



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**CAUSE NO.106 OF 2017**

**DAUD BOSIRE OGWAGWA .....CLAIMANT**

**VERSUS**

**STYLE INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGEMENT**

The claimant was employed as a general labourer by the respondent from September, 2015 to 17<sup>th</sup> December, 2016 earning Ksh.10, 108.00 and house allowance Ksh.1, 516.00 per month.

On 17<sup>th</sup> December, 2016 the claimant reported to work at 7.30am and worked until 11am when one Pauline a colleague was sent to inform him that he was required by the human resource officer, Tony. The claimant was informed that his employment had been terminated on instructions from the production manager with immediate effect and without any pay. There was no explanation or reasons given for such action.

The claim is that the actions of the respondent denied the claimant his constitutional rights and was contrary to fair labour relations under Article 41 of the constitution. The summary dismissal was not justified.

The claim is for;

- a. Notice pay Ksh.10,108.00;
- b. Annual leave Ksh.7,075.60;
- c. Prorata leave for 3 months ksh.1,768.90;
- d. Pay for 14 days worked Kssh.4,717.06;
- e. Compensation; and
- f. Costs.

The claimant testified that on 17<sup>th</sup> December, 2016 he was called by the production manager in his office and accused of sexually harassing two new employees M and M but no such matter had been brought to his attention or any complaint made for him to give his defence. There was no hearing and the dismissal was not justified. He was not harassing female employees as alleged by the respondent.

The defence is that the claimant was employed by the respondent in the stores section as a general worker and on 16<sup>th</sup> December, 2016 a female employee made a complaint to the management about some unbecoming behaviour of the claimant which aimed at sexually harassing the new female employee, M. The complaint was to the effect that on 14<sup>th</sup> December, 2016 while picking orders from the cages she missed one and asked the claimant who was standing, he started manhandling her by placing his hands on her shoulders. On the same day when M was picking her dust coat after lunch the claimant repeated the same act of placing his hands on her shoulders in from of other workers which was a sign of suggesting sexual harassment. The claimant did a similar act to another employee names M by placing his hands on her thighs.

The defence is also that the claimant was issued with a notice to show cause on 16<sup>th</sup> December, 2016 for making unwarranted and unwelcome sexual advances to two new employees of the respondent and who had complained to management. The claimant was given time to respond and state why stern action should not be taken against him following his misconduct.

The claimant was invited to a disciplinary hearing on 19<sup>th</sup> December, 2016 before the human resource officer in the presence of the two complainants who he had sexually harassed and his defence was that one of the supervisors had colluded to have his employment terminated. The claimant's actions were contrary to sexual harassment policy of the respondent and for failure to give a satisfactory defence on 31<sup>st</sup> December, 2016 he was issued with letter of summary dismissal.

Daniel Owino Ongoya the industrial relations manager of the respondent testified that on 10<sup>th</sup> October, 2016 the respondent employed two new employees in the stores section, MW and MN. They were to learn on the job with old staff teaching and training them as the work to be done is manual. On 16<sup>th</sup> employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.

The conduct complained of with regard to sexual harassment must be of a sexual nature that is unwelcome or offensive to the employee and by its nature detrimental to the employee's work performance. The determination of whether conduct is 'unwelcome' is an objective one, because conduct that may be subjectively unwelcome to one person may not be unwelcome to another. Thus touching of shoulders of one person may be offensive whereas it is not to another. Such part of the body may be considered to be a private part and the touching of which is unwelcome.

In this case, Ms MW and MN reported acts of sexual harassment by the claimant to the respondent. In defence, the respondent has attached the complaint made by Miriam Wanjiku to the effect that;

... I asked him (Bosire) where it was but instead of showing me in a proper way, he started mishandling me putting his hands on my shoulders. I moved away from him but he followed me laughing. I didn't argue I just walked away.

Later in the afternoon when I was coming from the same to pick a dust coat he also did the same thing but by then I was with my co-worker names Monicah and still he was harassing me.

MW in her statement complained that;

*It was on 13<sup>th</sup> Thursday when I was at the counter at the confirmation table. I was being shown how to confirm orders and Daud, started putting his hands on my thighs. I told him not to put his hand on my thighs because I was not happy at all and he continued to say that I don't listen to people because we had being (been) told to be careful of him and he said that people are jealous of associating with him.*

The next day I was putting hairs on cages. Instead of putting them on the right side he was putting his hands on my shoulder and told him to check on his behaviour because I did not know his intentions.

In her evidence Ms W testified that;

... In the morning we had many sections and while starting my work, the claimant instead of handing me the goods he kept on touching my thighs. I stopped him and he did not take it seriously and did it again. I made a report to the human resource and the claimant denied. I later attended the disciplinary hearing and gave my testimony. ...

In this regard the defence is that the claimant was issued with a notice to show cause over his actions and the alleged sexual harassment of the two employees. Such notice has not been attached to the statement of defence. The claimant testified that he was not issued with such notice, he was only called to the office and issued with the letter of summary dismissal on 19<sup>th</sup> December, 2016 but such conflicts with the letter of summary dismissal which issued on 31<sup>st</sup> December, 2016 and not as the claimant stated. It is therefore highly possible what the claimant received on 19<sup>th</sup> December, 2016 was the show cause notice but such records was the duty of the respondent to submit.

The record is that on 19th December, 2016 there was a disciplinary hearing where the claimant was invited and the two employees with complaints also called to testify.

The record of the disciplinary meeting minutes is that a *discussion* was held and the claimant denied the alleged sexual harassment complaints made against him. He further stated that Pauline Njoroge helped the employees make complaints against him because she wanted his employment terminated.

The claimant was found to have committed the alleged sexual harassment and was to await a decision.

In addressing similar issues of sexual harassment at the workplace, the court in the case of **Lydiah Mongina Mokaya versus St. Leonard's Maternity Nursing Home Limited [2018] eKLR** held that Cases and instances of sexual harassment are extremely personalized and difficult to prove. More often than not, these would not be documented but comprise of overt and covert overtures by the offending party. It is therefore expected that when this arises, action should be taken towards reporting or raising the same with the powers that be, the employer or his agents. Sometimes the prevailing environment may not be facilitative of this. It would therefore be unreasonable to employ the standard burden of proof on this kind of matters. This is like in the present case.

The matter having thus been addressed on the shop floor and the claimant found culpable, the defence that another employee wanted his employment terminated went contrary to what he ought to have given a defence to, that he sexually harassed his co-workers MW and MW. He failed to discharge this duty.

The finding that the claimant was culpable under the respondent's policy against sexual harassment cannot be faulted by the court. Under clause 2.5 of the Policy where an employee is found culpable the sanction is verbal warning, suspension, transfer or termination of

employment. An appeal is also allowed.

These sanctions under the policy against sexual harassment are quality lenient considering the potential impact and implications of the action of sexual harassment which may result in another innocent employee who is being sexually harassed I likely to cause detrimental effect on that employee's employment, job performance, or *job satisfaction* as set out under section 6(1) (d) of the Act.

As set out above, the policy allowed to termination of employment as the gravest punishment. To sanction of summary dismissal was therefore too harsh in the circumstances, and notice pay is due to the claimant with regard to termination of employment. Save that his conduct of being uncooperative during the disciplinary process denies him any costs.

The defence was also that the claimant as paid for his due leave days and wages for days worked. The claim was filed on 6<sup>th</sup> March, 2017 and the defence filed on 30<sup>th</sup> July, 2018 but there is no record(s) of such payment if at all these were paid to the claimant. Save that in the letter of summary dismissal, the claimant is offered pay for days worked until 31<sup>st</sup> December, 2016 and the due leave days earned. Such payments were to be paid less what the claimant owed the respondent and Strategic Sacco Ltd. The court takes this is in compliance with the provisions of section 19 of the Act which allow for lawful deductions from an employee's wages by the employer.

**Accordingly, pursuant to the provisions of section 49(1) (c) of the Act and based on the due gross wage, the claimant is hereby awarded notice pay of Ksh.11, 624.00 only.**

**Delivered at Nakuru this 10<sup>th</sup> day of July, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:

Court assistants: ..... & .....

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