



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 1502 OF 2015

TERESIA NYABOKE OSIEMO.....CLAIMANT

-VERSUS-

SUPER FORM LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for seeking the following reliefs:

- (i) A declaration that the termination of the claimant's employment and/or dismissal was unfair
- (ii) An order directing the Respondent to pay the claimant the calculated sum being Kshs.1,547,806 as particularized in paragraph 8 of the statement of claim with interest at court rates from the date of filing of this suit.
- (iii) An order directing and/or compelling the Respondent to issue a Certificates of Service to the Claimant in accordance with Section 51 of the Employment Act, 2007.
- (iv) The costs of this suit be awarded to the Claimant with interest thereon at court rates from the date of filing of the claim.

2. The respondent admits that it employed the claimant until 13.6.2013 when it terminated her services and off loaded her to Robs Investment Limited under a Labour Outsourcing Agreement. It further averred that from then forward the claimant worked for the outsourced Company until she deserted work from 13.4.2015. It denied that the claimant was its employee as at the time of the desertion or the day she alleges that it unfairly terminated her service.

3. The suit was heard on 27.9.2017 and 6.11.2018 when the claimant testified alone and the respondent called its HR Manager Mr. Reuben Nyakeri who testified as Rw1. Thereafter only, the respondent filed written submissions.

Claimant's case

4. The claimant testified that she was employed by the respondent in 1993 and worked continuously until 14.4.2015 when she was dismissed by the respondents HR Manager (Rw1). She further stated that she started off with a daily wage of Kshs.140 per day which was gradually increased until Kshs.475 per day as at 2015. That she used to report to work at 8.00 a.m. and leave at 4.00 p.m. daily and sometimes he was made to work on Sundays. That she also never went for her annual leave. From 1993 – 2009 the employer

never remitted NSSF for her and thereafter it did not regularly remit the same.

5. The claimant denied knowledge of the outsourced company and any employment relationship with it. She further denied ever signing the discharge agreement in favour of the respondent dated 10.6.2013. She contended that she never received any termination letter from the respondent and contended that she continued to work for the respondent receiving instruction from its supervisor.

6. The claimant further testified that on 14.4.2015, the respondent's HR Manager Mr. Reuben (Rw1) asked her for her National Identity Card for purposes of opening a bank account. She however told him that she had lost it in February 2015 and as such, she gave him a Police Abstract. That in response, he told her to go home until she found her Identity Card. That when she pleaded to be allowed to continue working he (Rw1) chased her away.

7. The claimant further testified that she got another identity card after 3 weeks but she never reported back to work because she had been chased away. She instead she sought advise from Kituo Cha Sheria who served a demand letter. She denied ever receiving any letter from Rob Investment Limited complaining that she had absconded work. She prayed for the reliefs sought in her suit.

8. On cross examination the claimant contended that she was never given an appointment letter by the respondent. That she never went for her annual leave for 22 years. She denied the signature appearing on the Discharge Agreement dated 10.6.2013.

Defence case

9. Rw1 testified that he joined the respondent in 2006. That he knew the claimant as employee of the respondent until 10.6.2013 when her services were terminated by the respondent and she was off loaded to Robs Investment Limited an outsourced company. That thereafter the claimant's wages were paid by the outsourced company.

10. Rw1 further testified that on 2.4.2015 the claimant and other employees were requested by their employer to avail their national Identity Cards for purposes of opening Bank Accounts but the claimant failed to present her Identity Card or a Police Abstract to prove that it was lost.

That from 13.4.2015, she never reported to work until the employer received a demand letter from her lawyers (Kituo Cha Sheria).

11. He further testified that Robs Investment Limited wrote a letter dated 4.5.2015 to claimant and copied to the respondent stating that she had absconded work. He produced several documents to support his contention that the claimant was not employed by the respondent. The said documents included invoices for the labour supplied by Robs Investment Limited and receipts for NHIF and NSSF remittances where the claimant appeared as an employee of the outsourced company.

12. Rw1 concluded by stating that the claimant left the respondent in June 2013 and that by the at time she had been paid all her dues including leave earned based on the correct wages provided by the wage Order. He further contended that all her NSSF and NHIF contributions had been remitted to the respective funds.

13. On cross examination, Rw1 contended that the claimant worked for the respondent from August 1993 to June 2013 but denied that she worked continuously. He further contended that she was only hired on need basis and there was a clock in to prove attendance; that the claimant was going for her annual leave and there were record to that effect; and that her salary was inclusive of House Allowance. He however admitted that he did not produce the clock in records, leave records and payslips to support the foregoing contentions.

14. Rw1 further contended that the claimant was informed about her termination by an internal Notice of Termination and she signed a deed of discharge. There was a meeting between the respondent and her

over 500 employees before the deed of discharge was signed. He however admitted there was no minutes of the said meeting.

15. He admitted that the claimant was not a signatory to the outsourcing agreement between the respondent and Rob Investment Limited. He further admitted that the Deed of Discharge had an error on the date when it was signed and clarified that it was drawn on 10.6.2013 and signed on 14.6.2013. He contended further that the Deed of discharge indicated that the claimant was paid all her dues including salary. He however admitted that he had no documents to prove the alleged payments. He maintained that NSSF and NHIF contributions were remitted every month and explained that the gaps in the NSSF statement are subject to reconciliation to correct errors and omissions.

Analysis and determination

16. There is no dispute that the claimant was employed by the respondent from August 1993 to June 2013. The issues for determination are:-

- a) Whether the claimant was employed by the respondent from June 2013 to 14.4.2015.
- b) Whether the claimant's employment contract was unfairly terminated on 14.4.2015 by the respondent.
- c) Whether the reliefs sought should be granted.

Employer from June 2013 to April 2015

17. Rw1 contended that the respondent terminated the claimant's employment on 10.6.2013 and offloaded her to Robs Investments Limited, an outsourced company. The claimant however, denied the alleged termination by the respondent and contended that she was never served with any termination letter by the respondent. She further denied knowledge of the Robs Investment Limited and denied that she had any employment relationship with it. She contended that she was only employed by the respondent whose supervisor continued instructing her until 14.4.2015 when she was dismissed by the Rw1 who was and still is the respondents HR Manager.

18. I have carefully considered the evidence by both sides. The burden of proving that the claimant ceased to be her employee in June 2013 and that she was offloaded to Rob Investment Limited, rest on the respondent who alleges that. Rw1 never produced any termination notice or letter of separation. All he produced was a deed of Discharge dated 10.6.2013 which the claimant has disputed. The signature was never verified by the Document Examiner (Expert) even after the court ordered for the same. I therefore find that the said documents has not been proved to be genuine evidence.

19. The other documents attributed to the outsourced company were made in 2015 and the payment advance advice have erroneous dates in that they refer to different dates for different months. I also do not treat them as genuine evidence there is nothing genuine to prove that the claimant was paid her salary by the outsourced company and her evidence that she was instructed and supervised by an officer of the respondent and eventually dismissed by Rw1, HR Manager for the respondent was not rebutted by evidence. Consequently, I return that the claimant never ceased to be employee of the respondent in June 2013 but continued until 14.4.2015.

Whether the claimant deserted work or she was unfairly terminated

20. The claimant testified that she was dismissed by Rw1 on 14.4.2015 after she failed to produce her National Identification Card for opening a Bank Account. She contended that although she produced a "Police Abstract, the same was rejected and she was chased away.

21. Rw1 contended that in a meeting held on 2.4.2015, all the employees were requested to present their National Identity Cards for purpose of opening bank accounts but the claimant failed to produced her card

or at least a Police Abstract to prove that it was lost. That from 13.4.2015 the claimant absconded work and never reported back until she served the demand letter dated 18.6.2015. She produced letter by Robs Investment to the claimant dated 4.5.2015 complaining about her absconding.

22. The letter was copied to the Labour Officer and the respondent. There is however no evidence that the letter ever reached the claimant and the Labour Officer. I therefore find that the said letter is not watertight evidence to prove the alleged desertation and especially, without any witness being called from the alleged outsourced company to give evidence. Consequently I find and hold that the claimant never deserted work but she was dismissed by Rw1 the respondent's HR Manager.

23. Under section 45(2) of the Employment Act termination an employee's contract of service is unfair if the employer fails to prove that there was a valid and fair reason related to the employee's conduct, capacity and compatibility or, based on the employers operational requirements; and that a fair procedure was followed.

24. The claimant stated that the reason for her termination was the failure to present a national identity card for purposes of opening bank account. That although she presented a Police Abstract to prove loss of her card, she was chased away and her plea to continue work while she pursued a replacement card was rejected.

25. Rw1 contended that the claimant was not able to present her identification card as required or at least a Police Abstract.

26. After careful consideration of testimonies by the two sides, there is no dispute that they were known to each other for a long time. The claimant had received salary without issues for years. It was therefore not a valid and fair reason for the Rw1 to dismiss her or even to demand that she stays away from work until she was able to avail her identification card for purposes of opening a bank account. Temporary lack of National Identity card, in my view did not relate to the claimant's conduct, capacity, and compatibility. It also never related to the employer's operational requirements. I therefore find that the respondent has not proved a valid and fair reason for terminating the services of the claimant.

27. As regards the procedure followed, Rw1 never made any effort to prove that the claimant was accorded any hearing as contemplated by section 41 of the Employment Act. The said section provides that before dismissing an employee for misconduct, poor performance or physical incapacity, the employer shall explain the reason to the employee in a language he understands and in the presence of another employee or shop floor union official of his choice, and thereafter the employee and his chosen companion are entitled to tender their response which must be considered before the termination is decided.

28. Having found that the respondent has failed to prove that it dismissed the claimant for a valid and fair reason and that a fair procedure was followed, I return that the termination of the claimant's contract of service was unfair.

Reliefs

29. In view of the foregoing finding, I make declaration that the termination of the claimant's employment was unfair. Flowing from the said declaration, I award the claimant one month salary in lieu of notice plus 12 months salary as compensation for unfair termination considering her long service of over 20 years and also because she did not contribute to the termination through misconduct. The award is based on a daily wage of Kshs.475 per day equalling to Kshs.14,250 per month. The claim for leave is dismissed for lack of particulars. The claim for refund of unremitted NHIF and NSSF and salary under payment is also dismissed for lack of evidence and particulars.

Conclusion

30. I have found that the termination of the claimant was unfair and proceed to enter judgment for her as

follows:-

NoticeKshs.14,250

Compensation.....Kshs.171,000

Total Kshs.Kshs.185,250

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The award is subject to statutory deduction but in addition to costs and interest at court rates from the date hereof till payment in full.

Dated, Signed and Delivered in Open Court at Nairobi this 5th day of April, 2019

ONESMUS N. MAKAU

JUDGE