



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 576 OF 2018

JEMIMAH PAULINE AWUOR.....CLAIMANT

-VERSUS-

DORMANS COFFEE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 19.04.2018 in person. The amended memorandum of claim was filed on 26.11.2018 through Maura, Muthoni, Mikhala, Faraji & Associates Advocates. The claimant prayed for judgment against the respondent for:

- a. One month salary in lieu of notice Kshs. 58, 000.00.
- b. Medical expenses Kshs. 80, 000.00.
- c. Annual from 2003 to 2017 Kshs.568, 400.00.
- d. Overtime Kshs. 2, 500, 000.00
- e. Compensation for unfair termination Kshs. 58, 000.00 x 12 =Kshs.3, 902, 400.00.
- f. A declaration that the dismissal was wrongful, unfair, un-procedural and unlawful and in the circumstances the claimant is entitled to compensation as prayed for.
- g. Costs of the suit plus interest from the time of filing the suit till payment in full.
- h. Certificate of service per section 51 of the Employment Act, 2007.
- i. Any other relief the Court may deem fit and just.

The respondent filed the memorandum of response on 02.07.2019 through Waweru Gatonye & Company Advocates.

To answer the **1st issue** for determination, the Court returns that there is no dispute that parties were in a contract of service. The respondent employed the claimant in the position of a Merchandiser. The parties are not in agreement on the dated the employment commenced. The claimant has pleaded that it was effective 24.03.2003 at Kshs.7, 500.00 per month. He claimant further states that she was confirmed in appointment as a permanent staff by the letter dated 26.07.2006 and her salary gradually increased to Kshs.58,000.00 per month.

The respondent has pleaded the employment was effective12.05.2013 at Kshs. 10, 020.00 gross per month. The respondent further pleaded that the claimant was confirmed in employment on 26.07.2016 and appointed as a Junior Barista effective 01.07.2016. Further, the respondent pleaded that on 14.02.2017 the claimant was promoted to Promotions Events Coordinator at monthly gross pay of Kshs. 45, 000.00 and she reported to the sales manager. The respondent's witness (RW) was Kenneth Teyie, the respondent's manager. He testified that as at termination the claimant had worked for the respondent for about 15 years. By that evidence the Court returns that the claimant was employed in 2003 as per the claimant's evidence.

The **2nd issue** for determination is whether the termination of the claimant's contract of service was unfair. By the letter dated 25.10.2017 a

formal complaint was made against the claimant by her immediate supervisor, RW. The allegations ranged from insubordination, constant wild allegations against the supervisor and the other colleagues at work made in writing, work ethic of refusal to be held accountable by skirting around instead of giving proper answers to work related questions, engaging external staff (casuals) without approval, levelling against the supervisor unfounded allegations, failing to embrace team work and instead levelling accusations against assigned team members, attending weekly sales meetings at her own leisure despite reminders to attend and to take the meetings seriously, and taking weeks or even months to present reports and reconciliations of accounts. RW as her supervisor took the view that the claimant was not adding value but generated negative energy pulling everyone down and recommended that she either switches departments to report to someone she can actually work with and be replaced with someone more dynamic and better work ethics.

The claimant received the show-cause notice dated 31.10.2017 and the allegations included the following:

- a. Failure to attend weekly sales meetings on 2nd, 16th, 23rd, and 30th October 2017 and despite several reminders from her supervisor to attend and take the meetings seriously. That further she had failed to send updates to her supervisor or the finance department her accounts and status of debts owed by customers she handled and which was a very important agenda at the weekly meetings.
- b. On 23.09.2017 and 23.09.2017 she engaged a casual one Collins Muga in disregard of respondent's policy and approval by her supervisor. The casual had been engaged to assist the claimant to serve coffee at events the company was supporting. The same casual worker was engaged by the claimant on 12.10.2017 at an event to assist despite the direct instructions by her supervisor to deploy an internally contracted staff.
- c. Failure to provide timely reports and reconciliations and details were enumerated where she had failed to do so.
- d. On 30.10.2017 the claimant had failed to report on duty and without prior permission from her supervisor.

She was required to show-cause in 3 days why disciplinary action should not be taken against her. The letter was signed by Rose Magwilu, Human Resource Manager. The claimant testified that she attended the disciplinary hearing on 14.11.2017 and she opted not to attend with a union representative. Her responses to the allegations at the hearing per the minutes on record and which she signed were as follows:

- a. She was aware that it was mandatory to attend the Monday departmental meetings. On 02.10.2017 she had attended the meeting but on 16.10.2017 and 23.10.2017 she had not attended because she was attending to clients' events outside the office. On 30.10.2017 she did not attend the meeting despite repeated reminders by her supervisor to do so. Her response was that she reported at the field and notified her supervisor thereafter. She also stated that she did not attend the meetings because she had informed management issues about intimidation by her supervisor. The management had failed to intervene.
- b. She replied that she engaged the casual because her supervisor failed to support her on field events. At some events (Faraja and St. Christopher) the supervisor promised that he had advised Sam and Fridah to get her merchandisers to assist the claimant but none turned up for the event. She engaged Collins only when the support team was not available. On 29.09.2017 she requested the supervisor for assistance and only Fridah, the sales coordinator was available. She engaged the casual one Muga and her supervisor approved his payment. On 12.10.2017 she informed the supervisor that she would travel upcountry for burial of a colleague and there was a field event. The supervisor told her on phone to make her own arrangements because nobody was made available to step in and to assist. She had no option but to engage Collins Muga to assist and set up the field event which she had committed to the client. She explained that she did not seek approval prior to engaging Collins Muga because she had been using him since 2013 and he was a trained barista and he was reliable, respectful and supportive and her supervisor had full knowledge. She stated she had always communicated her challenges during field events.
- c. She delayed to do reconciliation on time when she had back to back events and also did not return remaining stacks of coffee if she had back to back events so that it was not mixed with fresh coffee in the production.
- d. On absence without permission, she explained she reported to the field and informed her supervisor later.

The claimant was summarily dismissed by the letter dated 13.12.2017. The dismissal was effective 13.12. 2017 with pay to that date and pay in lieu of leave due but not taken (less liability owed to the respondent). Her pension dues would be paid. She was informed about the right to appeal. She appealed. Her appeal meeting was held on 23.01.2018 with one Rozy Rana. The claimant explained as follows:

- a. She did not attend weekly Monday meetings because her supervisor attacked her at the meetings and that added to her ill-health. She had reported the grievance to the Human Resource Manager and told there was no evidence despite her availing audio recording but the Human Resource Manager had said it was not audible. The evidence from the doctor was an undated note stating the doctor attended to her and nothing more.
- b. On days off she said she informed the supervisor by email or phone that she was taking the days off. She was absent from duty on Mondays, the date of compulsory departmental meeting because she was tired from field events and by the same reason she communicated the absence belatedly.
- c. On hiring casuals, the claimant explained that she did so because she had not been provided the necessary assistants. She also explained she had been engaging Collins Muga over the years without prior approval by the supervisor and the Human Resource Manager.

By the letter dated 31.01.2018 the claimant was informed by the Managing Director Rozy Rana that the appeal raised no new grounds to justify the setting aside of the summary dismissal.

The Court has considered the evidence and the submissions. It is clear that the respondent accorded the claimant due process of a notice and disciplinary hearing as envisaged in section 41 of the Employment Act, 2007. The appeal process was undertaken. The Court returns that the dismissal was not unfair as far as the procedure was concerned.

As regards validity of the reasons, the claimant has by her representation and evidence shown that she would notify about her absence at meetings long after the meetings had taken place. She has also confirmed that she was aware that the Monday meetings were mandatory but she failed to attend on account that she was intimidated and attacked by her supervisor at the meetings. She also confirmed hiring the casual employee without prior permission or approval. She hired the casual employee without prior approval. She also confirmed delays in reporting and reconciliation and gave the excuse she did so when she had back to back events. The Court finds that the claimant breached the respondent's policies with respect to the levelled allegations and gave sheer excuses for her misconduct. The Court has considered the claimant's grievances about the alleged attacks by her supervisor, failure to be provided staff for the field events and the back to back events and returns that the failure to address the grievances as she may have raised was not a reasonable ground for acting to breach the clear respondent's policies in that regard. The Court considers that her grievances would pass as an explanation for failure to deliver or perform as expected or optimally and not a reason for breaching the respondent's clear policies in that regard. Accordingly the Court returns that the respondent has established that as at termination it had genuine reasons to terminate the claimant's contract of service as envisaged in sections 43, 45 and 47(5) of the Employment Act, 2007.

Thus, the Court returns that the termination was not unfair and the compensation as prayed for is not justified.

To answer the **3rd issue** for determination, the Court makes findings as follows on the other remedies as prayed for. **First**, the claimant during the disciplinary hearing confirmed that she would take an off for weekend days at field work. There was no dispute about the alleged overtime during the subsistence of the employment and the claimant testified that the overtime had to be computed by human resource department and then forwarded to accounts – and the claimant did not exhibit the documents she relied on in that process to justify the claims. While the claimant failed to show that the process was complied with, the Court finds that the particulars of the overtime time claim were not specifically pleaded and the necessary evidence was not provided. The prayer will fail. **Second**, the Court has found that the termination was not unfair and in view of the alleged gross misconduct, the Court returns that the respondent was entitled to terminate the contract of service with lesser notice than the contractual one so that pay in lieu of the termination notice will not issue as it was unjustified claim. **Third**, the Kshs. 80, 000.00 medical expenses will fail because the respondent has shown that it had a designated hospital for its staff and where it would meet the medical expenses but the claimant unilaterally failed to use that facility and allegedly incurred the amount now claimed. The prayer will fail as unjustified. **Fourth**, on annual leave RW testified that the leave days due were 16 days at **Kshs.44, 190.48**. The claimant has simply stated that she claims leave throughout the period of service. No evidence was given to justify the claim. In the circumstances she is awarded the amount as admitted for the respondent. **Fifth**, the claimant is entitled to a certificate of service.

The Court has considered the unresolved grievances the claimant made and returns that in absence of a specific remedy prayed for in that regard, the Court will not delve into the issue.

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

- a. Payment of Kshs.44, 190.48 by 15.01.2020 failing interest to be payable thereon at Court rates from the date of filing the suit till the date of full payment.
- b. The respondent to deliver a certificate of service by 15.01.2020.
- c. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 19th December, 2019**.

BYRAM ONGAYA

JUDGE