



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**  
**CAUSE NO.418 OF 2016**

**MILKA ATIENO OJUKA.....CLAIMANT**

**VERSUS**

**NASU TRAVELLERS SACCO.....RESPONDENT**

**JUDGEMENT**

On 17<sup>th</sup> October, 2016 the claimant filed the Memorandum of Claim and served the respondent. On 28<sup>th</sup> February, 2017 the respondent entered appearance, filed defence and witness statement. The matter was mentioned on 8<sup>th</sup> December, 2017 for taking hearing directions but the respondent was absent despite being served. The matter was mentioned on 13<sup>th</sup> June, 2018 for taking hearing date, the respondent was served and returns filed but they remained absent. A hearing date was allocated for 6<sup>th</sup> November, 2018 and the respondent served and returns filed noting Hearing Notice was received on 23<sup>rd</sup> October, 2018 but there was no attendance.

The court satisfied that the respondent was aware of proceedings, heard the claimant and reserved judgement as herein.

The claimant was employed by the respondent on 1<sup>st</sup> December, 2010 as a Secretary and paid a wage of Ksh.11,500.00 per month. The claimant worked until 1<sup>st</sup> August, 2014 when her employment was terminated unfairly and while earning a wage of Ksh.15,000.00 per month.

The claim is that the termination of employment was without notice and Certificate of Service was not issued. The claimant is seeking the following;

- a) *Notice pay at Ksh.15,000.00;*
- b) *14 days annual leave not taken Ksh.7,000.00;*
- c) *Severance pay Ksh.28,500.00;*
- d) *Compensation Ksh.180,000.00; and*
- e) *Certificate of Service.*

the claimant testified that upon employment by the respondent she was issued with a letter of appointment and worked diligently until 1<sup>st</sup> August, 2014 when closing work for the day Peter Ngetich the accountant for the respondent called her and said the boss, Mr Peter Maina the respondent chairman wanted to see

her. Mr Maina told the claimant to go home and rest until called back. This sounded well as the claimant had not taken her leave for 4 years. The claimant took a month but when her wage was not paid she went to the office to enquire and Mr Maina told her terminal dues would be paid. The claimant also found she had been placed and a new employee was at her desk undertaking the duties of secretary. She realised this was a dismissal from her employment.

The claimant reported the matter to the County Labour office that made a report and when the respondent was summoned said that the claimant had been of poor performance which was not true as no such matters had been brought to her attention before. The respondent then failed to attend summons by the labour officer.

The claimant also testified that the defence that she absconded work is not true as she had been sent home with a promise to rest and would be called back. She was the only secretary for the respondent and had not taken a break for many years. This resulted in unfair termination of employment and the dues claimed should be paid.

In defence, the respondent's case is that the claimant had a disciplinary issue on 6<sup>th</sup> June, 2014 and from 7<sup>th</sup> June, 2014 deserted work. Attempts to trace her were futile since she switched off her phone and became unreachable. The respondent had no option but to look for a casual employee to hold the claimant's place since the claimant would not hold the employer at ransom with continued absence without any explanation.

The claimant was never terminated in her employment, she deserted duty. She had not been a diligent employee and had several disciplinary matters. She was paid the due pay for July and August and none is claimed as evidence of her desertion of duty.

On a without prejudice basis, the respondent defence is also that the claimant had not picked her Certificate of Service. the desertion of duty is negligent for the reasons that it was without approval and she would report to work late, lacked teamwork, had uncontrollable bad emotions to other staff, misplacement of documents in the office, being untidy in the office and failing to keep the office clean. There was no diligent in duty and for these reasons, the claim should be dismissed.

In the witness statement of Peter Ngetich he avers that he is the office manager for the respondent. the claimant applied for her position as secretary, was interviewed and passed whereupon a letter of appointment was issued. For a period of one year she worked well until she started reporting to work late, would openly differ with her superiors and got into uncontrollable temper resulting in several reprimands but she failed to change.

On 3<sup>rd</sup> June, 2014 the claimant was issued with a show cause letter why disciplinary action should not be taken but she chose to abscond duty. The July salary was paid but the claimant had not reported to work. Efforts to trace her were futile. With desertion of duty, the claimant terminated her own employment.

There was no witness called by the respondent as they remained absent at the hearing.

At the close of the hearing, the claimant filed her written submissions.

The claim is that the claimant was sent home on 1<sup>st</sup> August, 2014 with a promise to be recalled back to work which was not done and when she sought to be paid her due wage, the respondent noted that these dues would be paid as her employment had terminated. The defence is that the claimant deserted work on 7<sup>th</sup> June, 2014 after she was issued with a show cause notice over a disciplinary matter. The show cause notice is not submitted and the nature of the misconduct committed to justify the issuance of such notice is not elaborated. The respondent has however confirmed the July and August, 2014 wages were paid. There is no claim with regard to unpaid wage.

Desertion of duty is a matter subject to summary dismissal. Where an employee is absent from work for

no good cause, the employer is allowed under the provisions of section 44(4) of the Employment Act, 2007 to dismiss such an employee summarily. On the defence that the claimant deserted work, no action was taken in this regard.

The pleadings that the claimant deserted work and efforts to trace her via phone were fruitless are bare.

The claimant was employed upon application and issued with a letter of appointment. There is letter dated 27<sup>th</sup> November, 2010 issued to the claimant upon employment by the respondent. Such letter had no address. The details with regard to the phone numbers the respondent tried to reach out to the claimant are not disclosed.

Section 10 of the Employment Act, 2000 requires an employer to keep a very detailed work record. Such must include the following;

*(2) A written contract of service shall state—*

*(a) the name, age, permanent address and sex of the employee;*

*(b) the name of the employer;*

*(c) the job description of the employment;*

*(d) the date of commencement of the employment;*

*(e) the form and duration of the contract;*

*(f) the place of work;*

*(g) the hours of work;*

*(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;*

*(i) the intervals at which remuneration is paid; and*

*(j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and*

*(k) any other prescribed matter.*

These provisions are mandatory.

Where there is compliance with the provisions of section 10(2)(a), the respondent ought to have had the permanent address of the claimant. Such would have become useful and relevant when her alleged absconding of duty is said to have happened.

Where the respondent failed to reach the claimant, recourse is with the labour officer. A notice to the claimant copied to such office would have dully been taken into account.

The lapse in addressing the provisions of the law, and then failure to address the alleged absence from work as required under section 44 of the Employment Act, 2007 left the defence untenable. The respondent has failed to justify the reason leadings to the termination of the claimant's employment.

In any event the payment of a salary for July and August, 2014 to an employee is allegedly absent from work following a case of misconduct which had warranted the issuance of a notice to show cause leaves the defence flawed. Why would an employer pay an employee absent from work for two months? Where

the claimant was the only secretary at the office and her absence resulted in the hiring of a casual employee to take over her duties from 7<sup>th</sup> June, 2014 the defence that that due salary afterwards was paid is a flawed defence. This leave the claimant in her evidence more reasonable and that she was sent away and when she returned she found her job allocated to a new employee.

Where termination of employment is without a valid reason and due process is not followed in accordance with section 35, 41 and 43 of the Employment Act, 2007 and which requires notice, hearing and a valid reason, such amounts to unfair termination of employment and notice pay is due as well as compensation.

The claimant was earning Ksh.15,000.00 as her last wage. Notice pay under section 35 of the Act is awarded at one month all at Ksh.15,000.00.

Compensation is due under section 49 of the Act and section 45(5) requires the court to take into account the previous conduct of the employee. Despite the respondent not attending at the hearing, the claimant did not address the various matters set out by the respondent with regard to her work and the matters of her work performance. putting this into account as the court is required to, a compensation of 3 months gross pay is found appropriate. The claimant is awarded Ksh.45,000.00 in compensation.

There is no challenge to the owing leave for 14 days. The claimant is awarded Ksh.7,000.00 for annual leave due.

On the claim for severance pay, the case for the claimant did not stand out as a redundancy to justify the claim for such a remedy. Such is declined.

**Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of compensation at Ksh.45,000.00; notice pay Ksh.15,000.00; due leave Ksh.7,000.00; and the claimant shall be issued with a Certificate of Service in accordance with section 51 of the Employment Act, 2007. Costs awarded to the claimant.**

Dated and delivered at Nakuru this 6<sup>th</sup> day of December, 2018.

**M. MBARU**

**JUDGE**

In the presence of:.....