



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.375 OF 2014

GRACE NJOKI MUTHUI.....CLAIMANT

VERSUS

WILHAM (K) LIMITED.....1ST RESPONDENT

RIFT VALLEY VEGETABLES LTD.....2ND RESPONDENT

JUDGEMENT

1. On 15th August, 2015 the claimant filed the Memorandum of Claim. The respondents were served and the 1st respondent entered appearance on 8th October, 2014 but no defence was filed.
2. By application dated 22nd November, 2016 the 1st respondent applied to be allowed to file defence out of time. Such defence was filed on 24th November, 2016.
3. Both parties filed their list of agreed issues.
4. On 20th February, 2017 both parties attended court and requested for time to settle the claims out of court and mention date allocated for 10th March, 2017. On the due date there was no consent and the respondent did not attend. A new mention date was allocated for 17th March, 2017.
5. On 7th March, 2018 the 1st respondent filed Notice of Change of Advocates. By this date, the claimant had secured a hearing date herein for the 14th May, 2018 and served Advocates for the 1st respondent. Such notice was accepted. There is an affidavit of service filed confirming service upon the 1st respondent.
6. On 14th May, 2018 both parties attended court and a Hearing date was allocated by consent for 3rd July, 2018. On the due date the respondent and advocates were absent. The claimant was heard on her evidence.

Claim

7. The claimant, a female adult was employed by the 2nd respondent company as a general worker and was issued with an employment contract and within such employment was moved to the 1st respondent for work and payment of salaries until the date of termination of employment and which was effected by the 1st respondent. The claimant remained in the employment of the respondents for 5 years at a monthly wage of Kshs.4, 323.00 ending 4th February, 2013.

8. The claim is that the claimant was wrongfully and unfairly terminated in her employment by the respondents where they declared a redundancy contrary to the provisions of the law and without payment of the lawful terminal dues. The claimant had a clean work record and had no notice that her employment would be abruptly ended by the respondents. The reasons leading to termination were not brought to the claimant's attention or requisite notice issued to her. This was contrary to the Employment Act, 2007.

9. The claimant is seeking for orders that her terminal dues be paid as follows;

a) Pay for days worked Kshs.665.10;

- b) One month notice pay Kshs.4,323.00;
- c) Overtime pay Kshs.600.00;
- d) Annual leave earned Kshs.2,539.00;
- e) Travelling allowance Kshs.1,300.00;
- f) House allowance Kshs.1,000.00;
- g) House allowed underpayment Kshs.3,000.00;
- h) Severance pay Kshs.12,470.19;
- i) Compensation Kshs.51,876.00
- j) Certificate of service.

10. The claimant is also seeking for costs of the suit.

11. The claimant testified in support of her case that upon employment by the 2nd respondent on 1st June, 2009 she was issued with a letter of employment and a pay slip each end month. The business was then sold to the 1st respondent who continued to allocate work and pay the due wages to the claimant until 4th February, 2013 when the claimant reported to work and was issued with a letter terminating employment by the 1st respondent. There was no reason given or notice to the same.

12. The claimant is seeking to be paid her terminal dues as she was not allocated housing by the respond and had to travel long distances to be at work as required. There was no travelling allowance paid and despite being unionised, the applicable terms for travel and accommodation were not adhered to. The claimant did not take her annual leave and was not paid in lieu thereof.

Defence

13. In response, the 1st respondent's case is that they never employed the claimant and therefore there exists no contractual liability but with due diligence, the 1st respondent confirmed that the claimant was an employee of the 2nd respondent from 1st June, 2009 and her contract ended on 24th June, 2011 and thus entered into a new contract with the 2nd respondent. The initial contract between the claimant and the 2nd respondent upon ending is subject to the application of section 90 of the Employment Act, 2007.

14. The defence is also that the claimant utilised all her leave days and the claims made are without merit.

15. The claimant was under a contract of two years with the 1st respondent and ending on 24th June, 2011 and the second contract was for 1 year and 6 months and the claim for dues over 5 years does not apply.

16. The defence is also that the claimant has not clarified in her pleading who between the respondents terminated her employment and the 1st respondent denies terminating the same as claimed. Where the 1st respondent did effect termination of employment, the law was followed with regard to redundancy with notification to the labour officer, the trade union and payment of all terminal dues to the claimant.

17. As set out above, the 1st respondent despite taking the hearing date by consent failed to attend at the hearing.

18. The 2nd respondent did not entire appearance, file defence or attend in these proceedings.

19. At the close of the hearing, the claimant filed written submissions.

20. In analysis the claims made and the defence on record, the applicable law and all put into account the question before court is whether there is a case for unfair termination of employment and whether the remedies sought are available.

21. A part of the work records, the respondent submitted a letter of appointment for the claimant issued by the 2nd respondent, Rift Valley Vegetables Ltd which is not dated or the dates are obliterated and another one dated 24th June, 2011. The second letter is to the effect that the claimant was employed with effect from 24th June, 2011 as a General Worker. There is also a record of annual leave form setting to that the claimant took leave for the year 2010 for 21 days starting 6th May, 2010 to 31st May, 2010. 22. On the records made available to the court, and the evidence of the claimant, I find there was employment by the 2nd respondent prior to 24th June, 2011 as leave for year 2010 was allocated and that there existed an employment contract from 24th June, 2011 which was open and without an end date.

23. In urging its case, the 1st respondent filed application dated 22nd November, 2016 and therein is the Affidavit of Philes Nyanduko Mwebi the 1st respondent Human Resource Relations Officer and who averred at paragraph 4 and 6 states;

The said Rift Valley Vegetables was would up in the year 2014 and its employment records had earlier been missing for quite some time.

...

On 19th November, 2016 the documents were found and a Memorandum of Response and List and Bundles of Documents have since been drafted.

24. On this evidence, I take it upon the 2nd respondent being would up; the 1st respondent took charge and has been able to obtain all work records with regard to the claimant. The evidence of the claimant is therefore not farfetched on the grounds that her employment with the 2nd respondent changed and was paid and her employment terminated by the 1st respondent on account of redundancy. The respondents can therefore not wriggle out of these proceedings and claim not to know the existence of an employment relationship between themselves severally and jointly with the claimant. Where the 2nd respondent was would up, the 1st respondent took over the affairs and continued to keep the claimant in their employment.

25. The above is confirmed by the 1st respondent's letter to the claimant and dated 4th February, 2013 and setting out that;

TERMINATION OF EMPLOYMENT ON ACCOUNT OF REDUNDNACY

The purpose of this letter is to confirm the outcome of a recent review by WILHAM (K) LTD (RVVT FARM). Poor soil and weather effects have led to low production in this farm. The company has therefore decided to reduce its number of staff.

As a result your employment will be terminated with effect from 4th February 2013.

26. The notice and effect of termination of employment was on the same date. The respondents notice relates to both respondents.

27. On the claims made, where it became operationally imperative to lay off the claimant following a redundancy, section 40 of the Employment Act, 2007 required that the respondents and in this regard the 1st respondent to comply.

28. In the case of **Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (KUDHEIHA) versus Aga Khan University Hospital Nairobi [2015] eKLR**, an in summarising the provisions of **Section 40 (1)** the court held as follows:-

The procedures applicable in a redundancy are therefore set out in law as above. The conditions precedent requires;

a. A notice to the union and the Labour Officer stating the reasons for, and the extent of, the intended redundancy;

b. Non-union employees should receive a personal notice together with the Labour Officer;

c. The selection criteria; and

d. Address the terms of the Collective Bargaining Agreement on redundancy on terminal dues without disadvantaging non-union employees.

29. In addressing the provisions of section 40(a) and (b), the Court of Appeal in the case of **Thomas De La Rue (K) Ltd versus David Opondo Omutelema [2013] eKLR** stated as follows;

It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."

30. In addressing similar issues the Court of Appeal in the case of cited above held that;

... The only difference in both sub-sections is whether an employee is a member of a trade union or not. A proper construction of both subsections would show that the phrase:

"...the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.."

Is common to both kinds of employees. So that, whether an employee belongs to a trade union or not, the reasons and period of notice should be spelt out.

31. In essence, whether the claimant was unionised section 40(a) and (b) required the respondents in employment on account of redundancy and noting or not, the application of effecting termination of the existing contract of employment was indefinite to issue the requisite notices. The claimant testified that she was unionised. She however did not state under which union. There is no record of a pay slip attached by the respondents to confirm which dues were deducted and remitted to which trade union. However in defence the respondent avers that they informed the claimant's trade union of the redundancy.

32. The union with whom the 1st respondent addressed the matter of termination of employment with regard to redundancy is not set out. The notices issued to such trade union are not submitted with the court as required under section 10(7) of the Employment Act, 2007.

33. On the basis that the claimant's evidence remains not challenged, I take her evidence as the truth. She was not issued with the requisite notices under section 40 or under section 41 with regard to her termination and there is no compliance with section 35 of the Employment Act, 2007 with regard to ending the contract of employment. On this basis, termination of employment is found without justification, not valid and even where there was an existing operational requirement(s) the applicable law under section 40 was not adhered to. The resulting termination of employment was procedurally unfair within the meaning of section 45 of the Employment Act, 2007.

34. Notice pay is due on the finding above termination of employment was procedurally unfair. The claimant has applied a basic wage in computing her claims. Section 49(1)(c) allow for computation of terminal dues based on the gross wage payable to the employee as lastly earned. One month notice pay is due at Kshs.5,323.00.

35. For days worked and the pay due and without challenge on the same, the claimant is awarded Kshs.665.10.

36. On the existing contract and running from 24th June, 2011 the claimant was entitled to 21 days of leave. This contract in its nature thus compromises any other employment of the claimant that existed prior as on this contract, a work relationship commenced and ended on its terms. Any claims arising outside of these relations is subject to the application of section 90 of the Employment Act, 2007. On this basis the claims for leave days due and severance pay are subject to the last existing contract of employment the claimant had with the respondents. On the records submitted, leave due from 2011 to 4th February, 2013 is payable. For the two complete years the claim for Kshs.2,539.00 is reasonable and is allowed.

37. Severance pay is equally for the two years in service and awarded at Kshs.8,646.00.

38. Compensation is due in a case of unfair termination of employment by application of section 49 of the Employment Act, 2007. In this regard where the claimant was earning gross wage of Kshs.5,323.00 per month, compensation at 12 month months of such gross wage is awarded at Kshs.63,876.00.

39. The claim for travelling allowance though made and justified that the claimant was travelling long distances, the rationale and legal basis is not set out. There is no Collective Agreement cited as being applicable to the claimant in this regard. On the pay slip attached to the claimant, there are no dues deducted for remittance to any trade union and despite evidence that the claimant was unionized, the evidence in this regard is lacking. Such is not due.

40. The house allowance is claimed in terms of underpayments. The claimant has attached a pay slip with a basic wage of kshs.4,323.00 and a house allowance of Kshs.1000.00 per month. A computation of the due house allowance on such basic pay would be Kshs.648.45 per month and thus the payment of Kshs.1000.00 for house allowance is over the allowed allowance.

Accordingly, judgement is entered for the claimant against the respondents jointly and severally in the following terms;

(a) The termination of employment procedurally unfair;

(b) Compensation awarded at Kshs.63,876.00;

(c) Notice pay Kshs.5,323.00;

(d) Severance pay Kshs.8,646.00;

(e) Leave pay due Kshs. 2,539.00;

(f) The claimant shall be issued with a Certificate of Service in accordance with section 51 of the Employment Act.

(g) Amounts due under (c), (d) and (e) above shall be paid with interests at court rates.

(h) Costs of the suit.

Orders accordingly.

Delivered in open court this 18th day of September, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants:.....

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