



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 347 OF 2017

PHYLISS WAIRIMU.....CLAIMANT

VERSUS

G.K. KAMURI AND SONS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 29th September 2017 for resolution of issues she framed as unfair and unlawful termination from employment, violation of the Claimant's rights under Article 41(1) of the Constitution and refusal to pay her terminal dues. She averred that she was employed by the Respondent as an attendant on 2nd September 2009 and was executing her duties diligently as per the employment contract signed between her and the Respondent when she was summarily dismissed on 26th August 2016 without cause and without due regard to the 3 months notice of termination or salary in lieu thereof as provided for in her contract of employment. The Claimant averred the Respondent declined to accord her an opportunity to defend herself contrary to Section 45 of the Employment Act and Article 41(1) of the Constitution amounting to unfair labour practices. She averred that the Respondent for unknown reasons failed to provide house allowance for the whole period of employment. She averred that the Respondent failed to comply with the provisions of Section 41, 16, 35 and 36 of the Employment Act, 2007. She averred that the Respondent's actions greatly injured her and as a result she suffered mental anguish. She sought a declaration that the termination was in violation of the Claimant's constitutional rights in particular Article 41(1) of the Constitution of Kenya as well as her employment, legal and contractual rights and therefore she entitled to 1 month's salary in lieu of notice Kshs. 13,500/-, unpaid salary for one month Kshs. 13,500/-, leave days 66,150/-, house allowance 168,055/-, gratuity allowance Kshs. 280,125/- and compensation for unlawful loss of employment Kshs. 162,000/- with interest on this item from the date of filing the suit, costs and any other relief the court may find fit to grant.

2. The Respondent filed a defence on 15th December 2017 and in it averred that the Claimant had been employed as a pump attendant in November 2009 and that she worked until 13th October 2013 when her services were terminated. It was averred that her basic salary was increased to Kshs. 5,500/- inclusive of house allowance and later in January 2012 the basic salary increased to Kshs. 6,000/- all inclusive. The Respondent averred that the salary rose over the years until 2014 when the basic salary was increased to Kshs. 12,000/- inclusive of house allowance and this was what she earned until 2016 when in March the Respondent further added house allowance of Kshs. 1,800/- and she continued to earn Kshs. 12,000/- as basic salary till she absconded from work in August 2016. It was averred that during her employment her statutory dues were paid promptly by the Respondent and that she always had her leave in accordance with the policy of the employer where for certain days the Claimant would be absent from her duties and cumulatively the days formed her entitled leave. It was averred that her unpaid salary for September 2016 and part payment of the October 2016 up to the 12th of that month inclusive of statutory deduction and house allowance was offered. In addition her basic salary of three (3) months was offered and she was directed to go and collect her cheque and she declined and rushed to this court. The Respondent averred that during the month of January 2016 it experienced a big loss in the business occasioned by all the pump attendants who were in employment provoking the management to come up with strict rules and regulations to curb the loss experienced in the manner of shortages by each individual pump attendant and notified all the pump attendants of the responsibilities. They were also notified that the shortages were to be recovered from their individual salaries based on what one had lost during the month. It was averred that the Claimant did not heed the warnings from January 2016 and the shortfall in the Claimant's account amounted to over ¾ of her basic pay. The Respondent denied that it owed the Claimant any unpaid salary and allowance and averred that it had paid the Claimant all her salaries and allowances from the date of her employment up to the time her services were terminated. The Respondent averred that the Claimant had no unpaid leave days as all leave days had been taken by the Claimant and that the issues raised by the Claimant on the alleged infringement of her constitutional and labour rights were merely hypothetical. It was averred that the Claimant was an ungrateful employee who had absconded from her duties and was claiming what she had not earned. The Respondent averred that the Claimant was not unlawfully terminated from employment as the employment records spoke for themselves and that she was the author of her own misfortune. The Respondent averred that the Claimant had not suffered any loss or damages as stated in her claim and therefore her claim should be rejected by the honourable court.

3. The Claimant gave her testimony on 15th March 2018 and stated that she was dismissed by the sales representative who told her to remove her uniform and leave. She testified that she was a pump attendant and that she worked from 2nd November 2009 till her dismissal on 26th August 2016. She stated she never got any letter of warning nor was she told of the reasons for the termination. She admitted that she was

later paid the salary for August 2016 and that the director had insisted that she had to apologise which she did after three weeks. She stated that she had not done anything to warrant an apology. She testified that there was no other time when she had done anything wrong. She stated that she was not given any dismissal letter and that she never got an opportunity to be heard. She thus urged the court to grant her requests as the employment was her only source of income.

4. She was cross-examined and stated that she was not issued with an employment letter but that there were payslips. She testified that the salary she earned by the time she left was Kshs. 13,500/-. She stated that each month there were shortages and deductions would be made each month from the salary for money lost. She testified that she was dismissed by the sales rep of Kenol-Kobil Mt. Kenya Region who told her to remove her uniform and leave. She confirmed that she was not employed by Kenol-Kobil. She stated that she was asked by the director to write the apology so that she could go back to work and despite this she was not reinstated. She was informed through a letter that she would be paid 3 months salary and part of October salary. She stated that she was sacked without notice and that the director kept telling her he would write a cheque but they kept her going in circles for a year and they never paid. She stated that she cannot take the money now.

5. In re-examination she testified that there was no debt she owed and that the deductions made were monthly. She stated that she had sued the Respondent the company she worked for and that Kenol-Kobil was a trading name.

6. The Respondent called Stephen Kuria Gatithi the executive director of the Respondent since 2014. He stated that he was a distributor with KBL and an agent of Kenol-Kobil. He testified that he knew the Claimant who was a former employee of the Respondent. He said that the arrangement was that they were the agent of Kenol-Kobil which would check how the pump attendants work and they could dismiss one if the pump attendant did not do what was required. He testified that there were times there were shortages and the Claimant would make payment. He stated that he wrote to the Claimant and her colleagues for sales shortages and all the pump attendants signed. He testified that the Claimant wrote the apology and that they were guided by Kenol-Kobil and that it was the Kenol-Kobil representative who had dismissed her. He stated that the sales rep would go around and check and that on that day when she confronted the Claimant, the Claimant did not speak well and the rep said the Claimant would not work again. He stated that the Respondent wrote the letter copied to the Labour office Kerugoya and the Claimant did not go for her benefits.

7. In cross examination he testified that the Respondent was a dealership for Kenol-Kobil and that the sales representative could do what they did. He stated that the Respondent did not have any problem with the Claimant and had written a letter to her copied to the Labour Office offering to pay. He testified that she had a problem with Kenol-Kobil and that there was altercation in his absence. He stated that there was a supervisor who reported to him and that if there was an issue they were resolved.

8. In re-examination he testified that there was a shortage and it was communicated through the supervisor. He said the shortage was huge and he spoke with them.

9. The second Respondent's witness Mercy Karigi Mbutia was called and she testified that she was a supervisor at the Respondent supervising pump attendants to ensure they offer services to customer and have good relations with customers. She stated that she would pay the staff and the records would be in a payroll book. She testified she had worked from 2009 to date and that the Claimant was employed around the same time though she started working before the Claimant. She stated that she recorded the fuel sales and the sales must tally with the stock. She was responsible for the leaves employees took. She testified that usually pump attendants worked from 9.00am to 9.00pm and that after working for 3 days they would go for 4 days off. She stated that from the document it was indicated that the statutory deductions were made and those would be remitted. She testified that the deduction of the 12,000/- was over a time after discussions with management and it was deducted like a loan. She stated that she was on duty when the Claimant was dismissed. She testified that the sales rep for Kenol-Kobil had brought the incoming sales rep and Phyllis was found leaning/sitting on the railing and that she accused Phyllis of sitting on it but Phyllis denied it and the sales rep told Phyllis she did not want her at work again. She stated that she went to the director and the director had been called by the sales rep and informed. She stated that she knew Phyllis was called but she did not know what transpired and that Phyllis was her best friend. She testified that Phyllis saw her as she went to the office.

10. She was cross-examined and she stated that Phyllis had sat on the rails. She confirmed she was not there and that she had been informed of it as she was in the office. She stated that Phyllis had no discipline issues and the cash shortages were recovered.

11. The Respondent filed submissions on 11th April while the Claimant filed submissions on 23rd April 2018. The Claimant submitted that the issues for determination were two.

- a. Whether the Claimant was unfairly and unlawfully terminated
- b. Whether the Claimant is entitled to the prayers sought in the claim

The Claimant submitted that the summary dismissal took place on 26th August 2016 and that via a letter of 13th October 2016, the Respondent stated that the Claimant had failed to adhere to the rules and regulations stipulated by Kenol-Kobil Management. It was submitted that the Respondent did not specify which rules and regulations the Claimant violated. The Claimant submitted that the provisions of the Employment Act Section 44 make provision on summary dismissal and that the law further states that no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled to by any statutory provision or contractual terms but for very specific causes. The Claimant asserted that no cause justifying summary dismissal was pleaded or proved by the Respondent. Reliance was placed on the Court of Appeal decision in **Bamburi Cement Ltd v William Kilonzi [2016] eKLR**. The Claimant submitted that the Respondent had indicated that there was a loss occasioned in the month of January by all the pump attendants in its employment yet only the Claimant's contract was terminated. It was submitted that in any claim arising out of termination of a contract, the employer is required to prove the reason for termination and where the employer fails to prove this, the termination shall be deemed unfair. Reference was made to Section 43 of the Employment Act, 2007. The Claimant submitted that in event she had conducted herself in a manner warranting summary dismissal, the Respondent was expected to have first given the Claimant a notification and a hearing and consider any representations which the employee may have. The Claimant asserted that the Respondent did not do this. The Claimant submitted that she was therefore entitled to the remedy sought as no house allowance had been paid contrary to Section 31 of the

Employment Act and that notice ought to have been given in terms of Section 36 of the Employment Act. She also sought gratuity for the 83 months she worked for the Respondent. She thus urged the court to grant her the remedies sought as prayed in the suit.

12. The Respondent submitted that the Claimant's services were terminated by the Kenol Kobil supervisor after the Claimant failed to respect the ethical conduct of the principal employer. The Respondent submitted that it did not terminate the Claimant's services as alleged. The Respondent submitted that after it wrote a termination letter the Claimant was requested to go for her 3 months salary in lieu of notice inclusive of the NSSF and NHIF dues but the notice was not adhered to. It was submitted that the Claimant chose to come to court having not exhausted all the available channels. The Respondent wondered whether the Claimant had come to court in order to punish the Respondent or for ulterior motives which she had refused to disclose to court. The Respondent asserted that the position taken by the Respondent was supported by documentation while the Claimant had not produced documents in support of her averments. The Respondent submitted that the Claimant wrote an apology and wondered why a good person would write an apology if she was the one wronged. The Respondent submitted that the Claimant did not know her earnings and that she was the author of her own misfortunes and should not scapegoat the Respondent. The Respondent submitted that the suit should face the sword of dismissal.

13. The dispute is one on termination and the terminal benefits payable. The Claimant asserts that she was terminated unlawfully and without notice. The Respondent asserts on one hand that the Claimant was dismissed by the sales rep for Kenol-Kobil while on the other had asserts that it dismissed her. In the letter of 13th October 2016, the Respondent stated as follows:

Following the meeting held with the board of Directors a resolution was made whereby they decided to terminate your services after you failed to adhere to the rules and regulations as stipulated by Kenol Kobil Management of which you were aware of and still ignored them anyway.

The letter had an indication of the send-off package for the Claimant which was salary for the month of September and part of October up to 12th October 2016, NSSF and NHIF inclusive. The letter stated that she was to be paid one month salary for a duration of three months. She was requested to collect her cheque. In her testimony, she stated that she visited the Respondent's premises a number of times and failed to obtain the cheque which was sheer frustration. The Claimant confirmed receiving salary till September leaving only the balance of 12 days of October 2016. The Claimant sought payment of gratuity, the unpaid salary as well as compensation. In regard to gratuity, she did not prove that she was not a member of NSSF which would bar her recovery of the sum. The Respondent deducted NSSF payments from the Claimant and the Claimant did not even bother to bring her NSSF statements to show whether the Respondent was remitting deductions or making the requisite payments. In my view, the failure to prove this disentitles the Claimant from seeking recompense under the head of gratuity. The Respondent did not avail leave records as off days given do not count towards leave. These are operation arrangements and have nothing to do with leave entitlement unless a contract of service expressly makes such provision. The Claimant would only be entitled to the payment for 3 years. The Respondent equivocated on the house allowance variously pleading that the salary was basic plus house allowance yet for 2012 there was a clear demarcation between the salary previously earned in 2011 to which a sum of Kshs.1,800/- as house allowance was added to the basic pay of Kshs.12,000/-. It is clear that the previous sums were therefore devoid of the house allowance component. Under Section 31 of the Employment Act, house allowance is pegged at 15% of the basic pay. She would be entitled to recover the house allowance from 2013 to 2016. As regards the dismissal, Section 41 of the Employment Act makes provision on the procedural fairness that should be used in dismissal of an employee for the failure to adhere to the code at work. The letter of dismissal was scanty in detail and therefore not one in keeping with the requirements of Section 43 of the Employment act. The dismissal was therefore unfair and unlawful and the Claimant thus entitled to recover damages for the same. The Respondent offered to pay the terminal benefits enumerated in the letter of 13th October 2016 but failed to forward the sums to the Claimant. In the premises as the Claimant has proved her case to some degree I enter judgment for the Claimant against the Respondent as follows:-

- i. One month salary in lieu of notice Kshs. 13,800/-
- ii. Payment for 12 days worked in October 2016 Kshs. 5,520/-
- iii. House allowance unpaid 1,800 x 36 Kshs. 64,800/-
- iv. 3 months per the letter of dismissal Kshs. 41,400/-
- v. The leave for 3 years Kshs. 41,400/-
- vi. Compensation for unlawful dismissal capped at 4 months Kshs. 55,200/-
- vii. Costs of the suit
- viii. Interest on i), ii), iv) and v) at court rates from the date of filing suit till payment in full
- ix. Interest on vi) above at court rates from date of judgment till payment in full
- x. Certificate of service.

It is so ordered.

Dated and delivered at Nyeri this 30th day of May 2018

Nzioki wa Makau

JUDGE