



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 219 OF 2017

PENINNAH KATHIKWA MWENDWA.....CLAIMANT

VERSUS

RE-SUNS SPICES LIMITED.....RESPONDENT

JUDGMENT

1. The suit by the Claimant against the Respondent is for the unfair unlawful and wrongful termination of the Claimant's services. The Claimant averred that her terminal dues were not paid upon termination. For purposes of this suit, she was employed as a general labourer on 12th June 2013 for a daily wage of Kshs. 475/- she was not provided with a written contract of service though the contract can be inferred from the correspondence between the parties. The Claimant worked devotedly and on 4th February 2015 was given maternity leave and upon her return from the maternity leave she was told she could not resume work she thus sought relief from court for the unlawful dismissal. No reason or a notice to show cause was issued by the Respondent. She reported the dispute to the Ministry of Labour and the Respondent failed to heed the request to settle the matter. She thus sought her terminal dues, statutory underpayments, one month's salary in lieu of notice, payment for leave not taken and service pay; compensation and costs of the suit together with interest. Punitive damages were also sought. She claimed her certificate of service.

2. The Respondent denied that it terminated the Claimant's contract of service. It was averred that the Claimant was a casual who was paid contingent upon her attendance. Respondent averred that the Claimant devoid of any reason, excuse, justification, leave or notice stopped attending work and therefore the Respondent could not issue a notice to show cause. It denied dismissing the Claimant and averred that the Claimant could not be issued with a certificate of service due to her unceremonious departure. It was averred that the rate for a casual employee was Kshs. 475/- when the Claimant stopped working for the Respondent and that the Respondent magnanimously forwarded a cheque to the Claimant settling her claim but she inexplicably failed to collect and cash it. It was asserted that the Respondent replied to all correspondence from the Ministry of Labour and forwarded a cheque in settlement of the Claimant's claim but the Claimant did not collect it.

3. The Claimant testified that she was employed by the Respondent as a general labourer and that she worked from 8.00am till 6.00pm from Monday to Saturday and that she at times worked on Sundays. She stated that she did not have any disciplinary issue with the Respondent and that she was given maternity leave and because she was overworked she was distressed and lost the baby during delivery. She stated she was not given an opportunity to show cause and she was not afforded an opportunity to defend herself before the dismissal. She reported the matter to the Labour office but nothing came of it.

4. In cross-examination she stated that she was not the one who signed the document produced as evidence of her employment as a daily employee. She testified that she was paid Kshs. 475/- per day and would not be paid on days she did not report to work. She stated that her work was good though she did not have a document from the employer commending her work. She stated that regarding the maternity she did not have any documents and that though she had proof of the demise of her child she did not have the proof before the court. She testified that she went to work and was told they did not wish to have her there. She stated that she was not aware of the letter from the Respondent settling the dues sent to Labour office and that she used to earn Kshs. 525/- a day. She was asked how long she had worked and she stated it was 2 years and when asked to refer to the exhibit by the Respondent she stated that she had given the Labour Office 1 year 8 months and on her demand letter it was indicated she had worked for 2½ years. She testified that it was the duty of the company to notify her of the cheque at labour office and on further questioning stated that she is the one who had reported the matter to the Labour Office and the office was bound to inform her. In brief re-examination she testified that she was asked to wait after her maternity leave and was not issued her cheque for her benefits.

5. The Respondent called Dinesh Shah the production and general manager of the Respondent. He stated that the Claimant had been engaged on a casual contract and that when the dispute arose the Respondent responded to the Ministry of Labour and also wrote a cheque for Kshs. 28,795/- on 8th June 2016. He testified that the cheque was not returned by the Labour Office and he did not know if it was delivered to the Claimant.

6. In cross exam he testified that the contract between the Claimant and the Respondent had been produced and he was not aware that the

contract contravened the law. He stated that the Claimant was paid for the days worked and that included the leave for 20 months (35 days) and notice pay of one month but no notice was paid. He stated that the Claimant was paid once a week and the pay was 475/- daily.

7. In re-exam he testified that the Claimant's service was not terminated and that she did not report to work. That marked the end of oral submissions and the Claimant filed submissions but the Respondent failed to though a motion to seek leave to file them out of time was filed by the Respondent but not argued.

8. The Claimant submitted that the legal issues that arose for determination was

- a) What were the terms of employment of the Claimant?
- b) Whether the Claimant's termination was unfair, unlawful and wrongful
- c) Whether the Claimant is entitled to the reliefs sought
- d) Who bears the costs of this cause

9. The Claimant submitted that she was not employed on a formal contract and that the purported contract of employment was unlawful as it violated the Claimant's rights as an employee and was a falsehood. The Claimant submitted that the period of her contract was to be taken as uncontroverted as the Respondent had not given the employment records to contradict her assertion on the period of employment. The Claimant cited the case of **David Kipkosgei Muttai v Green Palms Academy [2014] eKLR** where the court dealt with the issue of unfair termination and stated that the dismissal is wrongful if the party terminating breaches Section 36 of the Employment Act or the contract of employment by failing to serve a notice of termination or by serving a shorter notice than the one stipulated. The Claimant submitted that in the letter to the Labour Office, the Respondent had admitted to owing the Claimant one month notice and that on account of the authority cited, the termination of the Claimant's services was wrongful. The Claimant submitted that the dismissal was without reason and did not conform to the laid out procedures of termination under the law. The Claimant thus sought the reliefs she had pleaded in her suit. The Claimant submitted that she was dismissed unfairly and was entitled to compensation under Section 15(c) of the Labour Institutions Act and Section 49(1)(c) of the Employment Act. She submitted that she was discriminated against and terminated on account of her pregnancy and was therefore entitled to damages. Reliance was placed on the case of **G M V v Bank of Africa Kenya Limited [2013] eKLR** where damages for termination on account of pregnancy were awarded at Kshs. 3,000,000/-. The Claimant submitted that she went through a period of great suffering as her employment was terminated at her greatest point of financial need for her and her infant child. She submitted that she was victimized due to her pregnancy and is entitled to the relief. The Claimant also sought costs.

10. The Claimant had a burden of proving her claim under Section 47(5) of the Employment Act provides as follows:-

47. (5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination shall rest on the employer

11. The Claimant's case was riddled with some inconsistencies. She gave three varying time spans for her contract. She also stated that she was pregnant and was dismissed on account of her pregnancy. She did not attach any medical reports to suggest she was pregnant. She stated that she lost the child as she was distressed by the work she was forced to do causing her to lose the unborn child. She did not avail any records about the baby though it was a major pillar of her case. On the monthly pay, she stated in pleadings that she earned Kshs. 475/- a day. In her testimony in court she stated that she earned less than the statutory minimum and on the other hand stated that she used to earn Kshs. 525/- a month. She came across as an unreliable witness. The Respondent had what it called a contract of employment but which in essence was an illegal contract. The said contract suggests that the jurisdiction of the court is ousted and that the Claimant cannot seek redress before the court. Nothing can be further from the truth. The Claimant had been offered a sum of Kshs. 28,795/- which the Respondent shall pay forthwith within 14 days of the decision. The cheque shall be in her name just like the first one. Her suit against the Respondent having been unproved in terms of Section 47(5) is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 28th day of September 2018

Nzioki wa Makau

JUDGE