



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 309 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

GERALDINE MUSABI ORIEDO.....CLAIMANT

VERSUS

ROSE MASAKU T/A OJAY HOSTELS.....RESPONDENT

JUDGMENT

1. The Claimant herein filed her Memorandum of Claim on 12.3.2013 through the firm of Wandabwa Advocates alleging unfair termination and failure by the Respondent to pay her her terminal dues and withheld wages.
2. It is the Claimant's case that she was employed by the Respondent in February 2012 as a Cook, Cashier, Accountant, Administrator, Caretaker, Cleaner and Watchman. This was at the Respondent's hostel in Karen Nairobi.
3. She avers that on 1st August 2012 her job was designated as that of Matron but she continued carrying out the other dues aforementioned.
4. On 11.10.2012, she avers that she went on a two weeks paid leave. She avers that soon thereafter she received a short message service (sms) from the Respondent advising her not to report back to work until further notice.
5. On 9.9.2012 she avers that she received an SMS from the Respondent's supervisor at 8.23.20 am which stated as follows:-

“Morning, hope you are good and hope these text finds you in good position. Your contract was permanently terminated on 1.9.2012 after our final investigation report, now any time you are around just call for more information. Thanks.
6. The Claimant avers that she tried to get more information on the termination and tried to reach the Respondent but her several calls were ignored. The Claimant finally collected her belongings from the Respondent's hostel on 29.10.2012 but the Respondent refused to pay her her terminal dues and August 2012 salary.
7. The Claimant therefore seeks payment from the Respondent of her August 2012 salary, 1 month salary in lieu of notice, damages for unfair termination, issuance of a certificate of service and interests and costs.
8. The Respondents filed their Statement of Defence on 8/5/2012 through the firm of J. Ngaii Gikonyo and Company Advocates. The Respondents admit they employed the Claimant as Matron and at no time was she directed to perform any other duties. They aver that they finally dismissed her for gross misconduct and paid her all her terminal dues.
9. The Claimant gave her sworn evidence in Court and when cross-examined she indicated she worked for Respondent for about 1 year.
10. The Respondent called one witness who reiterated the Respondent's Pleadings. In cross-examination RW1 stated that the Claimant was terminated on 9.9.2012 via SMS. The witness also admit that their lawyer wrote a letter indicating that the Claimant was dismissed on 10/8/2012 and they paid her Kshs.3,945.20 for 10 days worked that month.
11. RW1 also indicated that she did not have minutes of the management meeting they held to dismiss the Claimant and also the attendance register.
12. The parties also filed their respective submissions. I have considered all the evidence and submissions of the parties. The issues for determination are as follows:-

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether due process was followed.

3. Whether the Claimant is entitled to remedies sought.

13. On the 1st issue, the Respondent have stated that the Claimant was dismissed for gross misconduct. They have however not demonstrated the misconduct in question. The details of the alleged misconduct are also not given even in their Statement of Defence.

14. Section 43 of Employment Act states as follows:-

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

15. By virtue of this Section, reasons that would warrant an employee to terminate the services of an employee, such reason must be real and not imagined or perceived. In case of summary dismissal Section 44 of Employment Act also enumerates instances which would warrant summary dismissal. None of these reasons have been demonstrated before Court and have existed to warrant dismissal. It is therefore my finding that there were no valid reasons to warrant dismissal of the Claimant.

16. In the same vein, the Claimant has stated that she was dismissed vide text message. There was no notice or a disciplinary hearing before the said dismissal. The Respondent failed to observe the Employment contract wherein they had indicated the contract could be terminated by 7 days notice. I find that due process was therefore not followed before the Claimant was dismissed.

17. It is my finding therefore that the Claimant was unfairly and unjustly dismissed and I declare the dismissal unfair and unjustified. The Claimant was on a 3 months' contract which was to expire on 31st October 2012. Since the contract was terminated before its due date, I award Claimant the salary due for the unexpired period upto 31.10.2012 and this translates to salary for 3 months given that she was not paid her August 2012 pay. This is = $3 \times 12,000 = 36,000/=$.

18. I also award Claimant notice = **12,000/=**

19. I further award Claimant 6 months salary as compensation for unfair termination = $6 \times 12,000 = 72,000/=$

Total = 120,000/=

20. Plus costs and interest with effect from the date of this Judgement.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Serunjeh holding brief Maina for Respondent – Present

Khasiani for Claimant – Present