



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
CAUSE NO.392 OF 2013

[Formerly Cause No.316 of 2010 (Nairobi)]

TRUFOSA KALEGI MUGOYA.....CLAIMANT

VERSUS

UKWALA SUPERMARKET NAKURU AND KERICHO BRANCH.....RESPONDENT

JUDGEMENT

Issues in dispute - unfair termination of employment and underpayment of wages

1. The suit commenced under Cause No.316 of 2010 Nairobi with three (3) Claimants and by an order of the court on 17th November, 2014 the claimants for the claimants were separated. The hearing of the case was before Radido, J. as the then Presiding Judge, Nakuru and having moved to Nairobi, proceedings were typed and I have had the advantage of going through the pleadings, the detailed evidence and written submissions of the parties to arrive at the judgment.
2. The claimant was employed by the respondent in August, 2007 in Nakuru as a Cashier and was transferred to the Kericho branch on 2nd February, 2008 in the same position. The claimant was earning Kshs.2,400.00 per week.
3. The claimant was confirmed into her position on 1st January, 2009 and issued with a letter.
4. While the claimant was working with the respondent at the Kericho branch she was issued with warning letters. One dated May, 2009 on allegations that some goods were found at her teller machine drawers. Second warning was issued on 1st May, 2010 following a complaint made by a customer for billing three times for the same item. The claimant was suspended for 5 days and wages for these days were deducted from her pay and a warning letter was issued.
5. On 28th October, 2010 a fellow employee, Aluva Amboyi snatched a pen from the claimant while at work. Management saw the altercation, intervened and called both employees and followed to terminate their employment without any justification. The claimant had also been issued with a warning letter allegedly for arguing with her seniors.
6. The previous warning letters taken into account were not all in force. The first warning letter of May, 2009 had expired. By the time of termination, the claimant only had one warning letter. The claimant was therefore harshly treated and not given a hearing. At the time the claimant was earning Kshs.8,400.00 plus Kshs.1,400.00 house allowances. Work hours were 8.30am. to 8.00pm. each day.
7. The claims are for underpayments, 3 years pending leave, notice pay, gratuity pay, and overtime work hours.
8. The claimant testified in support of her claims. Upon employment by the respondent the claimant was issued with a letter of appointment dated 1st November, 2008 as a Cashier. She was in billing and would issue customers with receipts. At the end of day she would do reconciliation.
9. The claimant attended work for 6 days in a week with a day off. She would be at work for 12 hours Monday to Saturday and Sunday would work for 11 hours. Her contract required work for 45 hours per week and the 26 hours overtime were never paid for. house allowance was paid at 15% of the basic pay. In 2007 to 2009 as a Cashier, the claimant should have been paid Kshs.11,031.00 as basic of which 15% house allowance was Kshs.1,654.00 all being Kshs.12,685.00 thus an underpayment of Kshs.3,085.00 per month.
10. The claimant also testified that on 1st May, 2009 she was paid Kshs.7,636.00 and 1,145.00 as house allowance all being Kshs.8,781.00

per month. Under the law, basic wage was Kshs.13,017 and Kshs.1,952.00 house allowances. Gross pay should have been Kshs.14,969.55 and thus an underpayment of kshs.6,188.00 for the period.

11. From 1st May, 2010 to 28th October, 2010 the claimant was earning Kshs.8,400.00 and Kshs.1,060.00 house allowance total being Kshs.9,660.00 per month. The law provided for basic wage at Kshs.14,319 and house allowance of Kshs.2,147.00 gross being Kshs.16,466.00 per month. There was an underpayment of Kshs.6,086.00 per month.

12. Upon termination of employment the claimant was paid Kshs.11,175.00 which was without her underpayments, overtime dues and gratuity.

13. The claimant also testified that she worked with the respondent for over 3 years without annual leave. In May, 2009 she was issued with a first warning letter; second warning letter in May, 2010 together with a letter of suspension for billing a customer wrongly. The 5 day of suspension were deducted from the pay. On 28th October, 2010 the claimant was suspended from work following a quarrel with a colleague over a pen. She resumed work on 2nd November, 2010 but was not allowed to resume duty. On 3rd November, 2010 the supervisor called and informed the claimant her services were no longer required by the respondent. her dues would be paid. There was no hearing or notice of such action. For such injustice, compensation should be paid and notice pay.

14. On cross-examination, the claimant testified that upon her reemployment by the respondent she did not sign a contract as a Cashier but as a Till operator. Her duties were to bill clients and receive money. She reconciled her records at end of day. She worked for 6 days each week with a day of rest and each day worked for hours save for Sundays she worked for 11 hours. All were 71 hours per week and was not paid due overtime. Pay slips for June, August, and December, 2010 show payment for overtime hours. It was included in the pay slip. It was paid monthly. These were not paid as for a Cashier, it was less. The terminal dues were Kshs.11,175.00 which indicated a payment in lieu of notice after 3 warning letters.

Defence

14. In response, the respondent admit to employing the Claimant from 27th August, 2007 as a Till Operator and not as a Cashier as alleged in the Memorandum of Claim. On 1st November, 2008 the claimant confirmed into permanent employment on a basic salary of Kshs.6,471.00 plus 15% house allowance. During the course of the claimant's employment she was issued with several warning letter for gross misconduct including theft of goods which were found concealed in her teller machine drawers, overbilling a customer and insubordination and use of foul language and altercation in the full view of customers.

15. Following the various acts of gross misconduct by the claimant the respondent gave her a hearing and chance to improve on her discipline but failed to do so. Internal disciplinary procedures were carried out against the claimant, she was suspended and invited to give her defence.

16. On 28th October, 2010 the claimant engaged in a public quarrel with a fellow employee which resulted in a serious altercation and use of foul language and amounted to gross misconduct. Such conduct is contrary to the ethics required at the workplace. The respondent's supervisor Mr Charles Wesonga attempted to resolve the matter but the claimant would not budge and refused to calm down and continued pulling at the other employee shouting obscenities. These events took place in the full view of the respondent's customers. It amounted to insubordination and gross misconduct. This warranted summary dismissal of the claimant from her employment with the respondent.

17. Terminal dues for the claimant were computed to include one months' notice pay and legal dues as admitted by the claimant having received Kshs.11,175.00 in terminal dues. No other dues are owing to the claimant save for the issuance of Certificate of Service which the claimant has refused to collect.

18. The claims made for overtime pay, underpayments, notice pay, untaken leave days and compensation are not justified and cannot issue. Such claims are made for unjust enrichment.

19. In evidence, the respondent's witness was **Lawrence Ochieng Miruka** the Administrator at the time of the claimant's employment having worked for the respondent from 2007 to 2016. He was in charge of the day to day running of the respondent business including human resource issues for Nakuru and Kericho branches. The claimant was issued with a letter of appointment as a Till Operator. She was issued with 3 warning letters due to various acts of gross misconduct. On 28th October, 2010 the witness received a call from the Kericho branch following an altercation between the claimant and another employee and which the supervisor Mr Wesonga had tried to resolve to no avail.

20. Mr Miruka also testified that he talked to the supervisor and the branch manager and got information that the claimant had engaged in a fight with another employee and while doing so used abusive language in the full glare of customers at the branch. Efforts to calm down the claimant did not yield fruit. A decision was taken to suspend the two employees involved in an altercation. It was then agreed to dismiss the employees. The claimant was dismissed for using abusive language against her supervisor and noting the 3 warning on records, the decision was justified.

21. The terminal dues paid to the claimant included her service pay for one (1) year, accrued leave and one (1) month pay in lieu of notice. The claimant signed for her final dues in acceptance. She had taken her leave days in previous years and overtime was paid with her salary when earned. Such dues were paid to the claimant as a Till Operator and not a Cashier as claimed. No other dues are payable to the claimant and claims should be dismissed with costs to the respondent.

22. At the close of the hearing, both parties filed written submissions.

23. The claimant submits that she was employed as a Cashier of the respondent with duties to collect money from customers purchasing goods at the supermarket. She would do conciliation at the end of day. Her salary at the time was not commensurate to that of a cashier hence an underpayment based on gazetted government minimum wage for a cashier. Such underpayments should be paid together with due overtime and house allowances due for a cashier's position. The assertions by the respondent that the claimant was a Till Operator are not correct as the duties allocated to the claimant relate to a Cashier.

24. The claimant also submits that for 2 years her leave days are not compensated.

25. The termination of employment was unlawful, there was no hearing and thus unfair. Compensation is due.

26. The respondent submits that the claimant was employed as a Till Operator and not as a Cashier as alleged. Such designation was outside the employment contract as held in **Flora Wasike versus Destino Wamboko [1988] eKLR**. The contract with the claimant has not been alleged to be a fraud or a misrepresentation. The claims thus made on the basis that the claimant was a Cashier should be dismissed.

27. At the time of termination, the claimant had no leave days pending to justify the claim for untaken leave days. In the final dues paid to the claimant, the untaken leave days were put into account.

28. There were valid reasons leading to the claimant's termination of employment, with such justification, no compensation is due. By engaging in a public altercation while at work and when addressed failing to abide the orders of the supervisor, the claimant grossly misconducted her and thus warranted summary dismissal.

29. The court has considered the pleadings, the evidence of the parties, the written submissions and the issues identified by the parties and find the issues for determination is;

Whether the claimant was a Till Operator or a Cashier;

Whether there is a case for underpayments;

Whether there was overtime unpaid;

Whether the remedies sought are due.

30. The claimant in her Memorandum of Claim has attached letter of confirmation of employment effective 1st January, 2009. The pay slips attached for December, 2009 and September, 2010 indicate her position was that of Till Operations.

31. The respondent has attached the letter of appointment dated 1st November, 2008 where the claimant is designated to the position of Till Operator. The letter of confirmation is for the same position of Till Operator. The pay slips for June, August, October, 2010 relate to the claimant's position as Till Operator.

32. Under the Distributive Trades (Remuneration Order) (Amendment) Regulations 2009 issued further the two Distributive Trades (Remuneration Order) Regulations 2004, the specific categories of employees involved in the supermarkets trade are outlined with regard to their remuneration. In the clusters of a Check-out Operator is the role of a till operator. The cluster of a Cashier is thus different and set out with a different remuneration scale.

33. The claimant has relied on the case of **Amwata Mutahi Nicolus & another versus Ukwala Supermarket Nakuru & Kericho Branch, Cause No.392 of 2013** where the court relied on the Wholesale and Retail Distributive Trade Order Legal Notice No.249 of 1973 but in this case I find the most applicable remunerative order is the one published with regard to the sector the respondent operates and set out as above under the Distributive Trades (Remuneration Order) (Amendment) Regulations 2009. I take it the earlier remuneration Order of 1973 has since undergone consultative changes with all stakeholders to arrive at the more recent and applicable Orders of 2009 which has since been reviewed to apply each year as published by the Minister.

34. Under the applicable Remuneration Order, 2009 the category where the claimant fell of a Check – out Operator, remuneration was set out as follows;

1st year Kshs.6,035.00;

2nd year Kshs.6,230.00

3rd year Kshs.6,425.00; and

4th year, Kshs.6,610.00

35. Even in a case where the claimant was a Cashier, which is not the case here as her specific appointment is that of a Till Operator, the remuneration order was as follows;

1st year Kshs.6, 425.00;

2nd year Kshs.6,610.00;

3rd year Kshs.6,795.00; and

4th year Kshs.6,995.00

36. The claimant testified that upon her employment by the respondent in August, 2008 her starting gross salary was Kshs.9,600.00 per month. Such gross wage comprised a weekly wage of Kshs.2,400.00 all being Kshs.9,600.00 per month.

37. The letter of appointment was issued on 1st November, 2008 thus ending the casual relationship that may have started between the parties in 2007. The basic wage was kshs.6,471.00 and a house allowance of 15% per month. Such would translate to gross wage of Kshs.7,4471.65 per month.

38. I find such amounts of gross pay are above the remuneration orders applicable to the claimant's position at the time as a Till Operator. To claim more where the respondent had paid over the minimum wage would negate fair labour practice. Similar assessments for subsequent years based on the applicable remuneration orders give the same results. The respondent paid the claimant above the minimum wage set by the Minister.

39. Section 10(6) and (7) of the Employment Act, 2007 requires an employer to submit all work records once a dispute is filed with the court. with regard to overtime claims made by the respondent , I find pay slips attached to the statement of Defence and those attached to the Memorandum of Claim reconciled to the fact that the claimant was paid for overtime work hours. Different months have hours set out. Such translates to the fact of payment of overtime work hours when due and owing.

40. As set out above, with the finding that the claimant was not a Cashier but a Till Operator, to base her claim for overtime work hours pay on such a rate is in error. For work done over work hours, such were remunerated accordingly.

41. It was also the claimant's case that there was unlawful termination of employment. She was not given notice, hearing or a chance to give her defence. Mr Miruka for the respondent testified that he was called by the Kericho branch and given vents leading to the altercation between the claimant and another employee.

The claimant testified that on 28th October, 2010 she had a quarrel with a colleague she was sent on suspension. On 2nd November, 2010 she reported back to work but was not allocated duties. She was issued with a letter of termination and her terminal dues amounting to Kshs.11,175.00.

42. The respondent's witness Mr Miruka was not able to testify to events leading to the claimant's termination of employment as he was not present and the supervisor present at the time has since left the respondent's employment. However, even with the supervisor's absence, no record of what took place was presented.

43. Section 35 of the Employment Act, 2007 requires that an employee be issued with notice before termination of employment. Section 41 of the Act requires that such an employee be given a hearing on the shop floor in the presence of her representative. Even in the worst case that warrants summary dismissal, section 41(2) requires that the employee be given notice and a hearing before dismissal from employment. Such procedures would guarantee fair procedural justice. Such would allow an employee to explain their conduct leading to suspension. Where the employer therefore fails to demonstrate the procedural justice accorded to an employee,, section 4 of the Act provides that the termination from employment is unfair and the remedies under section 49 of the Act are due.

44. The claimant is seeking compensation for the unlawful conduct of the respondent. section 45(5) of the Employment Act, 2007 requires the court in addressing the compensation due to an employee to put into account the previous work record of the employee. It is not contested that by the time the claimant was terminated from her employment with the respondent, she had a record three warning letters relating to her work ethics, performance and conduct. Such are material factors which are relevant in the court assessing the compensation due.

45. Taking the matters between the claimant into account, the work record and the finding that there was procedural unfairness in her termination of employment, compensation is awarded at three (3) months gross pay based on the last paid wage. Such amounts to Kshs.29,580.00.

46. Notice pay is due in a case of unfair termination of employment. In the defence the respondent set out that they paid the claimant Kshs.11,175.00 in terminal dues and which included notice pay. Though this was contradicted by the witness, I find the records attached to the defence informative to the extent that there was a payment of Kshs.8,400.00 on notice pay to the claimant.

47. Annual leave due in included in the final dues payment. I find no material challenge that leave accruing in other years was not taken or remained unpaid.

48. The claim for gratuity was set out as being based on the previous practice of the respondent. there is however no statutory foundation for the same as being due to the claimant.

Accordingly, the claims made are hereby dismissed save for the payment of compensation at kshs.29,580.00 and each party to bear own costs.

Delivered in open court at Nakuru this 30th day of April, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Nancy Bor

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