtime would be payable.

37. The *Grievant* did not lay a sufficient evidential foundation or even attempt to disclose total number of hours or amount payable as overtime.

38. The sum was only stated in the submissions. The Court finds that this head of claim was not proved.

Lost income

39. The *Grievant* sought Kshs 255,760/- on account of remuneration she would have earned had the contract run to expiry.

40. In my view, considering the material placed before Court, I can only endorse the very persuasive holding by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Pay in lieu of notice

41. Since the *Grievant* was not issued with written notice, and the Respondent had offered the same, the Court finds that she is entitled to the equivalent of 1 month salary, in lieu of notice of Kshs 14,175/-.

Compensation

42. The *Grievant* was on a 2 year fixed term contract which was terminated with about 11 months to run. The *Grievant* had also served the Respondent for several years.

43. In consideration of the above, the Court is of the view that the equivalent of 6 months gross wages as compensation would be appropriate (gross wage was Kshs 17,975/-).

Certificate of Service

44. A certificate of service is a statutory entitlement and the Respondent should issue one to the *Grievant* within 15 days.

45. For clarity, the Court also allows the dues offered by the Respondent in the separation letter.

Conclusion and Orders

46. The Court finds and declares that the termination of the *Grievant's* employment was unfair and awards her

(a) Pay in lieu of notice	Kshs 14,175/-
(b) Compensation	Kshs 107,850/-
(c) Salary for May 2013	Kshs 17,975/-
(d) Leave travelling allowance	Kshs 3,500/-
(e) House allowance leave days	Kshs 3,800/-
(f) Leave	Kshs 14,175/-
TOTAL	Kshs 161,475/-

47. Certificate of Service to be issued within 15 days.

48. *Grievant* to have costs on half scale as advocate entered the proceedings only during the hearing on the merits.

Delivered, dated and signed in Nairobi on this 9th day of April 2019.

Radido Stephen

Judge

Appearances

For Grievant Mr. Sang, Sang Chambers & Partners

For Respondent Benson Masinde & Co Advocates

Court Assistant Lindsey