

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 46 OF 2018

ANN NYAWIRA WANYIRI.....CLAIMANT

VERSUS

ELIUD MUTAHI T/A EMUTECH ACCESSORIES.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 31st January 2018 seeking to recover for the alleged unlawful termination from employment. She avers that she was employed as a shop attendant earning Kshs. 8,000/- a month from 1st April 2013 and was dismissed on 4th December 2017. She was dismissed without notice and her dismissal was verbal. She averred that there was no indication of poor performance or a show cause before her services were terminated. She sought damages for unlawful termination, service pay for five years, unpaid leave for 5 years and one month's salary in lieu of notice. She averred that she issued a demand and notice of intention to sue and the same were ignored hence the suit. She attached her witness statement as well as her demand letter. She thus sought entry of judgment against the Respondent as prayed for as well as costs for the suit.

2. The Respondent filed defence on 1st March 2018 in which it averred that the Claimant was employed as a shop assistant in April 2013, that she abandoned her work in April 2015 and only returned in May 2015 seeking to be taken back under new terms. It was averred that the Claimant approached the Respondent on 5th December 2017 seeking payment for the two days she had worked in December 2017 which he did thus clearing her dues and that she wrote messages wherein she indicated she was not interested in working for the Respondent. The Respondent averred that the Claimant performed her duties in breach of the trust bestowed upon her, was incompetent, insubordinate and refractory in performance of her duties thus negatively affecting the economic progress of the business. He averred that the Claimant was not dismissed from employment but that she abandoned her duties and thus was not entitled to any award as claimed or at all. He averred that no demand letter was served upon him indicating an intention to institute legal proceedings. The Respondent sought the dismissal of the suit with costs.

3. The Claimant filed an amended claim on 19th March 2018 with a very minor amendment of replacing her demand for general damages with a claim for compensation for 12 months in terms of Section 49 of the Employment Act. The Respondent filed a witness statement on 19th March 2018 in which he attached the screen shots of the messages the Claimant had sent to the Respondent on various days.

4. She testified on 9th October 2018 and stated that she was employed by the Respondent at his shop selling various accessories and that she came to work on 5th October 2017 only to find that he had changed the lock. She said that she had called him on 4th and told him she was not feeling well and that he called her inviting her for a meeting at the pub and she declined. She was cross-examined and she had not read all the messages that had been attached by the Respondent. She stated that she had sent a message to him after he locked the shop. He would check the sales each week and that when he called her to meet him at Maru Building, she declined as it was not at work. She had called on 3rd October 2017 indicating she was not feeling well and that he advised her to come so that they settle accounts and that she texted him that he appeared happy she was leaving. She testified that she also sent a message seeking her payment for days worked and that she did not threaten him. She said that she had a shortfall that she had to settle and that she had paid 2,000/- and was to pay the balance of Kshs. 6,000/-. She admitted that her salary was paid and that from 5th December 2017 she did not go to work as the shop was closed. She was cross-examined and stated that the deduction was as a result of a shortfall of Kshs. 6,000/- in November and that the shortfall was resolved and the issue was not before the court.

5. The Respondent testified and stated that he was an agri-consultant and that he had a business where the Claimant worked. He stated that the Claimant sent him a message indicating she wanted to leave employment and he sought that they meet on Monday and he indicated willingness to meet. The venue was proposed to be a restaurant and that she did not show up but later met him and gave him the key. He testified that she sent a message telling if he did not pay the matter would be serious and he paid for the 2 days she had worked. He stated that she had locked up on Saturday and left with the keys which she brought to him on Monday. He stated that there was a shortfall that the Claimant was to make good and she paid the first installment of Kshs. 2,000/- in October. He said that the Claimant used to pay herself her salary from the sales proceeds and that the 2,000/- refund was paid willingly. In cross-examination he testified that the Claimant wrote on 3rd demanding severance pay. He stated that she was to pay her NSSF dues and she would go on leave. He said that he would be at the shop mainly on weekends and that the Claimant worked from 9.00am or 9.30am to 5.00pm. He testified that the message of 3rd December was after her last day of work on 2nd December. The issue of the shortfall had been resolved by the agreement on how she was to sort it and that she owed Kshs. 4,000/-. He stated that he did not demand it in the claim before court. That marked the end of oral testimony and the parties were to file written submissions. The Claimant filed written submissions on 22nd October 2018 and the Respondent filed presumably on 31st October 2018.

6. The Claimant submitted that the issues that led to their separation was not clear. She submitted that the Respondent had attempted to demonstrate that the Claimant had deserted duty willfully but did not demonstrate that he accorded her a fair hearing under Section 41 of the Employment Act or attempted to have Claimant to show cause. It was submitted that in terms of Section 43, 45 and 47 of the Employment Act there were no valid reasons for the termination of her employment. The Claimant submitted that it would appear the relationship with the Respondent was hostile and she thus sought the maximum compensation as she had served for over 5 years together with notice and leave for the period served.

7. The Respondent submitted that the main issue for determination was who actually terminated the contract of employment. Reliance was placed on the case of **SAS Services Partners v Whalley Appeal No. EAT/561/91** where the UK Employment Tribunal relying on the case of **Martin v MBS Fastenings Distribution (1983) ICR 511** held that the question as to who terminated the contract of employment is a question of fact taking into consideration all the circumstances of the case. The Respondent submitted that it was the Claimant who wrongfully terminated the contract by acts which entitled the Respondent to treat the employment as terminated. The Respondent cited the case of **Hong Kong FIR Shipping Co. Ltd v Kawasaki Lisen Kaisha Ltd (1962) 1 All ER 474** for the proposition that it is the non-defaulting party who is entitled to claim any damages resultant of such repudiatory breach. The Respondent submitted that the claim should be dismissed with costs.

8. The Claimant and the Respondent do no dispute there was employment though there was no written contract of employment. The Claimant admits she sent text messages to the Respondent and that in the preceding month there was a shortfall that was to be paid off through monthly deductions. The Claimant in the message for 2nd December 2017, she wrote **I shl cm on Monday, twangalie iyo hesabu coz sioni kama nitaendelea** and on 3rd December the Respondent wrote **Vile umesema huoni ukiendelea, we meet at Maru tomorrow at 12 p.m tuangalie hesabu. Hakuna haja ya kufungua. I will all the necessary books**. And on 4th December he wrote **Nitazipeana, but nataka tuongee, utoke kama umerithika**. She replied **Am so thankful ad God bless for evrthng**. The messages written in a smattering of English, Kiswahili and a short form now vogue with some users of mobile phones suggests very clearly that the Claimant was no longer desirous of continuing to work for the Respondent. The Respondent on his part wanted the parting to be amicable and in one specific message told her he would have the items she sought given but would want to meet her so that she leaves while satisfied. The issue that she kept seeking resolution on, in the line of messages was her service. She said that her former boss at Nairobi had paid her 50,000/- for 2 years and she wanted some payment for her service. The Respondent did not apparently accede and even at one point accused the Claimant of being a thief. From all evidence adduced, the Claimant was working for the Respondent for 4 or so years. She was not a member of NSSF or a pension scheme. Her termination was not the fault of the Respondent from what I discern. The Claimant just felt she could not work for the Respondent any more. She therefore gave notice of her intent not to resume work on Monday. She therefore left the employ of the Respondent willingly. As established in the case, there was no retirement scheme and the Claimant was not subscribed to NSSF. The Claimant earned Kshs. 8,000/- a month and the service pay would be 15 days for each complete year of service being Kshs. 4,000*4 = Kshs. 16,000/-. She was not entitled to notice as she gave intention to cease working. The final result is that there is judgment for the Claimant against the Respondent for

- a. Kshs. 16,000/- being her service
- b. Costs which I cap at Kshs. 20,000/-
- c. Interest at court rates on the sum in a) above to run from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 12th day of November 2018

Nzioki wa Makau

JUDGE