



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.287 OF 2015

NANCY WANGUI MWANGI CLAIMANT

VERSUS

OPTICA LIMITED RESPONDENT

JUDGEMENT

In April, 1998 the respondent employed the claimant as an Optician Assistant and issued a contract of service at a consolidated wage of Ksh.2,800.00 per month. The claimant was then issued with a letter of employment dated 18th September, 2003. This was after a period of 15 years.

The claim is that the claimant had a consolidated wage of Ksh.7,000.00 and there were intermittent increases.

The wage increases were from 1st January, 2004 to January, 2011 by letter dated 9th March, 2011 and 4th March, 2011.

The claimant was then issued with letter of appointment dated 8th September, 2012 with a comprehensive job description. The respondent then made false allegations against the claimant and issued warning letter dated 28th November, 2012. She was invited for a hearing at Nairobi office. The claimant was suspended from duty for the purpose of allowing investigations. It was for unspecified period vide letter dated 15th March, 2013.

On 18th March, 2013 the respondent wrote to the claimant on allegations of misconduct that she had issued a customer with a pair of spectacles which was false.

On 12th March, 2013 the claimant was invited for hearing and after the hearing she resumed duty on 13th March, 2013 but the manager at Nakuru Mr Shashi informed her that Raghav had informed her that she should not report back to work. There was suspension from work without any written communication and for an unspecified period of time.

On 26th March, 2013 the claimant lodged a complaint at the labour office and when the respondent attended was advised to give the claimant the reasons for suspension but the respondent did not oblige and kept her out of duty. There was no salary paid during such period. At the time the due wage was ksh.23,080.00 per month.

On 1st August, 2013 the claimant demanded for her dues as there was no communication with regard to her employment status or the lifting of suspension.

The claimant was then forced to file suit and claim the following;

- a) Unconditional reinstatement without loss of employment benefits;
- b) Payment of all accrued wages and allowances during the period of suspension from 1st March, 2013 to 30th June, 2015 a period of 27 months ksh.623,160.00;
- c) Payment of house allowance Ksh.214,357.00;
- d) Payment of unpaid salary Ksh.39,288.00;
- e) Full disclosure of the investigations;

- f) An order restraining the respondent from intimidating the claimant during the subsistence of the employment contract; and
- g) Costs of the suit.

The claimant testified that upon employment by the respondent she was issued with various letters of appointment with a consolidated wage and without payment of house allowance. In the year 1998 she remained without written terms of service until letter dated 18th September, 2003. She was then issued with letter dated 8th September, 2012 as letter of appointment and confirmation as optician assistant with an all-inclusive wage but no house allowance was paid. Such letters and wage increased continued being issued intermittently with the last paid wage being ksh.23,080.00.

By letter dated 28th November, 2012 the claimant was issued with a warning on the grounds that she had used the office phone and allowed her visitors at work which was not true. After being with the respondent for over 13 years there were many customers and had become acquainted with them and would come to the premises to ask questions. The Doctor attending was new and not used to the claimant. It was not true that all visitors in the business premises had to be customers as some needed to ask questions before making orders.

All the office phones were kept by the manager and one had to get permission to use.

The claimant also testified that she had her father ailing and also had young children she needed to attend to. The manager then made allegations without considering her circumstances.

By letter dated 29th November, 2012 the claimant responded to the allegation made against her and noting all the previous 7 doctors had worked well with her until Dr Sashi arrived as the manager. She had been allowed to attend to her sick father-in-law who was in hospital but she got delayed and was quarrelled and that for time away her wage would be deducted. She had been allowed to be away.

By letter dated 22nd December, 2012 the respondent directed that there should be no use of the phone unless for an emergency. The claimant was then alleged to have ignored office rules but such rules did not exist.

In the year 2013 a customer lodged a complaint against the claimant. Due to post-election violence the office was opened on and off and the claimant could not confirm to the customer when his spectacles could be ready for collection. He deposited Ksh.4,200.00 as there was no bargaining allowed. This was followed by other incidents between the claimant and the manager but she went out of her way to address all customer concerns but this resulted in a disciplinary hearing on 13th March, 2013 and upon attending she was suspended to allow for investigations. She was only paid the wage due for March, 2013.

She never got any letters inviting her for hearing. All her letters and communications would come through the respondent's postal address. Such were never delivered to her.

The claimant is seeking that the outcome of the investigations be revealed to her together with her terminal dues.

Defence

The claimant amended her Memorandum of Claim but the respondent maintained the initial defence filed.

The respondent's case is that on 28th November, 2012 they issued the claimant with warning letter for reasons that she had consistently used her private phone during work hours contrary to the rules of the respondent. on 29th November, 2012 she responded to the warning letter ad denied using her phone and on 22nd December, 2012 she was fully informed that such conduct was not allowed.

The policy in prohibiting the use of phones during working hours was informed on the fact that some employees would divert clients and take instructions from outside in collusion with competitors and then use the respondent's shop to execute orders without notice to the respondent and to the loss of the business.

The claimant had a consolidated wage of Ksh.7,000.00 and during employment was issued with warning letters for reasons of insubordination of the branch manager, Nakuru when advised to adhere to the company policy and being restrained from using her mobile phone. The warning was dated 28th November, 2012 and the claimant replied on 29th November, 2012 and where she introduced new matter which required investigations and some were found to be false.

On 13th may, 2013 the claimant was summarily dismissed from her employment for reasons of attempting to defraud the respondent by processing a client's order outside the respondent's shop demonstrating dishonesty. Before taking such action the respondent followed the due process;

On 12th March, 2013 the claimant was invited to a meeting at the head office to address the complaints made by a client Davies Mtaki that he had been issued with a receipt after being served outside the office;

On 18th march, 2013 the respondent issued the claimant with letter directing for her response for issuing a client with a receipt that the management was not aware of;

The claimant failed to respond and absconded duty;

On 3rd May, 2015 the respondent posted letter to the claimant through her address to attend hearing on 13th May, 2013 and she failed to attend and was thus dismissed from her employment.

The claims made are without merit and should be dismissed with costs.

Wazeem Mohamed testified that he is the operations manager and conversant with the matter and claims made by the claimant. He testified that in the year 2013 a customer complained that he had paid cash for glasses order he had made but was not issued with a receipt and upon following up on the same the employee called him outside when he became suspicious and lodged a complaint. There was an investigation over the matter and it was established the claimant had taken the money and failed to account for it. She was invited for a hearing and a week later on 12th March, 2013 was called to explain her conduct but could not give a satisfactory answer. She was given 7 days to do a written explanation but failed to address the matter in issue. She was suspended.

Mr Wazeem also testified that when the customer was called he admitted he had paid cash to the claimant but such payment had not been declared to the respondent. When the full investigations were completed the claimant was invited for a hearing but failed to turn up or give a good reason. The notices were sent to her postal address.

The claims made for a house allowance are not justified. It was not related to her employment. The salary paid was as agreed and there was a contract. The contracts issued to the claimant she failed to sign.

Both parties filed written submissions.

The claimant gave a long and winding path of her employment with the respondent from the year 1998 to 2013.

Of importance are the various letters of appointment all dated 9th March, 2011.

The unique feature of these letters is that even though dated 9th March, 2011 the period of application is different. These letters also relates to the *review of your performance during the period of;*

1st January, 2004 to 31st December, 2004 and salary review to Ksh.9,000 with effect from 1st January, 2005;

1st January, 2005 to 31st December, 2005 and salary review to ksh.10,000 with effect from 1st January, 2006;

1st January, 2006 to 31st December, 2006 and salary review to ksh.13,500 with effect from 1st January, 2007;

1st January, 2008 to 31st December, 2008 and salary review to Ksh.16,000 vide letter dated 4th March, 2011;

1st January, 2009 to 31st December, 2009 and salary review to ksh.17,500 vide letter dated 4th March, 2011;

1st January, 2010 to 31st December, 2010 and salary review to ksh.19,500.00 with effect from 1st January, 2011.

These offers and letters have not been signed by the claimant. There was however no contest that the due wage was not paid save the claim is that there was no house allowance paid to her.

These letters refers to review of the wage as the letter of appointment issued to the claimant is the one dated 8th September, 2012. The claimant testified that previously her terms were oral.

Previously the claimant was issued with letter dated 18th September, 2003 as optical assistant with a consolidated wage of ksh.7,000.00.

There is also payment voucher dated 27th April, 1998.

Effectively, the court reading of all the letters issued to the claimant, section 7, 8, 10 and 37 of the Employment Act, 2007 requires an employer who has oral or casual terms of employment with a given employee to reduce the same into writing and convert such casual terms of employment into terms regulated under the law.

The letter dated 18th September, 2003 is signed by the respondent appointing the claimant as optical assistant as a wage of ksh.7,000.00 per month and stated to be a consolidated wage. And the letter of appointment dated 8th September, 2012 and taking effect from 1st January, 1999 is not signed by the respondent nor is the offer of appointment accepted by the claimant.

The parties therefore remained governed under the letter and appointment dated 18th September, 2003. Mr Wazeem testified that the respondent had many employees spread all over the country and this may have been omitted. That when the claimant failed to sign the issued contract nothing was done and in good faith her employment was maintained and paid her dues. The human resource assistant Rachel Kiungu is no longer with the respondent to testify to the circumstances for the omissions and it has been long as employment of the claimant ended through summary dismissal in March, 2013.

As noted above, the letter governing employment remained the one dated 18th September, 2003. At the time the applicable legislation was the Employment Act Cap 226, now repealed. Upon the coming into force of the Employment Act, 2007 the contract dated 8th September, 2012 would have addressed the subsisting employment but this is not signed by the respondent and the claimant has not accepted its terms. In the absence of such contract, the claimant's employment became governed by the terms and conditions under the Employment Act, 2007 from 2nd June, 2008.

By letter dated 28th November, 2012 the respondent issued warning to the claimant for;

.....showing insubordination towards the branch manager when being corrected for using your personal mobile phone during working hours and also inviting your family and friends to come and talk to you during work hours.

The rules of the company do not allow any staff to use their personal mobile phones during working hours. It has been noticed you are taking personal calls, which are not urgent and ignoring your work.

Additionally, it's [it has] been noticed you have your friends visiting you during working hours, again not for any urgent matter. The same time parents/customers are waiting to be served who are ignored, this is affecting sales of the shop and also our reputation in Nakuru. This as you are aware is not allowed. You have your free time during the lunch hours and these friends can be met with during these times.

The manager has requested you politely on many occasions to not do the above however you have ignored his requests and continue to do the same repeatedly.

...

This is a warning letter being given to you. A repeat of such incident and showing insubordination towards the branch manager who you report to may result in termination from work. ...

On 29th November, 2012 the claimant responded and stated among other matters that;

.....I conform, ... to me I don't [do not] deny that I have friends but have tried to tell him 95% of this [these] people are customers. There is no time that I have ignored a client..

Yesterday I called my cousin to help me take my father-in-law to hospital since I could not have time and he has to be taken by two people since he cannot walk. ... in any case I have been taking care of this shop like its mine to make sure everything is okay.

The second person I talked to was BSI security guy who brought the contract form. I explained what I needed since ...

In her evidence in court the claimant admitted that during this period she was having problems taking care of her ailing father-in-law and at the same time she had young children she was taking care of. It is therefore not in dispute the warning letter had its context and the claimant admitted she had been using her mobile phone while on duty for various personal matters but denied that this was not at the expense of her work duties.

Section 12 of the Employment Act, 2007 requires an employer with over fifty (50) employees to have in place disciplinary rules and regulations or a workplace policy regulating employee relations.

12. Statement on disciplinary rules

(1) A statement under section 10 shall—

(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

(b) specify the person to whom the employee may apply—

(i) if dissatisfied with any disciplinary decision relating to the employee; and

(ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and

(c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.

...

(3) This section shall not apply whereas at the date the employee starts work the employer has employed less than fifty employees.

The respondent's witness Mr Wazeem testified that the respondent has many employees spread all over the country but no number was given. That there was a human resource assistant who has since left and who issued the various letters including the letters dated 9th March, 2011 to the claimant.

What is clear to the court is that there is no work place policy submitted and which regulated employment terms and conditions. The letter of appointment which would have formed the basis of the claimant's employment and dated 28th September, 2012 is not signed and of no intrinsic value.

However, even where the claimant had no work policy regulating her employment by the letter of warning dated 28th number, 2012 her conduct was brought into focus and addressed. The use of mobile phone during work hours, the visit of friends during work hours and ignoring her duties were addressed.

Upon the response by the claimant to her warning notice, on 22nd December, 2012 the respondent then wrote to her that;

Subject: Confirmation of Warning Letter

...

I would like to bring to your attention that you are not allowed to use your mobile phone's whatsoever during working hours and in case of emergencies you can give our office contacts to your family member's. we have a mobile and a landline in the shop for family member to reach you.

Furthermore you have highlighted about the misbehaviour about the branch manager using abusive language towards you, why is it that this information is brought to our notice when a warning letter was issued to you. You should to have informed the Head office about this ...

This letter thus clarified and gave emphasis to the claimant on workplace conduct.

What followed the warnings noted above is a complaint by a customer complaint to the respondent with regard to the claimant's attendance to his order.

By letter dated 18th March, 2013 the respondent noted the following;

Re: Allegations by the customer Mr Davis Mtaki

This refers to your visit to the Head Office following the allegations made by the customer Mr Davis Mtaki and further investigations into conduct by you are the Nakuru branch recently;

It was alleged and noted that;

You have initiated an order process for a pair of spectacles without having raised an Optica order and later asked customer to collect spectacles outside Optica shop

You have not issued a receipt to the customer as is required for any payment being made, a right of the customer and a law of the county.

...

Upon your visit to head office on the 12th of March, you have made a verbal and written statement which does not at all give clear reasoning for any of the above actions

We give you 7 days from the date of this letter to respond to these allegations.

The claimant has not attached the written response. Her evidence in court was that at the time of issuance of this notice there were post-election violence and work attendance was on and off. The office would open on and off.

However, the claimant failed to explain the substantive issues raised in the notice. failing to initiate an order process for a customer and failing to issue the customer with a receipt. Whatever the prevailing circumstances, where a customer attended for service, due process required for all cash received to issue a customer with a receipt. This lapse is not addressed at all. No reasonable justification for such lapse is given.

Upon the claimant attendance at head office on 12th March, 2013 she testified that she was suspended from duty to allow for investigations. The employer is given the prerogative to suspend an employee to allow for investigations and upon such investigations call the employee to show cause why employment should not be terminated or to a hearing, and upon such process sanction the employee. Such suspension can also result into return to work with condition or unconditionally. See **Kenyatta University & another versus Fred Obare [2017] eKLR**.

In this case the claimant was invited to attend disciplinary hearing by letter dated 3rd May, 2013.

The invitation letter to the claimant was sent to her postal address, P.O. Box 13788, Nakuru.

The letter was sent by Certificate of Posting and registered mail through *Optica No.1128* and address noted as 41625 – 00100 to *Nancy Meaning* whose address was noted as 13788, Nakuru.

The claimant as directed to attend disciplinary hearing to show cause why she failed to respond to letter dated 18th March, 2013 and that she had not reported back to work since.

These communications are copied to the Labour Officer.

The claimant testified that following her suspension on 13th March, 2013 after attending meeting at the head office in Nairobi, on 15th March, 2013 she wrote to the her manager and noted that;

.....you told me not to report to work as you did your investigations. I told you to write a letter which you did not reply on 13th March I reported to work which the branch manager called you and you said you will send on 14th March through G4S so I should wait but up to date I have not received it. ...

The claimant also reported the matter to the labour officer, Nakuru. She noted;

REF: Optica letter forwarded to your office

This has reference for my visit to your office when I came to lodge a complaint against me by Optica Ltd. Having read the sent letter by optica.

I wish to deny and disagree with each and very content contained in the letter sent to your office by Optica. ...

The claimant thus got to know of letter dated 18th March, 2013 upon attendance at the labour office. She did not reply.

The claimant testified that her postal address of service was through the respondent's postal address. That she had been with the respondent for many years and this became her postal address.

This was the postal address the respondent applied in sending the various notices to the claimant. These notices and letters were registered to ensure the claimant received them.

In the letter dated 26th March, 2013 the claimant wrote to the labour officer, Nakuru through her address;

Nancy W Mwangi,

P.O. Box 13788

Nakuru.

This address is replicated through the claimant's letter dated 1st August, 2013 to the respondent.

This is the same address used by the respondent in sending communications to the claimant;

P.O. Box 13788

Nakuru.

The claimant filed the claim herein on 6th October, 2015 and therein attached her Verifying Affidavit and avers that her Postal address is P.O. Box 13788, Nakuru. Further her address of service for this suit is the same address, P.O. Box 13788, Nakuru.

Section 10(2) of the Employment Act, 2007 allow the employer to apply the contact details issued by the employee in communications. To cover the employer against any blame therefrom, a copy to the labour officer is allowed. See **Peter Maina Kinyanjui versus Woolmart Supermarket Limited Cause No.113 of 2016 (Nakuru)**.

The claimant cannot be found to reply on the fact of being on suspension for an undefined period of time and that she was not aware of termination of employment. Through her provided address, contact was made and she failed to attend. This is the address the claimant has continued to apply in these proceedings until her advocate on record made change.

The court finds the respondent issued hearing notices to the claimant through the postal address given, the claimant did not attend at the hearing and on 13th May, 2013 summary dismissal notice issued and sent through the given postal address.

Where the claimant changed her postal address as provided, there is no evidence of such notice of change. The notices were therefore properly served through registered mail.

Failure to attend disciplinary hearing is hereby found without justification. The summary dismissal which issued was upon the due process. It was justified.

On the remedies sought, reinstatement is not available to an employee whose employment is terminated for good cause. The findings in the cited case of **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR** have a different foundation and finding from the claim herein. In the cited case reinstatement was allowed for different reasons therefrom.

On the claim for accrued wages and allowances from 1st March, 2013 to 30th July, 2015 under prayer (b) of the Amended Memorandum of Claim, termination of employment was vide letter dated 13th May, 2013.

Annexure 'NWM/30' page 30 of the Amended Memorandum of Claim is payment statement for march, 2013 where the claimant was paid ksh.23,080.00 gross wage. This is a document of the claimant to confirm payment of her wage.

The respondent has not confirmed any other payment after this date.

The wage due to the claimant up and until the summary dismissal on 13th May, 2013 is due. April 2013 wage ksh.23,080.00 and for 13 days in May, 2013 Ksh.10,001.30 all Ksh.33,081.30 is due to the claimant whatever the reasons leading to summary dismissal. She remained the employee of the respondent until the issuance of the letter of summary dismissal.

The claimant under paragraph 23 of the Amended Memorandum of Claim has made various claims for unpaid wages from the year 1998 to March, 2013. These is followed with a claim for the payment of Ksh.214,357.00 for due house allowances, underpayments and under the various contracts of employment and wages reviews.

From the payment statements submitted to support the claims made, there is payment of a house allowance. This is noted in the following documents;

Page 20 of the claim payment state for September, 2006 house allowance paid at ksh.1,305;

Page 25, August, 2011 ksh.2,544;

March, 2011 Ksh.2,900;

December, 2012 Ksh.2,900;

January, 2013 ksh.3,300;

March, 2013 Ksh.3,010.00.

Under the Wage Orders the claimant's employment as Optical assistant is not regulated. She thus fell under the provisions of a general worker. She did not testify to being trained and with any professional credentials for conferment of any other wage category. Under the wage orders applicable from the year 1998 to the year 2012/2013 the paid house allowances weighed against the paid wage of ksh.23,080.00 was over and above the allowed minimum. Regulation of Wages (General), (Amendment) Order, 2012 and operational from 1st May, 2012 to 30th April, 2013 made provision for a minimum wage of ksh.7,915.90.

The claimant did not accept or sign contract dated 28th September, 2012 which would have allowed for the protection of the wages set out under such contract. The wages reviewed over time under the letters dated 9th March, 2011 and particularly for the period 1st January, 2010 to 31st December, 2010 and salary review to ksh.19,500.00 with effect from 1st January, 2011 was a provision generous and over and above the allowed minimum wage due to the claimant at the time.

To claims for alleged underpayment, house allowances and differences in alleged basic pay is not due. these claim have no legal foundation in view of the applicable minimum wage.

On the claim for a provision and full disclosure of the outcome of investigations, this arose following what the claimant perceived that she remained on suspension until August, 2015. This is a wrong perception as employment terminated on 13th May, 2013 upon invitation to attend and address matters sent out under the invitation letter and there was no attendance. Had the claimant attended following notices issued to her through the given postal address, she would have engaged on the outcomes of the investigations. The claims to have the report disclosed is thus overtaken by events.

Claim with regard to having the respondent stopped from intimidating the claimant during her employment is addressed by the summary dismissal.

The claims made are therefore found without foundation and are hereby dismissed. Save the claimant shall be paid the due wage from April, 2013 to 13th may, 2013 all at ksh.33,081.30 and 25% of her costs.

Delivered at Nakuru this 17th day of December, 2019.

M. MBARU

JUDGE

In the presence of: