



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 89 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd October, 2018)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT

versus

NAIVAS SUPERMARKET LIMITED....RESPONDENT

JUDGEMENT

1. The Claimants herein filed their Memorandum of Claim on the 28th January 2014 on behalf of the grievant herein, Ms. Lydia Njeri Waweru claiming unfair and unlawful termination of employment and failure by the Respondents to pay her terminal dues.
2. The Grievant testified that she was employed by the Respondent as a Shop Attendant with effect from 12th January, 2011 and served with an appointment letter dated 8th January, 2011. The grievant testified that her starting salary was Kshs. 12,000/= per month. She identified Appendix 2 as her appointment letter.
3. She stated that she was first employed at Kubwa Branch at Naivasha town and later transferred to Nakuru in January, 2012. On 15th May, 2012, she was transferred to Mombasa, Nyali Branch and deployed at the cosmetics department within the shop. She identified App. 3 as her transfer letter to Mombasa.
4. She averred that on 24th August, 2012, while at her workplace, she fainted and collapsed following which she received first aid attention within the shop and; and then the Branch Manager Mr. Francis Waweru instructed a Mr. Karanja, the company driver to drive her, accompanied with a female work colleague, Ms. Faith Sigei to Coast General Hospital (also known as Makadara). She was treated and released to go home.
5. She stated that on 25th August, 2012, she visited the hospital again for check-up and further treatment. On **26th August, 2012**, she reported for duty but unfortunately she fainted and collapsed again and was rushed to the Hospital by the same driver accompanied by Ms. Faith Sigei.
6. She was then advised to take medical tests including CT-Scans at Coast General Hospital, Family Health Options Kenya and at Vision Medical Laboratory. She identified Appendix 4 as medical records relevant to her ill health. She further informed the Court that at all time, the Respondent was fully aware of her ill-health and even paid for her medical treatment much as they availed a driver and a colleague to drive/accompany her to the hospital.
7. She testified further that on 27th August, 2012, Ms. Faith Sigei informed her that she had received a call from the Branch Manager asking her to inform the grievant to continue with her medical treatment until she was fully recovered to resume duties.
8. She stated that from 27th August, 2012-8th September, 2012 the Respondent had sponsored a seminar on **customer service** for supermarkets, facilitated by Distributions Management Systems Ltd and that whereas she would have attended with the first lot of trainees, she was unable to attend due to poor health and that she finally attended the seminar on 3rd and 4th September, 2012, at the end of which she was issued with a certificate of attendance. She identified Appendix 5 as the attendance certificate issued to her.
9. The Claimant contends that between 5th - 9th September, 2012 she performed her duties as usual but that on 5th September, 2012, she discovered that during the entire period of her ill health she was marked absent without any reference to sick leave. Upon inquiry, she was told to see a Mr. Maina at the back office. Mr. Maina informed her that it was the Branch Manager who gave instructions to mark her as absent.

10. She testified that on the 9th September, 2012 after her duties, she travelled to Nairobi to complain to the Respondent's Human Resource Department having been verbally directed by the Branch Manager to see Mr. Njau in the HR Department at Nairobi.

11. She avers that the 10th September, 2012 was her off duty day and having visited the Human Resource Office in Nairobi during the day, she travelled back at night to Mombasa and was at her appointed place of work on 11th September, 2012, her shift having been scheduled to report at 12.00 noon.

12. The Human Resource Department had promised to talk to the Branch Manager to the effect that she was lawfully entitled to seven (7) days sick leave with full pay and to seven (7) days sick leave with half pay on any one year and that her attendance register would be corrected to reflect that lawful provision.

13. When she reported back on the 11th September 2012, she was not allowed to perform her duties and was asked to see the Branch Manager who kept her waiting at the office upto closure of the shop when she was asked to go home and report the following day, 12th September, 2012.

14. She avers that at about 11.00am on 12th September, 2012, she was invited into the Branch Manager's office where she was joined by two other managers and a termination letter was handed over to her which she read and understood and told to leave the office. She identified Appendix 6 as the termination letter. The reasons given in her termination letter were that; - she had travelled to Nairobi without the Managers knowledge and that she was using sickness as an excuse to stay away from work. She avers that she was never accused of absenting herself from work on the 11th September 2012.

15. She avers that she had not been informed that she would receive such a letter or face any disciplinary action and was not given any opportunity to defend herself.

16. She testified that she consulted her union for help after this and the union referred this dispute to the Ministry of Labour. She identified Appendix 10-14 being letters regarding conciliation efforts with a certificate of unresolved trade Dispute.

17. The Respondents were served with the Memorandum of Claim and a hearing notice in this case. They failed to enter appearance. During the day set for hearing, they also failed to attend Court.

18. I have examined all the evidence and submissions filed by the Claimant. I note that the Claimant's case is not controverted. I note the Claimant was unwell on duty and had to seek medical assistance. She was rightfully entitled to sick off as provided in Section 30 of the Employment Act which provides as follows:-

“30(1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre”.

(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it”.

19. The Respondent's own driver and a female employee Ms. Faith Sigei drove/accompanied the grievant to the hospital on the authority and approval by the Branch Manager. The Respondents were therefore fully aware that the claimant had been unwell.

20. It is my finding that the Claimant's dismissal was unfair and unjustified.

21. I therefore find for her and order the Respondent to pay her:-

1. An equivalent of 12 months salary as compensation for the unfair/unlawful termination which is

=12 x 16,695 = 200,340/=.

2. I also award her one month's pay in lieu of notice = 16,695.00/=.

3. Pay in lieu of pending leave for 1 year & 9 months =25,042/=

Total 242,077/=

4. Issuance of a Certificate of Service.

5. The Respondent will pay costs of the suit to the Claimant plus interest at Court rates.

Dated and delivered in open Court this 22nd day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Minda holding brief for Nyumba for Claimant – Present

Respondents – Absent