



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 77 OF 2018

KENYA UNION OF COMMERCIAL, FOOD

AND ALLIED WORKERS.....CLAIMANT

VERSUS

GENERATION ELECTRIC ALLIED LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievant Ms. Caroline Wambui Kiguai. The Claimant averred that it had no recognition agreement with the Respondent but that the nature of the Respondent's business was within the purview and province of the Claimant union's representation. It averred that the Grievant was employed verbally on 5th October 2012 as an Mpesa cashier earning a basic salary of Kshs. 8,000/- per month with no housing allowance. The Claimant averred that the Grievant joined it in January 2015. The Claimant averred that the Grievant proceeded on maternity leave on 18th January 2017 and was to resume on 3rd May 2017 after 3 months maternity leave per Section 29 of the Employment Act. The Claimant averred that the Grievant received a text message on 2nd May 2017 from the Accountant informing her to report back on 6th May 2017. On 3rd May 2017 it was averred that the Grievant received a call from the Accountant who informed her that she was to be transferred from Embu to either Machakos or Eldoret and was to elect which of these 2 places she was to go to on transfer. She pleaded that the transfer be placed in abeyance as she had a little child. The Claimant averred that the Respondent issued her with a transfer letter on 9th May 2017 and she was required to report on 16th May 2017. She sought the deferment of the transfer but the Respondent declined warning her of dire consequences if she did not report to her new station. The Claimant averred that the Grievant therefore opted to resign from her employment with the Respondent. The Claimant averred that the Grievant decided to take the painful decision to terminate her services with the Respondent after being frustrated while still healing and nursing an infant. The Claimant averred that it communicated with the Respondent over the issue but the Respondent never responded to it prompting the Claimant to report the dispute on 7th September 2017 to the Cabinet Secretary Ministry of Labour in terms of Section 62 of the Labour Relations Act, 2007. The Claimant averred that it prepared a proposal on 10th January 2018 and forwarded it to the Conciliator duly appointed by the Minister. The Claimant averred the Conciliator invited both parties to a meeting on 25th January 2018 and the Claimant attended the meeting alongside the Grievant but the Respondent failed to attend the meeting. The Conciliator called another meeting on 2nd February 2018 and the Respondent failed to attend yet again prompting the Conciliator to issue a referral certificate in terms of Section 69 of the Labour Relations Act, 2007. The Claimant averred that the Grievant was entitled to resume work and be engaged on expiry of her maternity leave to the same job she held prior to her maternity or to a reasonably suitable job on terms and conditions not less favourable than those that would have applied had she not been on maternity leave. The Claimant averred that the Respondent issued the transfer letter to frustrate her and that it should have notified her before her maternity leave of the intention to enable her prepare to move to the new station. The Claimant averred that the Grievant should have been given at least 3 months' notice before transferring her with her small infant. The Claimant averred that the Respondent did not pay the Grievant any house allowance or for public holidays worked. The Claimant thus sought terminal dues for the Grievant being days worked Kshs. 18,211.80, house allowance – Kshs. 222,342.20, wage underpayment – Kshs. 888,221.10, public holidays – Kshs. 42,230.20, accrued annual leave for 4 years – Kshs. 88,683.50 and pro rata leave dues – Kshs. 11,613.30 as well as costs of the suit.

2. The Respondent filed a defence that denied the averments by the Claimant union and put the Claimant to strict proof of the averments in the claim. The Respondent averred that the Grievant was a casual worker who resigned on her own volition and therefore could not blame the Respondent for her imagined deprivation. The Respondent averred that it paid the Grievant all her dues as per her arrangement with the Respondent. The Respondent averred that there was no law that barred it from transferring its employees to any of the branches countrywide. The Respondent averred that it had no personal relationship with the Claimant for it to be branded malicious. The Respondent thus sought the dismissal of the claim with costs. The director of the Respondent David Mwangi filed a statement in which he stated that the Grievant was employed on temporary basis and that no letter of employment was issued as she was never fully in employment. He denied dismissing the Grievant and stated that she refused to go on transfer to the company's branch in Eldoret and demanded payment of her dues which she was given. The director stated that her place was taken by a more competent employee and that the Grievant was paid the salary agreed between her and the company. He stated that the Grievant never complained of underpayments during her employment and there was no summons to it to attend any conciliation meeting. He stated that the claim had been lodged outside the jurisdiction of the court and an objection would be raised on jurisdiction.

3. The Grievant testified that the Respondent transferred her after her maternity leave and she was asked to choose between Eldoret and Machakos. She stated that she sought a deferment of the transfer but the Respondent was adamant and sent her on transfer to Eldoret. She claimed there was no payment of house allowance and that the Respondent did not pay her for public holidays worked or a proper salary. She stated her salary was Kshs. 11,000/- a month as at the time of termination. She thus sought the dues as per her claim.

4. The Respondent's advocate and its witness did not attend the hearing and the submission were filed for the Claimant reiterating the averments and the testimony of the Grievant. The Respondent filed a motion to re-open the case as counsel was engaged in a case at the high court on the material day and that the failure to attend court was not intentional. The application was not fixed for hearing and was not heard.

5. I have considered the pleadings on file, the statements of the Grievant and the Respondent's Director, the submissions filed and the law in coming to this decision. The Grievant was treated in a callous manner by the Respondent. Under Section 29 of the Employment Act, the law provides as follows under Section 29(1) and (2).

29. (1) A female employee shall be entitled to three months maternity leave with full pay.

(2) On expiry of a female employee's maternity leave as provided in subsections (1) and (3), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.

6. The fact that the Respondent failed to accord the Grievant the options as required in Section 29(2) meant that the transfer to Eldoret was without proper foundation as much as the Respondent had the authority to transfer its staff. It is disingenuous to assert that the Grievant was a casual member of staff less competent than others yet promptly transfer her to Eldoret upon her resumption of duty after maternity leave. The Respondent engaged in constructive dismissal of the Grievant as the employer created an environment that forced the Claimant to resign her employment. The classic definition of constructive dismissal also known as constructive discharge or constructive termination occurs when an employee resigns as a result of the employer creating a hostile work environment. Since the resignation is not *strictu sensu* voluntary, it is in effect a termination ergo, constructive dismissal. In regard to the underpayment claimed, the Grievant did not raise the issue of underpayment during her employment as required and therefore waived her right to seek redress for the underpayments in previous years except for the final year of her employment in terms of Section 90 of the Employment Act as underpayment is a continuing injury for which redress must be made within 12 months. She therefore would be entitled to the difference in pay between the salary earned for the final year of her service and the statutory minimum which is Kshs. 25,737.10 for Embu Municipality (other areas). She earned Kshs. 11,000/- as at the time of the termination which was Kshs. 14,737.10 a month lower than the statutory minimum. She is entitled to Kshs. 176,845.20 as underpayment as well as maximum compensation for unlawful dismissal on account of the malicious constructive dismissal just after her maternity leave amounting to – Kshs. 308,845.20 as well as costs of the suit together with interest on the sums awarded at court rates. In the final analysis I enter judgment for the Grievant against the Respondent as follows:-

a. Kshs. 176,845.20 as underpayment

b. maximum compensation for unlawful dismissal – Kshs. 308,845.20

c. interest on the sums awarded in a) and b) above at court rates from date of judgment till payment in full

d. costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 17th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar