



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 223 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ELIZABETH NASWA KHAEMBA CLAIMANT

-Versus-

KAKUZI LIMITED (KABOSWA TEA ESTATE) RESPONDENT

J U D G E M E N T

The Claimant filed suit against the Respondent alleging unlawful termination of her employment by the Respondent. She seeks a declaration that the termination of her employment was unlawful and payment of Shs.168,173.20 on account of notice, leave, overtime and compensation for unfair termination. She further seeks costs and interest.

The Respondent filed a defence in which it denies allegations of the Claimant and avers that the Claimant was terminated on account of redundancy after adequate notification. The Respondent further avers that the Claimant was duly notified of the voluntary retirement request, duly heard as per the rules of natural justice and given an opportunity to appeal against the said retirement package in accordance with the forums of dispute resolution under the Labour Relations Act.

The Respondent finally avers that this suit was unnecessary as it is the Claimant who failed, ignored and/or refused to collect her legally payable terminal dues as agreed between the Claimant, the Respondent and the Kenya Plantation and Agricultural Workers Union in spite of signing an agreement undertaking to collect the same.

At the hearing of the case the Claimant testified on her behalf while the Respondent called KABURU MUKHETHA, Divisional Manager in Respondent's Kaboswa Estate where the Claimant worked. Parties thereafter filed and exchanged written submissions.

Claimants Case

The Claimant in a brief testimony testified that she was employed at Kaboswa Estate as a tea picker on 5th September, 2011 and was paid according to the harvest weight. She worked until 8th January 2014. On that day she reported for duty and found her number missing. She was informed by the supervisor that her number was not there. She was not told why and was never given any letter of termination. She testified that a missing number signified a termination.

She testified that the name of her supervisor was Simon Korir. She denied absconding duty. She also denied that she left employment in 2012. She testified that she worked from 6am to 5pm from Monday to Saturday and rested on Sunday except during peak season when she worked on Sundays too. She was

given public holidays off.

Under cross examination the Claimant stated that she was employed as a casual, that she was given a number then stopped and again given a number then stopped severally over the period she worked. She stated that the fixed term contract was introduced later, although she could not remember when. She stated the contract was periodic, sometimes up to 9 months. She further stated that she was never given annual leave or paid in lieu.

Respondents Case

KABURU MUKHETHA for the Respondent testified that he knew the Claimant who worked as a tea plucker. He testified that she was employed on fixed term contract. Her first contract commenced on 2nd December 2011 to 14th February, 2012. It was contract No.504342. The second contract was from 3rd August 2012 to 29th November, 2012.

Mukhetha testified that the Claimant was paid on piece rate depending of the quantity of tea picked. He testified that she was provided with housing at Taboyat village House No.79 throughout the period she worked. He stated that since the contract stated the start date and the end date the Claimant was not entitled to termination notice. He stated that the last contract was supposed to end on 29th November, 2012 but the Claimant worked up to 29th September, 2012. He testified that because she did not work for 12 consecutive months, the Claimant was not entitled to annual leave and further that she did not qualify for pro-rata leave as she never worked for 3 months. He testified that the Claimant was not terminated, that she deserted duty. He testified that she is not entitled to any of the prayers sought.

Under cross examination the RW1 stated that the Respondent paid NSSF for the Claimant. When referred to the NSSF Provisional Member Statement for the Claimant for the period 1st September, 2006 to 30th September 2013 at page 13 of the Claimant's bundle of documents he confirmed it reflected contributions for the whole year in some years. He however stated that the Claimant did not work for all the 12 months for the Respondent.

The Respondent's witness was cautioned at least two times for being evasive in responding to questions put to him in cross examination.

Determination

I have carefully considered the pleadings, the evidence adduced in court and the written submissions.

There is a lot that does not make sense in the Respondent's case. To start with, the pleadings state the Claimant was declared redundant yet in the witness statement by Kaburu Mukhetha, he states that the Claimant worked on fixed term contracts between 6th December 2011 and 14th February 2012, 5th May 2012 and 26th June 2012 and finally from 4th August 2012 to 28th September, 2012.

In the contract documents filed in court there is evidence that the claimant was at work from 2nd December, 2011 to 30th January 2012, 3rd May to 30th August 2012 and again from 3rd August to 29th November, 2012.

The Claimant on the other hand produced NSSF statement reflecting remittances for the months of December 2011, January, February, May, June, August, September, October, November and December 2012, January to September 2013 with the exception of August, 2013.

From the foregoing it is evident that the Claimant worked on fixed term contracts between December 2011 and February 2012, then May and June 2012, then August 2012 to September 2013 continuously with a break only in August 2013.

It is on the basis of the foregoing that I will consider this case. The issues for determination are therefore how and when the Claimant left employment, and what she is entitled to.

On the 1st issue the Claimant states that she was terminated by the withdrawal of her employment card. The Respondent has 2 different versions. In the pleadings it states as follows at paragraphs 7, 8, 9 and 11 of the Replying Memorandum -

7. THE Respondent denied the contents of paragraph 7 of the Memorandum of Claim in total and further avers that it has a right to terminate the Claimant on account of redundancy which he had been well informed of and adequate notice issued.

8. THE Respondent further contends that, the Claimant was duly notified of the voluntary retirement request duly heard as per the rules of natural justice and given an opportunity to appeal against the said retirement package if any in accordance with the forums of dispute resolution under the Labour Relations Act.

9. As a consequence of the foregoing, the Respondent justifiably terminated the Claimant and contends that due process including a fair hearing was accorded to the Claimant in accordance with the relevant laws, regulations and agreements that were applicable as between the Claimant and the Respondent.

11. THE Respondent is a stranger to the contents of paragraph 9 of the Memorandum of Claim and avers that this suit is unnecessary as it is the Claimant who has failed, ignored and/or refused to collect his legally payable terminal dues as agreed between the Claimant, the Respondent and the Kenya Plantation & Agricultural Workers Union where the Claimant is a member from the Respondent despite signing an agreement as to the amount payable undertaking to collect the same. The Respondent shall therefore pray for the Claimant to pay for the unnecessary litigation costs the claimant has placed on the Respondent.

However in the witness statement and at the hearing the Respondent avers that the Claimant deserted duty. The Respondent however did not produce any proof of the Claimant's desertion of duty.

It is trite law that a party is bound by its pleadings. As was stated by the Nigerian Supreme Court in ADETOUN OLADEJI (NIG) V NIGERIA BREWERIES PLC S.C. 91/2002 by Judge Pius Aderemi JSC,

'... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'

(See also **Independent Electoral Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR**. Having pleaded that the Claimant was declared redundant and her terminal dues were awaiting her collection, I hold that the Claimant was declared redundant as pleaded in the Respondent's defence, and that she did not desert duty as alleged by RW1.

As I have pointed out, the Respondent's witness KABURU MUKHETHA(RW1) had to be cautioned twice for evading questions asked by the Claimant's Counsel in cross examination and therefore his testimony cannot be trusted. The fact that the Respondent pleaded one thing and then abandoned its pleadings and led evidence completely different from its pleadings also shows that the evidence of the Respondent cannot be trusted.

Remedies

Having found that the Claimant was declared redundant, what then is she entitled to?

She prayed for one month's salary in lieu of notice which I award her at a basic rate of Shs.345.19 per day per her payslip for February 2012 for 28 days at Shs.9,665.30. (Refer to sections 35(1)(c), 36, 37 and 49 of Employment Act)

She also prayed for leave. According to the evidence on record, she worked for a total of 18 months. At 2 days per month provided for in her contract she is entitled to 36 leave days. Based on the rate of pay of Shs.345.19 per day, I award her Shs.12,426.90.

The Claimant further prayed for severance pay. The only evidence on record is that she worked for 18 months over a period of 2 years. Going by the provisions of section 40 of the Employment Act, I award her 1 year's severance pay at 15 days which amounts to Shs.5,177.85.

The prayer for overtime is rejected as the Claimant was paid on piece rate and her payslips reflect that she was paid overtime with her monthly wages.

On the prayer for compensation, I award the Claimant 2 months' salary on grounds that the Respondent did not comply with the procedure for redundancy under section 40 rendering the redundancy an unfair termination of employment. Two months' salary at Shs.345.19 per day is Shs.20,711.40.

The Respondent shall also pay Claimant's costs and the decretal sum shall attract interest at court rates.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF FEBRUARY, 2017

MAUREEN ONYANGO

JUDGE