



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 188 OF 2015**

**MERCY KAGWIRA.....CLAIMANT**

**-VERSUS-**

**KENYA MEAT COMMISSION.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> May, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 28.10.2015 through the Secretary General of her Union, Kenya Union of Commercial Food and Allied Workers, one Boniface M. Kavuvi. The claimant prayed for judgment against the respondent for:

- a) Kshs.9, 925.00 being one month pay in lieu of the termination notice.
- b) Kshs.17, 146.00 being gratuity.
- c) Kshs. 3, 787.40 being days worked and not paid for.
- d) Kshs. 6,007.00 being annual leave due and not taken or paid for.
- e) Kshs. 107, 100.00 being 12 months' pay for compensation for unfair termination.
- f) Total claim Kshs.143, 965.70.
- g) Respondent to pay claimant's costs of the suit.

The respondent did not file a response to the memorandum of claims. The claimant opted to rely on the pleadings and documents on record. On 30.03.2017 the matter came up for confirmation of filing of the claimant's final submissions when the court was also informed that respondent had filed a notice of appointment of advocates on 30.03.2017. The court considered that the respondent had been consistently served with all relevant court papers in the suit and directed that the matter would proceed to pronouncement of judgment.

The respondent employed the claimant on 01.10.2012 as an operative KMC 10 at a salary of Kshs.8, 925.00 and Kshs.4, 300.00 per month for house allowance making a gross pay of Kshs.13, 225.00 per month.

By the letter dated 18.07.2014 the claimant was suspended from duty with immediate effect on account of

alleged theft of 1.5kg of ox-liver about which the suspension letter stated the claimant had, in her written statement, confirmed to have stolen. By the letter dated 23.07.2014, it was stated that the ox-liver was found hidden in the claimant's sweater which the claimant had carried when she was being frisked on her way out of the respondent's inner gate on 17.07.2014. By that letter of 23.07.2014 the claimant was invited to attend a disciplinary hearing on 31.07.2014 at 10.00am at the respondent's board room. The letter stated that the claimant was at liberty to be accompanied to the hearing by another work colleague or a trade union representative. The hearing did not take place as was scheduled and was postponed to 07.08.2014 at the same venue and time as endorsed on the letter of 23.07.2014.

It appears that the meeting took place on the adjourned date and by the letter dated 11.08.2014, the respondent dismissed the claimant from employment on account of being culpable of the offence of theft of about 1.8kg of ox-liver wrapped with a black T-shirt hidden inside a black paper bag which was found on the claimant as she was frisked by security personnel on the claimant's way out at the respondent's inner gate on 17.07.2014. The letter specified the claimant's terminal dues as payment of salary up to 08.08.2014, the effective date of the dismissal and payment of 22 days of earned leave as at 08.08.2014.

The claimant's union reported a trade dispute to the Cabinet Secretary as per section 62 of the Labour Relations Act, 2007 as per the union letter dated 30.07.2014. The respondent failed to cooperate and the conciliator advised the union to invoke section 73(1) of the Labour Relations Act, 2007, as per the conciliator's letter of 09.02.2015.

The **1<sup>st</sup> issue** for determination is whether the claimant's termination was unfair. The material on record show that the claimant was given a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. However, the respondent never filed a defence and never gave evidence in court to establish the reason for termination. The letter of termination alleged that the claimant had committed the offence of theft but there was no material on record to show that a court of competent jurisdiction had found the claimant culpable of such offence as was alleged in the termination letter. Accordingly, the court finds that the termination was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007. The court has considered that the claimant had served for only 2 years and she did not contribute to her removal. The court has considered the claimant's un-refuted case that the security guard who implicated her had personal differences with the claimant. Further the claimant has denied authoring a statement to admit the theft as was alleged in the suspension letter. The claimant's position that the alleged statement was a forgery by the said guard aimed at fixing the claimant has not been refuted. Taking all the circumstances into account, the court awards the claimant 9 months' gross salaries for unfair termination under section 49 of the Employment Act at Kshs.13, 225.00 per month making **Kshs.119, 025.00**.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The court finds as follows:

- a) As the termination has been found to have been unfair and immediate, the court finds that the claimant is entitled to **Kshs.9, 925.00** being one month pay in lieu of the termination notice as a minimal statutory entitlement under section 35 of the Employment Act, 2007.
- b) The court finds that the claimant is not entitled to Kshs.17, 146.00 being gratuity as the same was not justified and there was no evidence to support the same.
- c) The court finds that the claimant is entitled to **Kshs. 3, 787.40** being days worked and not paid for and as alluded to in the dismissal letter.
- d) The court finds that the claimant is entitled to **Kshs. 6,007.00** being annual leave due and not taken or paid for and as referred to in the dismissal letter.

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

- a) The declaration that the termination of the claimant's employment was unfair and the respondent

to pay the claimant a sum of **Kshs.138, 744.00** by 01.07.2017 failing interest to be payable thereon from the date of the suit till full payment.

b) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 5<sup>th</sup> May, 2017**.

**BYRAM ONGAYA**

**JUDGE**