



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 77 OF 2013
OLIPHA NYACHMA KENYANYACLAIMANT

VERSUS

SANA INDUSTRIES COMPANY LIMITED..RESPONDENT

Mr. Khalwale for the claimant

Mr. Kimondo for respondent

JUDGMENT

1. The suit was brought vide a memorandum of claim on 23rd January 2013 and amended by one filed on 26th November 2014 in which the claimant seeks compensation for wrongful dismissal and payment of terminal benefits set out in paragraph 15 of the memorandum of claim as follows;

(a) One month's salary in lieu of notice	Kshs.7,958/=
(b) 10 months' salary between July 2011 – May 2012	Kshs.79,580/=
(c) House allowance for 10 months	Kshs.14,040/=
(d) Annual leave for one year	Kshs.7,958/=
(e) Severance pay for 10 years	Kshs.34,130/=
(f) Overtime and underpayment	Kshs.113,580/=
(g) 12 months' compensation	Kshs.95,496/=
(h) Costs of the suit	
Total	<u>Kshs.352,742/=</u>

Facts of the Claim

2. The claimant was employed by the respondent as a General Worker in March 2001 at a monthly basic pay of Kshs.6,826/=.

3. The employment was oral. The claimant worked from 7 a.m. to 5 p.m. for 7 days without payment of overtime.
4. The claimant contracted a disease in the course of the employment and was treated at Kenyatta National Hospital for several days. The disease was due to chemicals the claimant handled without protective clothing.
5. The employment of the claimant was terminated in August 2011, without payment of terminal dues.
6. The claimant served diligently for 10 years continuously and seeks the reliefs sought stating that the termination of employment was unlawful and unfair.
7. The claimant filed a written statement dated 27th March 2012 in which he confirmed the particulars of claim adding that the termination was without notice and or payment of the listed terminal benefits. The claimant seeks a certificate of service also. The statement was adopted by the claimant as her evidence in chief.

Response

8. The respondent filed a statement of response to the claim. The respondent states that it manufactures hair additions and that the claimant was employed on 24th August 2004 and not 2001 as she alleges.
9. The respondent produced a copy of employment application form dated 24th August 2004 and allegedly signed by the claimant.
10. The respondent also produced a letter of termination of employment dated 2nd February 2007 allegedly signed by the claimant.
11. Respondent added that the working hours were from 7.30 a.m. to 4.30 p.m. and 7.30 a.m. to 12.30 p.m. on Saturdays. That Sundays and public holidays were rest days.
12. That respondent paid overtime worked together with the salary and same was reflected in the payroll and pay advice slips issued to all employees every month.
13. The respondent produced copies of the payroll for the years 2007, 2008, 2009, 2010, 2011 which show the various payments made monthly to employees including basic pay, house allowance, overtime and statutory deductions of NSSF, NHIF and PAYE.
14. Respondent denies the various claims by the claimant therefore of house allowance; severance pay, overtime and refund of NHIF and NSSF contributions.
15. The name of the claimant is shown on the payroll and he was severally paid basic pay, house allowance and overtime and statutory deductions of NSSF, NHIF and PAYE are reflected therein.
16. Respondent avers that the claimant was not dismissed from work but she deserted work in August 2011 and continued absenting herself from work without permission.
17. That she came back in February 2012 when she claimed to have been sick. During the absence she did not inform the respondent of her whereabouts nor about her sickness.
18. She was requested to explain in writing the reasons for the long absence with supporting documents and in particular a certificate of incapacity as per the law. She did not comply and was not seen again until when she came to court.
19. The respondent denies that the claimant worked near any chemicals as alleged or at all and that she

worked in general pipe curl section where pipes are used for production.

20. Assuming she fell sick, she ought to have reported for the appropriate claim procedures to be followed with supporting documentation from a medical doctor. She did not do so at all.

21. Respondent states that the claimant worked for 7 years and had two (2) warning letters for gross misconduct.

22. That the claimant having deserted work is not entitled to notice pay or any compensation. That claimant earned a basic pay of Kshs.7,958/= and house allowance of Kshs.1,404/= making a gross pay of Kshs.9,362/=. She was not entitled to any additional house allowance.

23. That the payslips reflect these payments and also reflect non-payment for prolonged absence.

24. The claimant was not declared redundant and is therefore not entitled to severance pay.

25. The claimant was also granted annual leave or paid in lieu of leave at all material times. The claimant's NSSF and NHIF contributions were duly remitted and she is thus not entitled to service gratuity. Copies of payroll and remittance are produced as exhibits.

26. The respondent prays the suit be dismissed with costs.

Determination

27. The issues for determination are;

(i) Whether the claimant absconded work or was wrongfully dismissed.

(ii) Whether the claimant is entitled to the reliefs sought.

Issue I

28. From the totality of oral and documentary evidence before court including the testimony by the claimant and that of RW1 Simon Mbutia, Personnel Officer of the respondent since 1998, the claimant has failed to show on a balance of probability that she was dismissed from work.

29. To the contrary, RW1 demonstrated that the claimant absented herself from work for a prolonged period without permission and without having explained the reason for the absenteeism.

30. That upon returning to work, she was asked to bring documentary proof of her sickness and treatment as she purported to have been ill but she absconded and never returned to work.

31. For these reasons, the claimant has failed to prove on a balance of probability that she was wrongfully dismissed from work.

Terminal Benefits

32. Equally, the claimant has failed to demonstrate that she was entitled to notice pay having deserted work.

33. The payroll and advice slips show that the claimant was paid on a monthly basis a basic pay and house allowance. She was also paid overtime occasionally as and when she did overtime. The claimant has therefore failed to show that she is entitled to these reliefs.

34. With regard to the claim for severance pay, the claimant having absconded duty is not entitled to severance pay. The respondent has demonstrated that the claimant was registered with NSSF and

contributions were duly remitted. The claimant should claim her pension dues from the Fund.

35. With regard to payment in lieu of untaken leave for one year, the respondent has not rebutted this claim and the court awards the claimant Kshs.10,000/= in lieu of leave days not taken.

36. In the final analysis, the entire suit is dismissed except an award in respect of payment in lieu of annual leave for one year in the sum of Kshs.10,000/=

37. The sums of Kshs.10,000/= is payable with interest at court rates from date of judgment.

38. Respondent to issue certificate of service to the claimant within 30 days.

39. The respondent to pay half, the costs of the suit.

Dated and delivered at Nairobi this 28th Day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE