



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1254 OF 2013

MARY M MWANGI CLAIMANT

VERSUS

SOFIA MANGINA T/A

ATHENS LEATHER PRODUCTS RESPONDENT

JUDGEMENT

The claimant, Mary Mwangi was employed by the respondent, a business situate at the Village Market as a Shop Attendant on 27th January, 2006. The claimant was paid a monthly wage of Kshs.9,000.00 which was increased to Kshs.15,500.00 at the time of termination. On 30th March, 2013 the claimant's employment was terminated without notice or reason and without payment of the terminal dues owing.

The claimant is seeking payment of;

- a) *One month salary in lieu of notice at Kshs.15,500.00;*
- b) *Accrued leave for 2 years Kshs.21,700.00;*
- c) *Service pay for 7 years Kshs.54,250.00;*
- d) *Balance of salary for December 2012 Kshs.8,000.00;*
- f) *Balance salary for February 2013 Kshs.6,000.00;*
- g) *Balance of salary for March, 2013 Kshs.2,000.00;*
- h) *House allowance for 7 years Kshs.195,300.00;*
- i) *Compensation; and*
- j) *Costs.*

In evidence to support her case, the claimant testified that upon employment by the respondent she performed her duties diligently. She worked for the respondent for 7 years from 2006 to 30th March, 2013. The claimant was at work with her 3 year old child since she had no househelp at home. In the evening and before they could close the shop the respondent called her and wanted to know why she had brought a child at the shop but the claimant noted that there were 3 other employees with children but the

respondent got angry and told her to leave her shop and go away. That the termination was unfair as there was no notice and it was common practice to bring children at work as there was a playing ground near the shop and within the Vilalge Market.

In cross-examination the claimant testified that the shop and business of the respondent is situated at the high end Village Market visited by ambassadors and persons of high calibre. That she had gone to work with her child as this was a public holiday and there were many customers visiting the shop. The claimant as the supervisor had to attend work due to high business. She did not inform the respondent or agree with her manager as this was not the first time she was bringing the child at work. The respondent Ms Mangina was the godmother to the child who bought a gift for the child even before birth.

The claimant also testified that each employee had to sign in and out while at work. All sales and payments were recorded. But on 30th March, 2013 the respondent called the claimant and directed that because she had come to work with her child she had to leave immediately. The respondent was not at work and had to call a colleague of the claimant to confirm that there was a child at the shop. The termination was done over the phone. Several times the claimant was out of work due to illness and she only had to call the respondent for permission to be away. When she took the child to work, there was a playing ground with people looking after the children and she only went to feed the child over lunch hour.

The salary due for March, 2013 was paid via the phone but there was no notice pay.

The claimant also called Miriam Wairimu Wathugi as her witness and testified that on 30th March, 2013 the claimant came to work with her child since she had no househelp and it was a public holiday. The employees were allowed to bring children at work as there was a play ground just near the shop and work place. But on this day the respondent called and asked to know who had allowed the claimant to bring her child and became angry and then called the claimant and told her to get out of her shop. The respondent had called Sandra and told her to put the phone on loudspeaker as the respondent was taking to all the employees shouting and quarrelling as to why the claimant had been allowed to come to work with her child at the shop when there were many customers.

Ms Wathugi also testified that as the manager, upon her defence of the claimant she was given compulsory leave and she decided never to report back at the respondent work and thus terminated her employment the same day. That she had had several shouting incidents with the respondent. Such were erratic and not informed on any basis. The respondent was of the habit of quarrelling employees who felt victimised and kept silent to avoid losing employment.

Defence

In defence, the respondent admits that the claimant was in their employment but there was no case of unfair termination. That the failure to issue the claimant with a letter of appointment was not fatal to her employment and the claims set out are denied. The claimant's employment and work attendance were erratic and irregular as she was either absent from duty without leave or said to be unwell or had absconded duty after taking advances on her salaries. The claimant was not terminated but absconded duty and was therefore not entitled to notice or pay in lieu thereof.

The claim for leave due is not due for the reasons that;

In 2011 the claimant took 13.5 days of leave with a balance of 7.5 aggregated to Kshs.3,750.00

In 2012 the claimant took 4.5 days of leave with a balance of 16.5 days aggregated to Kshs.8,250.00

2013, the claimant had no leave days due as her work attendance was erratic.

The defence is also that the claimant was not entitled to a house allowance as this was not part of her contract of employment. And by absconding duty, the claimant effectively terminated her employment with the respondent. This absconding was the norm in the entire duration of employment, a matter the

claimant failed to disclose to the court. The claims set out are not justified or due in law and the claim should be dismissed.

In evidence, Ms Sofia Mangina the proprietor of the respondent retail business situate at the Village Market and testified that the claimant was her employee and had no problems with children and went out to give support to mother and child where every year she allowed employees to bring their children for a lunch as the employees had to work over weekends. This was to give support to employees by allowing them a day out with their children.

The claimant was on and out of work due to family problems. She was not attending work in a coordinated manner or time as she would report and then ask for time off and would only come back in an irregular manner. There was an attendance register and the claimant signed for work attendance and all the advances taken.

Ms Mangina also testified that she had known the claimant for a long time and knew she had personal problems. She would discuss the problems with her as a friend and give advice. The claimant had an affair with a security officer at the Village Market and he was based near the shop and after getting a child they had problems. The claimant spent so much time following up on the father of the child and sometimes left the child along the corridors of the mall at the Village Market where the shop was placed.

Ms Mangina had a soft spot for the child as she loves children and in sympathy and bought gifts. However on 30th March, 2013 the claimant never called her to state that she had problems at home. The claimant brought the child at work and made the child sleep on the floor of the shop. Had she said there were problems at home, time off was allowed. As the shop is visited by many customers of high rank, to find a child sleeping on the floor was not good and in any case this was not proper for the child and the business.

Miriam was the manager but covered for the claimant and when the witness called at the shop to find out how things were going she heard a child crying from the background. She sensed that things were not going well and she used her own means to find out what was wrong. She established that the claimant had been with the child within the shop all day as the Village Market has no child playing field where a child can be left on its own all day. It was also not possible to leave a 3 year old child on its own for long hours. There were no employees of the Village Market employed to look after other employees' children and this meant the claimant had to attend to her child while at work which was not appropriate. It was also a matter that could damage the business name for customers to come and find a child sleeping or crying inside the shop.

The claimant was in essence spoiling the business by her conduct and this was not allowed. Despite the good relations between the claimant and her employer, she had crossed the line by going beyond limit. Ms Mangina got upset with the claimant and Miriam who had tried to cover up for the claimant. She therefore called the claimant and asked her to go and resolve her problems and then report back to work as had happened before when she had problems. She demoted Miriam due to her conduct and by the end of the day, Miriam refused to talk to her and was therefore asked to hand over the office keys to Sandra. She never reported back to work the next day.

That there were all chances of terminating the claimant due to her irregular work attendance but having known her for long and the personal problems she had discussed, she sympathised and let her return to work. The case of unfair termination does not apply. The claimant was paid for all days worked. There is a work record to this effect.

Both parties filed written submissions.

Determination

I have gone through the pleadings filed, the evidence of both parties and the written submissions filed and putting these into account, the issues that emerge can be set out as;

Whether the claimant was terminated from her employment with the respondent;

If there was termination whether such was unfair; and

Whether there are any remedies

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The respondent has admitted that there was no employment contract issued to the claimant. The claimant absconded duty after being confronted for bringing her child at work without prior approval or knowledge of the respondent. The remedies sought are not due since the claimant was paid all her dues; there was no house allowance due in her contract of service and that the case should be dismissed.

The law requires that the employment relationship such as existed between the claimant and the respondent be put into writing. Such is important as the terms and conditions of such an employment are put down and either party is able to know their work boundaries.

In this case it became apparent in evidence that the respondent, Ms Mangina and the claimant enjoyed a long relationship over the years that translated into friendship and employment. The respondent became lenient and allowed the claimant a lot of latitude to attend to her personal issues and time off work. Ms Mangina went further and became the godmother to the claimant's child and with it gifts and sympathies went with it.

Whereas it is important for an employer and employee to maintain healthy work relations, become friends and socialise, where there is no written terms the conditions that regulate the employment relationship, things can get hazy and the employee can take advantage of the goodwill of an employer and the employer can get into an unhealthy relations with the employee for being unable to enforce the unwritten rules for work attendance.

Even where friendship may lead to employment, the law makes it mandatory that the employer is under a duty to issue an employment contract to the employee. Section 10 of the Employment Act provides that;

10. Employment particulars

(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment. [emphasis added].

Where employment has started informally, within two months, the employer should know whether the continued employment of the employee is necessary or appropriate and as such, a contract of service should be issued. 2 months is a reasonable time period to assess an employee and know what terms and conditions to set out.

With employment, the employee enjoys rights. Before termination of such employment notice and reasons for such termination must issue in terms and section 35 and 43 of the Employment Act. Where an employee abscond duty for whatever reason(s), such warrant summary dismissal by the employer. The duty is upon the employer to demonstrate the circumstances leading to the termination and or summary dismissal.

In this case, where the claimant absconded duty after the incident of 30th march, 2013 there is no written communication by the respondent to this effect, warning or letter of reprimand issued. The claimant was never recalled back to work and she declined to attend.

I take it the camaraderie relationship established between the claimant and her employer, the claimant took

it to mean that she could leave work at will and come back at will. There were no written rules to be followed. None had been issued to her for the entire duration of her employment. Even where there were rules, such were not written and therefore not subject to reference in these proceedings. This goes back to lack of having a written contract of service. Had there been one such contract, the respondent would have gone back to it where the claimant misconducted herself by bringing her child to work and let the child lie on the floor of the shop.

The failure to issue a written contract of service to the claimant must be at the expense of the employer. The duty to issue the contract of service is upon the employer.

The claimant was clear in her evidence that the employees were allowed to bring their children at work. That there was a policy to bring such children and leave them at the playing grounds behind the shop. The respondent witness contested these submissions on the basis that there was no such policy and in any case the Village Market where the respondent business is situated has no such facility.

The claimant testified that her child was 3 years old. Any facility such as the Village Market, even where there is a playing ground or not, a child of 3 years cannot be left unattended by a caregiver, a parent or a person directly responsible over the child in an open and common facility such as a playing field. Such is a child too young to be left unattended for long period of half day until lunch hour when the claimant testified that she went out to feed the child. At such an age, such a child requires round the clock close monitoring and attendance. Such a child has obvious needs that cannot wait and hold in a common public facility such as a playing field.

I take the evidence of the respondent witness as credible and true that the claimant had carried her 3 year child to work and made the child sleep on the floor. This is not healthy for a child of 3 year old and in any event to have a child sleep on the shop floor while customers are walking around the shop is catastrophic for any business. Any person seeing the child on the floor would challenge the business practice of the respondent. Such is a matter that can easily invite a call to the police or the nearest child care office.

The claimant's case is that there was a policy to carry children at work. Such policy was not written. 4 other employees had their children at the shop but their ages are not stated. This goes back to the unwritten rules and policies of the respondent. The failure to put any record into writing, the employees interpreted the unwritten rules and regulations to suit their needs.

The claimant can therefore not be faulted for taking matters into her own hands when faced with a personal problem such as not having a spouse. She knew there was an unwritten rule to bring her child to work and attend to the child to the best of her knowledge.

Ultimately, the failure by the respondent to issue a written reprimand, warning or notice to the claimant to the effect that she should report back to work or that due to her failure to attend work she had been dismissed goes contrary to the law. The direction that the claimant should leave the shop and go away was simply taken as directed. The claimant in her mind interpreted the same to mean that she had been terminated without notice or for no reason. This has resulted in the current suit.

Where an employee has been dismissed or by the conduct of the employer the employee finds to have been dismissed, section 47 of the Employment Act provides;

(1) Where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87.

(2) ...

(3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any

other infringement of his statutory rights.

(4) ...

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The practice of not issuing any written communication to the claimant in the entire course of employment comes to bear. The employment and termination is not documented. The law apply. The respondent could not thus terminate the employment of the claimant without written notice or reasons as required under Section 43 of the Employment Act thus provides;

(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.

On this background, even where the respondent genuinely felt that the claimant had absconded duty, the failure on their part to act in accordance with the law by formerly terminating the employment or issuing a summary dismissal as required under section 44 of the Employment Act, putting the claimant in limbo was an unfair practice specifically prohibited under section 45 of the Employment Act.

The apparent failures by the respondent to comply with clear provisions of section 10, 35, 43 and 45 of the Employment Act led to the unfair termination of the claimant. The failure to issue a contract of service spelling the terms and conditions of employment was a fatal mistake. Such can only be applied to the advantage of the employee. I find the claimant was unfairly terminated from her employment.

Remedies

On the finding that the claimant was unfairly terminated, noting the work history and attendance of the claimant was irregular, the resulting termination though in the fault of the respondent, compensation beign at the discretion of the court shall not issue. However, the claims for terminal dues owing shall be assessed on their merits.

Notice pay is due in a case of unfair termination. Such is due in terms of section 35 of the Employment Act. The claimant is awarded Kshs.15,500.00.

Leave days due claimed at 2 years are claimed. Section 28 of the Employment Act requires the employer to give an employee annual leave and keep a record of such leave. Even where the claimant was irregular in work attendance, the respondent has not separated the time off as beign for days off or on annual leave. In the absence of a record to annual leave that is due to the claimant under section 28, the claim for leave due for 2012 and 2013, the leave for 2012 shall be paid in full while the claimant is only entitled to 6 days leave for 2013 as she was terminated on 30th march, 2013. The claimant is awarded Kshs.18,600.00 for annual leave due.

Service pay is due in terms of section 35(5) and (6) of the Employment Act and particularly where there is no record that the employer deducted and remitted statutory dues. The respondent has not submitted a pay slip or confirmed that there were NSSF and NHIF deductions or remittances for the claimant. In such lapse, service pay is due for the number of years served based on the last salary paid. Employment commenced January, 2006 and ended March, 2013 such beign 6 full years of service. The service pay due is Kshs.46,000.00.

The claim for balance pay for December, 2012 and February, 2013 as well as the salary for march, 2013 is claimed on the basis that such were not paid. The respondent has submitted records to confirm such payments and based on the work attendance records of the claimant. The claimant also confirmed in evidence that her march, 2013 salary was paid via Mpesa and through her phone. Based on the work records, the claims for non-payments as set out are not due.

House allowance is claimed on the basis that this was not provided and the claimant was not given housing. There is no pay slip or statement or contract of service setting how the claimant was to enjoy her right under section 31 of the Employment Act in terms of provision of housing. For the 84 months the claimant was in the employment of the respondent, based on the last salary paid, 15% of the same amounts to Kshs.195,300.00. Such an allowance is thus due and the claimant is awarded Kshs.195,300.00.

Judgement is hereby entered for the claimant against the respondent in the following terms;

- (a) Notice pay Kshs.15,500.00;
- (b) Leave days due, Kshs.18,600.00;
- (c) House allowance Kshs.195,300.00;
- (d) Service pay Kshs.46,000.00; and
- (e) Each party shall bear own costs.

Dated and delivered in open court at Nairobi this 9th February, 2017

M. MBARU

JUDGE

In the presence of

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