



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1630 OF 2016

LINET LUGUSI MATIKA.....CLAIMANT

VERSUS

SAS SECURITY COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th November, 2019)

JUDGMENT

The claimants filed a memorandum of claim on 25.08.2006 in person and prayed for judgment against the respondent for:

- a) One month pay in lieu of notice Kshs.7, 000.00.
- b) Annual leave $7000/30 \times 2$ Kshs.9,800.00.
- c) Housing allowance $15/100 \times 7000.00 \times 3$ years Kshs. 3, 150.00.
- d) Salary for March, June, and May 2015 Kshs.21, 000.00.
- e) Remainder of July 2015 salary Kshs.3, 500.00.
- f) 5 working days in August 1, 166.67.
- g) Uniform deduction Kshs.2, 500.00.
- h) Total claim Kshs.48, 116.67.
- i) Compensation for wrongful dismissal to 12 months' compensation.
- j) Costs of the suit.
- k) Interest on all the foregoing prayers.
- l) Any other relief as the Court may deem just.

The respondent filed the statement of defence and counterclaim on 26.09.2018 through John N. Mugambi & Associates. The respondent prayed that the suit be dismissed with costs.

The claimant's evidence was as follows. She was employed by the respondent as a guard in February 2012 and her last monthly pay was Kshs. 7, 000.00. Her employment ended on 05.08.2015 when the respondent's accountant summoned her and told her to return the uniform. She complied and stood terminated. She verbally demanded her terminal dues but she was not paid. She filed the present case. It was her evidence that she worked on public holidays but she was not paid; she was given annual leave in 2013 but not in 2014 and 2015. She was not also paid the 5 days worked in September 2015. In cross examination the claimant stated that she used to work in Parklands and when the respondent's contract lapsed in February 2014, she was told to go away for 3 months. She was thereafter deployed to Mombasa Road on night shift and the clock-in and clock-out machine could be used only in the morning and not night shift. She denied that she was ever absent for 16 days as alleged for the respondent. Further whenever she had a funeral or sick child she would be given permission to be away. The claimant further testified that the respondent through the advocates on record summoned her to settle the claim at Kshs.27, 000.00 but she declined because she had filed the suit.

The respondent's witness (RW) was Abednego Mandu, the Operations Manager. His evidence was as follows. That the claimant worked in Parklands but the client declined to have a woman guard. That was in March 2015 and she took leave for 21 days. She was to resume work and she was reassigned but failed to clock in all the days. She was paid less the days she had failed to clock in and on 06.08.2015 RW telephoned and she said she had been paid less wages as deducted. The amount deducted was for 16 days she had not clocked in. That was the Mombasa Road assignment. RW confirmed that the record on hours worked had not been filed. RW discussed with the claimant the issue of deducted salary and the claimant opted to resign.

The Court has considered the material on record including the pleadings, evidence and submissions. The Court makes the following findings on the matters in dispute:

- a) The claimant's employment ended when the claimant raised a complaint about the deduction of 16 days. The respondent has not provided the evidence of the clock-in record to show that the claimant indeed was absent for the 16 days. The Court finds that the claimant was entitled to resign because she had a valid grievance but which the respondent was not willing to address fairly. The deduction of 16 days' wage amounted to a valid grievance and its initiation could not constitute a fair reason for dismissal under section 46 of the Employment Act, 2007. The Court further finds that the claimant's evidence that she was asked by the accountant to return the uniform cannot be doubted. The Court finds that when she protested the deduction the respondent opted that they separate. In the circumstances the Court returns that the termination was unfair for want of a valid reason as envisaged in section 43 of the Act and for being based on unfair reason, the initiation of a reasonable complaint about deduction of the 16 days of wage.
- b) The court has considered the aggregate period the claimant had served. The respondent mitigated his position when RW telephoned the claimant about the grievance but the claimant had already made up her mind to separate having handed in the uniform. To balance justice for the parties, the claimant is awarded **Kshs.42, 000.00** being 6 months' wages in compensation under section 49 of the Act.
- c) The claimant testified whenever she applied for permission she was granted and RW testified that she took some break in March 2015 pending reassignment. The claimant also confirmed that in February 2014, she was told to go away for 3 months. In such circumstances the Court finds that her claim for leave will fail because she substantially took leave.
- d) The termination was abrupt and the claimant is awarded **Kshs.7, 000.00** under section 35 of the Act in lieu of the termination notice as prayed for.
- e) The respondent offered no evidence that salary for March, June, and May had been paid and the claimant is awarded **Kshs.21, 000.00** as prayed for. She is also awarded **Kshs.3, 500.00** as unfairly deducted salary for July 2015. She is awarded 5 days worked in August 2015 **Kshs.1, 166.67**.
- f) There was no evidence to justify the prayer for house allowance and the same is declined. The respondent's submission that a consolidated [pay was agreed upon is upheld.
- g) The claimant returned the uniform as per her evidence and she is awarded **Kshs.2, 500.00** for uniform as prayed for.
- h) As the claimant has succeeded in her claims she is awarded costs of the suit fixed at **Kshs.25, 000.00**.
- i) The claimant is entitled to a certificate of service under section 51 of the Act.
- j) The respondent counterclaimed for salary in lieu of notice for March to April 2015 and for August to September 2015. There was no coherent justification for the claims by way of evidence and submissions. Further the claimant's last day at work was on 05.08.2015 and the counterclaim was filed on 26.09.2018 long after the lapsing of the time of limitation under section 90 of the Employment Act, 2007. The prayers will fail as the cause of action was time barred.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant **Kshs.102, 166.67** by 15.12.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to deliver the certificate of service by 15.12.2019.

Signed, dated and delivered in court at **Nairobi** this **Friday, 8th November, 2019**.

BYRAM ONGAYA

JUDGE