



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1690 OF 2015

SABINA WAMBURA RIBUTHI.....CLAIMANT

- VERSUS -

DEFENCE FORCES CANTEEN ORGANISATION..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 23.09.2015 through Olando Udoto & Company Advocates. The claimant prayed for:

- a) The respondent rescinds the said decision of deducting her salary.
- b) The respondent refunds any monies already deducted from her salary.
- c) The respondent pays the commensurate dues and allowances as from the date the claimant started working as the acting manager in April 2014 to 11.09.2015.
- d) Costs of the cause.
- e) Any other just and equitable relief the Court may grant.

The memorandum of response and counterclaim was filed on 14.10.2015 through Keyonzo, Mweseli & Karanja Advocates. The respondent prayed for:

- a) The claimant's claim to be dismissed with costs.
- b) Judgment be entered against the claimant on the counterclaim in the sum of Kshs. 1, 133, 405.90.
- c) Costs of the suit be awarded to the respondent.

The respondent employed the claimant in November 2006 as a Supplies Clerk III Job Group 5. She was promoted to [the position of Supplies Assistant Job Group 8 effective 12.09.2014 and as per the letter of promotion dated 19.09.2014. The sum of Kshs. 8,558.00 was recoverable from her salary effective 03.07.2015 at Kshs. 1, 000.00 per month being on account of misappropriation of respondent's stock at warehouse. The claimant wrote her letter dated 08.07.2015 complaining that she had not received any report showing the loss of alleged stock. The notice for further recovery No. 086 varied the amount to be recovered to Kshs. 33, 473.00 at Kshs. 1, 000.00 per month effective 10.07.2015. By change advice No. 277 the amount to be recovered were increased by Kshs. 14, 738.75 recoverable at the same rate of Kshs1, 000.00 per month effective 01.08.2015. The recoverable amount was increased to Kshs. 01.09.2015 per change advice No. 453 effective 01.09.2015. The claimant's case is that she was not involved in the fraudulent transactions at the stores and the recovery as deducted from her on monthly basis was unfair. The claimant's further case is that effective April 2014 there was no substantive manager and she was directed to act in that capacity. She complied and acted until 11.09.2015 and she was not paid commensurate dues in that regard. She claimed to be paid accordingly.

The respondent's case is that any acting capacity was at the respondent's discretion and no extra pay was due as per the letter of appointment. Further from July 2015 the respondent has been making recoveries from the claimant as duly notified to the claimant and on account of losses attributable to the claimant's negligence or wilful default in handling the claimant's property. Further, the respondent's case was that such recovery was lawful under section 19 (b) of the Employment Act, 2007. The respondent's further case was that between June and July 2015 the respondents internal auditors did an audit of several stores where the claimant was in-charge the audit revealed losses or theft of goods in the stores under the claimant's charge being Store C Kshs. 53, 397.90; Store E Kshs. 201, 477.00; and Store D Kshs. 878, 405.00

making a sum of Kshs. 1, 133, 405.90 now counterclaimed for.

The only issue for determination is whether the parties are entitled to the remedies as prayed for. The Court has considered all the material on record and makes findings as follows:

1) The claimant's case was that from April 2014 to 15.09.2015 her boss one Kisoi Stephen instructed her to act as Manager in the warehouse but she was not paid acting allowance which she now claimed. She acted as Manager for stores C, D, and E. The acting allowance claimed was the difference between the pay for substantive post held being of Clerk and pay for a Manager and for 17 months acted it amounted to Kshs. 243, 491.00. The respondent's witness (RW) testified that the claimant worked as Assistant Manager in Stores CDE. The Court has considered the evidence. The letter of appointment provides that the appointment is subject to the respondent's standing orders, instruction and procedures. The respondent's Terms and Conditions of Service do not provide for the position of Manager but provides for Assistant Manager Warehouse. The Terms and Conditions of Service provide for appointments to be in writing. Clause 66 thereof specifically provides that acting appointment shall be in writing and acting allowance should be the salary difference between the acting officer's pay and starting point in the higher grade. The Court returns that the claimant failed to provide evidence in that regard. The Court finds that whereas RW confirmed that the claimant performed duties of Assistant Manager, there was no written appointment to act and there was no provision for acting allowance. The Court finds that there was no evidence of a grievance by the claimant to be paid acting allowance throughout the alleged period of acting. In any event the claimant did not specifically plead the amount claimed by way of quantifying the same in the claim and did not provide documented evidence of the alleged salary for Manager, Warehouse. The Court finds that the claim will fail as vague and not specifically pleaded and falling outside the Terms and Conditions of Service.

2) The claimant has established that the investigation report for the respondent's stores C, D and E MAB did not implicate the claimant in the stock losses and the fraudulent transactions involved. The report shows that the losses were attributable to Florence Aloo Kshs. 73, 060.00; Allan Opiri Kshs. 805, 471.00 and Joseph Langat Kshs. 254, 874.90. The claimant was not implicated at all. Clause 47 of the Terms and Conditions of Service provides that the respondent's management is responsible for ensuring the maintenance of discipline and good behaviour at all times. Further, a Board of Inquiry shall be formed to hear misconduct charges. Similarly an Audit Report on losses shall have authority equal to that of a Board of Inquiry if the case shall require such investigation and in such a case a Board of Inquiry shall only be formed if the findings are disputed. The Court finds that the audit report in the instant case did not implicate the claimant and the Board of Inquiry did not make any decision prior to the purported recovery being imposed against the claimant. Thus, the recovery was unfair and the claimant is entitled to refund of all recoveries as prayed for and the monthly recovery to stop forthwith. Needless to state, the counterclaim is found unjustified as it was unfounded.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to rescind the decision of deducting the claimant's salary on monthly basis by way of recoveries and the recoveries to stop forthwith.
- 2) The respondent to refund all monies already deducted from the claimant's salary and to refund all of it by 05.12.2018 failing interest to be payable thereon from the date of the judgment till full payment.
- 3) Dismissal of the counterclaim.
- 4) The respondent to pay the costs of the claim and counterclaim.

Signed, dated and delivered in court at Nairobi this Friday 16th November, 2018.

BYRAM ONGAYA

JUDGE