



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 184 OF 2017

DORCAS AMBETSA ANYOSO.....CLAIMANT

VERSUS

MARTHA WANJIRU NGANGA

KOBIL ELDORET QUICK SERVICES.....RESPONDENTS

J U D G E M E N T

1. The Claimant alleged that she was employed by the respondent as a supervisor/pump attendant on 16th October, 2003 and worked until 30th December, 2015 when the respondent unlawfully terminated her service and refused to pay her dues. The Claimant averred that the termination was unlawful because the union was not informed before termination nor was she given opportunity to be heard first.
2. The respondent on the other hand pleaded that the Claimant was a pump attendant and further that she was not a member of any union since the respondent had no recognition agreement with any union.
3. The respondent further pleaded that no unfair or unlawful termination ever took place on the contrary it was the Claimant who deserted duty in breach of her employment contract.
4. The respondent further denied the Claimant was entitled to any leave pay as she proceeded on leave during her employment. The respondent further denied the Claimant worked overtime and in any event such claim would be time barred by virtue of section 90 of the Act. The respondent further denied the Claimant was entitled to gratuity because she was registered with N.S.S.F.
5. In her oral evidence the Claimant stated she was hired on a verbal contract and that she had worked for eleven years by the time she got terminated.
6. According to her she was dismissed for no reason she was just asked to hand over and leave. She was not issued with any termination letter. It was further her evidence that she used to work from 6.00 am to 8pm and that her monthly salary was Kshs. 15,000/= by the time she left.
7. In cross-examination she stated that she made petty mistakes at work and apologize. She denied disappearing from work. She further stated the respondent used to remit N.S.S.F and N.H.I.F dues. She further stated she was not a member of a union.
8. The respondent's witness Ms Martha Ng'ang'a stated that the Claimant was employed in 2003. She denied unlawfully terminating her service. According to her, the Claimant absconded work after receiving her November salary.
9. The respondent tried to reach her but she had switched off her phone. They later learnt from customers that the Claimant was working at another petrol station. The Claimant never worked in December.
10. According to her the relationship with the Claimant was good and that she used to be on the 8.00 am – 4.00 pm shift. In cross-examination he stated that old records are removed and could not remember if there was a letter of appointment. She also stated that she never filed any documents on clocking in and out. She further stated that she had no proof the Claimant was employed elsewhere and that she did not write a letter calling the Claimant back to work. The Claimant also switched off her phone.

11. A termination of employment will be considered unfair if the employer fails to provide any reason for the termination or fails to justify the reasons for the termination.

12. In this matter before me, the Claimant has alleged that she was simply asked to handover and leave her workplace where she had worked for eleven years. The respondent has on the other hand denied terminating the Claimant's service and stated that she just left employment after being paid her November salary.

13. It is not usual for an employer who has been with an employee for such a long period of time to simply decide and ask such employee to hand over and leave.

14. It is further curious that after the cessation of employment relationship was when the Claimant found it fit to make claim for nonpayment of overtime for eleven years, leave pay, underpayment for eleven years among others.

15. Whereas these claims were pleaded, the Claimant never went beyond mere allegations to show or demonstrate the nature of her work and the circumstances under which she worked that warranted her working overtime and less pay for eleven years. Further the Claimant never presented any evidence of her monthly salary even for any one period so that the Court could compare with gazette wage and be able to see if there was underpayment.

16. Whereas the Court has power to make award for underpayment, overtime and leave not taken, caution must be exercised especially where such claims span over several years and when the employment relationship has been brought to an end under circumstances such as this one where it is not clear who was responsible for the termination. The Court would be failing in its responsibility to do justice if it were to allow claims spanning several years just when the employment relationship has ended. More evidence ought to be supplied and circumstances under which to such employee worked need to be clearly shown in order to justify the late consideration of such claims.

17. In this particular case its not clear how the party's employment relationship ended. It would therefore not be unsafe unfair to make any award.

18. The claim is therefore found not proved and is hereby dismissed with no order as to costs.

19. It is so ordered.

Dated at Eldoret this day of 2019

Abuodha Jorum Nelson

Judge

Delivered this 28th day of November 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge