



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 1378 OF 2014

MARGARET MUTHONI IRUNGU.....CLAIMANT

VERSUS

WELLS FARGO LTD.....RESPONDENT

JUDGEMENT

1. The claimant averred that she was employed by the respondent as a security guard from 28th February, 2008 at monthly pay of Kshs 13,454/=. She worked until 11th January, 2012 when she was suspended by the respondent on allegations of theft of property belonging to Biersdorf East Africa located along Lung Lunga Road Industrial Area where she had been assigned to guard.
2. She was on the same day arrested together with other workmates and taken to Industrial Area Police Station and later arraigned at Makadara Law Courts and charged with theft. The claimant further averred that upon release on cash bail, she returned to her place of work but was advised that she was on suspension until the conclusion of the court case. She continued with the case until 7th March 2014 when the prosecution withdrew the case due to lack of evidence.
3. The claimant through her advocates subsequently wrote to the respondent asking to resume duties and for payment of her accumulated dues but the respondent took no action. She therefore regarded herself as constructively dismissed. According to the claimant the criminal case that formed the basis of the charges at Makadara were withdrawn and there being no formal internal investigations carried out by the respondent. She was therefore exonerated from any wrong doing hence she was entitled to have the suspension lifted and she resumes duties.
4. In the response to the claim the respondent admitted that claimant was its employee. The respondent however denied suspecting the claimant. According to the respondent the claimant never reported back to work from the date of her arrest and the respondent's attempt to trace her whereabouts were futile hence she was declared a deserter effective 23rd January, 2012.
5. In her oral testimony the claimant additionally stated that she used to work as a day guard for six days in a week. She used to be given off-days or pay in lieu. It was her evidence that during the suspension he was not paid any salary. They reported to their place of work after the criminal case ended but were told their jobs were long gone.
6. According to her, they were never issued with any dismissal letters and no notice to showcause was never issued and further that she was never paid her terminal dues. The claimant denied ever receiving any letter of desertion and that though the respondent had her number she was never called to resume work.
7. In cross-examination, she stated that they used to write letters to explain absence from work the next day upon return to work. She stated that the respondent never called her back to work and that she never found any missed call on her phone.
8. The respondent's witness Mr Stephen Kangethe stated that he was the HR Manager. According to him theft occurred at a customer site and the respondent's guards who were assigned there were suspected to be involve. According to him the respondent was aware of the criminal charges but the respondent was not the complainant. According to him the complainant and the other guards arrested never came back upon their release from custody. He denied the claimant was suspended and that suspension has to be in writing. It was his evidence that the respondent's area manager tried to contract the claimant without success.
9. In cross-examination he said he did not have a report on the claimant's absence and that the respondent never informed the labour office of the claimant's absence. He stated further that the letter of desertion did not state the attempt to contract the claimant.
10. In order to justify termination of employment on grounds of desertion, an employer must show that reasonable steps were taken to

contact the employee concerned and notice to showcause why the employment contract should not be terminated on grounds of desertion. This is because the employee could for valid and or justifiable reason be absent from work under circumstances prior notice of absence could not reasonably be given.

11. The claimant herein was undergoing prosecution for allegations of theft which occurred at the respondent's customer site. The respondent admits they were aware of the incident and the ensuing prosecution but never followed up to know the outcome of the prosecution.

12. The letter of desertion attached to the memorandum of response was addressed to the claimant through respondent's address yet the claimant was accused of not being at work without lawful cause. How was she going to receive it? Further the letter is dated 24th January, 2012 some twelve days after the claimant's arrest and arraignment in court. The letter effectively terminated the claimant's service without first of all calling on her to showcause why her service should not be terminated

13. It is the court's view that the reason for termination of the claimant's service was not a valid reason or rather the respondent failed to justify that the claimant deserted duties. She was never called to showcause why her service should not be terminated on account of desertion. The court therefore finds the termination unfair and awards the claimant as follows:

a. One month's salary in lieu of notice	13,454
b. Ten months salary in compensation for unfair termination of service	<u>134,540</u>
	<u>147,994</u>

c. Costs of the suit

d. The respondent shall further pay the claimant the terminal dues as computed in its letter dated 24th January, 2012 terminating the claimant's service on account of desertion.

e. Items (a) and (b) shall attract interest at court rates from date of judgement until payment in full but subject to taxes and statutory deductions.

14. It is so ordered.

Dated at Nairobi this 17th day of May 2019

Abuodha J. N.

Judge

Delivered this 17th day of May 2019

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.