



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 681 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 28th June, 2018)

SALOME NANCY MUMIA.....CLAIMANT

VERSUS

TOP FOOD E. A. LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 13th May 2013 through the firm of Stanley Henry Advocates seeking damages for unfair and unlawful termination and unpaid dues.
2. She avers that between January 2007 and February 2011 she was employed by the Respondent as a General Worker in the packaging department. In the second week of January 2011 she fell sick and was given a 3 days sick leave by a Director of the company Dr. Mayur and after the expiry of the 3 days, on her return to work, the sick leave was extended for a further 3 days.
3. She states that after the end of the further 3 days sick leave she reported back to work and for about 3 weeks she was not allocated any responsibilities by the officers of the Respondent and even after seeking the intervention of other directors of the company including one Mr. Mutesh no work was allocated to her and she was asked to go home.
4. She further avers that the dismissal was illegal, unfair and unlawful since no reason was given to justify the dismissal and further no notice for the termination, intended termination or pay in lieu of leave were given to her.
5. She states that throughout her engagement with the Respondent she was to be paid Kshs. 325 for each day worked. She was however paid Kshs. 1,950 weekly meaning that she was not paid for the seventh day of the week throughout her engagement with the Respondent hence claims for the underpayment. She also claims a monthly pay in lieu of notice of Kshs. 9,750.
6. She further states that the Respondent did not register her to NSSF and as such the Respondent did not make its contribution to NSSF amounting to Kshs. 200 per month, she therefore lost Kshs. 9,600 throughout the 4 years which she claims from the Respondent. She also avers that she worked on public holidays during which she was entitled to payment. She claims Kshs. 10,400 for the 32 holidays she worked in all the 4 years.
7. The Claimant further claims for issuance by the Respondent of a duly signed certificate of service for the 4 years worked. She states that demand for admission has been made and notice of intention to sue duly given to the Respondent but the Respondent has refused and/or ignored to make good the Claimant's claim.
8. The Respondent filed their Memorandum of Response and Counterclaim where they admit that the Claimant was their employee but deny each and every allegation raised in the claim and put the Claimant to strict proof. They deny that the Claimant fell sick and was given 3 days sick leave by one of the directors and that the same was extended for a further 3 days. They also deny that for about 3 weeks she was not allocated any work and that she was illegally dismissed from work without any reason or notice.
9. They aver that the Claimant deserted duty as per Section 44(a) of the Employment Act hence the summary dismissal. They state that she breached the terms and conditions of the contract by absenting herself from place of work without leave or valid reason, she absconded and therefore they claim compensation for breach of contract. They also denied that they received notice of intention to sue and aver that for the reason aforesaid they have made good the alleged claim.

Submissions

10. The Claimant filed her submissions where she submits that by operation of the law she was deemed to be a permanent employee of the Respondent and therefore subject to be given a notice prior to her termination as espoused under the Employment Act 2007.

11. She avers that under Section 35(1) (c) of the Employment Act the Respondent was obliged to issue a termination notice prior to terminating her services. She relied on the case of **Kennedy Nyanguncha Omanga Vs Bob Morgan Services Limited [2013] eKLR.**

12. She avers that it is crystal clear that the Respondent did not comply with the dictates of the law as laid down under Section 40 of the Employment Act and as such her services were terminated unfairly, wrongfully and unprocedural. She states that no notice or warning was adduced hence making the termination unlawful and unfair.

13. She further avers that she is entitled to her terminal dues and other benefits for the period that she had worked for the Respondent as prayed in the Memorandum of Claim.

14. The Respondent did not file their submissions.

15. I have examined all the averments of the Parties. The Respondent admitted the existence of an employment relationship between the Claimant and themselves but aver that she was summarily dismissed when she absconded duty in January 2011.

16. The Respondent having admitted that the Claimant was their employee, have not shown any attempt to write to her and issue a show cause letter as to why she should explain her absence. No dismissal letter was ever issued to her as contended.

17. In their Appendix 3 (Claimant's documents) they were served with a demand notice (which they had denied), the Respondent indicated that they had already resolved the matter.

18. It is my view that the Respondent erred in their dealing with the Claimant by first not issuing her with an appointment letter stating the terms and conditions of employment. The manner in which the Claimant left their employment is also suspect or obscure. They did not subject the Claimant to any disciplinary process.

19. It is my finding that they unfairly and unprocedurally dismissed the Claimant. I find for Claimant and award her as follows:-

1. 1 months salary in lieu of notice = 9,750/=.

2. Pay in lieu of leave = 9,750/=.

3. Pay for national holidays worked = 10,400/=.

4. 6 months' salary for unlawful termination = 6 x 9750= 58,500/=.

5. Unremitted statutory deductions = 9,600/=.

TOTAL = 98,000/=

6. Issuance of a certificate of service.

7. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

8. The counter claim is not proved and is therefore dismissed.

Dated and delivered in open Court this 28th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ouma holding brief Amutallah for Claimant – Present

Respondent – Absent