



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1282 OF 2014

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS..CLAIMANT

VERSUS

SELECTIONS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant Union brings this claim on behalf of its member, Marion Kathure Michubu (the Grievant) seeking relief for unlawful and unfair termination of employment. The claim is contained in a Memorandum of Claim dated 15th July 2014 and filed in Court on 5th August 2014. The Respondent's defence is contained in a Reply dated 10th October 2014 and filed in Court on 11th November 2014.

2. When the matter came up for hearing the Grievant testified on her own behalf and the Respondent called its Human Resource Assistant, Jeremiah Kagwe Njoroge.

The Claimant's Case

3. The Claimant states that the Grievant was employed by the Respondent as a Sales Representative on 28th September 2007 at a monthly salary of Kshs. 6,300 which was later increased to Kshs. 12,000. She was stationed at the Junction Branch, Ngong Road.

4. The Claimant further states that on 5th January 2013, after suffering a pneumonic attack the Grievant sought medical attention at a health clinic along Naivasha Road. She was granted two (2) days off duty of which she informed the Respondent's Human Resource Assistant, Betty Cherotich who wished her quick recovery.

5. Upon reporting back to work on 8th January 2013, the Grievant was transferred to Prestige Branch, Ngong Road where she was assigned night shift duties. On 28th February 2013, the Grievant made a request to the Respondent's Managing Director to be moved from night shift on health grounds. She was asked to go home and wait for further communication as her request was being considered.

6. On 3rd March 2013, the Grievant received a termination letter stating that she had absconded duty from 28th February 2013. The letter also asked her to serve a resignation notice in case she was leaving the company.

7. Upon receipt of this letter, the Grievant sought audience with the Managing Director in a bid to find out

why her employment was being terminated. She was not given any audience. The Claimant also sought audience with the Respondent on behalf of the Grievant but this too did not bear any fruit.

8. The Claimant reported a trade dispute to the Minister for Labour on 6th June 2013 and a Conciliator was appointed on 10th July 2013. The conciliation process did not resolve the dispute hence this claim.

9. The Claimant states that having authorised the Grievant to stay at home, the Respondent cannot around and accuse her of absconding duty. Further, the Grievant was condemned unheard. The termination was therefore unlawful and unfair.

10. The Grievant's claim is as follows:

- a. One month's salary in lieu of notice.....Kshs. 18,490
- b. Accrued annual leave.....35,958
- c. 15 days' pay for each year of service.....46,379
- d. Underpayment.....233,280
- e. 12 months' salary in compensation.....221,880
- f. Overtime compensation.....173,642
- g. Costs of the suit

The Respondent's Case

11. In its Reply dated 10th October 2014 and filed in Court on 11th November 2014, the Respondent states that the Grievant was not a member of the Claimant Union and no deductions were ever made from her salary on account of union dues.

12. The Respondent further states that the Grievant was employed as a Sales Representative on 28th September 2007 at a basic salary of Kshs. 6,300 plus commission and allowances, including house allowance.

13. The Respondent controverts the Claimant's averment that the Grievant fell ill in the course of her employment and adds that the document produced by the Claimant marked Appendix 3 is a fabrication. The Respondent denies granting the Grievant permission to be away from work. The Respondent further denies receiving any complaint from the Grievant about her work shift.

14. Regarding the termination, the Respondent states that the Grievant was terminated for gross misconduct after it emerged that she had been worked for a competitor operating in the same shopping mall as the Respondent, for a period of five (5) months.

15. Additionally, after the Grievant's termination, the Respondent took stock and found that goods worth Kshs. 35,695 which had been placed under the Grievant's care were missing.

16. In response to the accusation of lack of cooperation during the conciliation process, the Respondent states that after the dispute was lodged at the Ministry of Labour, it sought clarification on the Claimant's capacity to represent the Grievant. Moreover, the Claimant failed to file submissions as directed by the Conciliator.

Findings and Determination

17. There are three (3) issues for determination in this case:

- a. Whether the Claimant has *locus standi* to bring this claim on behalf of the Grievant;
- b. Whether the termination of the Grievant's employment was lawful and fair;
- c. Whether the Grievant is entitled to the remedies sought.

Locus Standi

18. The Respondent maintains that the Claimant lacks the necessary *locus standi* to bring this claim on behalf of the Grievant. In pursuing this argument the Respondent submits that there being no recognition agreement between the Claimant Union and itself, the Union has no capacity to bring action on behalf of the Grievant.

19. In addressing this issue it is necessary to distinguish between recognition and representation. Section 54(1) of the Labour Relations Act provides that an employer is obliged to recognise a trade union for purposes of collective bargaining only if that trade union represents a simple majority of unionisable employees. This provision does not however extinguish the right of every employee to join a trade union of their choice which is firmly secured by Article 41 of the Constitution.

20. In *Kenya National Private Workers Union v Lavington Security Services Limited [2013] eKLR* this Court held that the notion that the absence of a recognition agreement vitiates the right of an employee to representation flies in the face of the of Article 41 of the Constitution. I find no reason to change my position on this matter.

21. That said, the only determination I need to make on this issue is whether the Grievant was indeed a member of the Claimant Union. In this regard, the Claimant produced the Grievant's membership card showing the date of membership as May 2012. The logical conclusion is that at the time of her termination, the Grievant was a member of the Claimant Union and she was entitled to representation by the Union in this cause. The Court therefore finds that the Claimant is clothed with the necessary *locus standi* to bring this claim on behalf of the Grievant.

The Termination

22. On 3rd March 2013, the Respondent wrote to the Grievant as follows:

"Dear Madam

RE: TERMINATION LETTER

You have absconded duty since 28th February 2013 without any communication to the Human Resource office; we are hereby terminating your services with Selections Company Limited. Please note that you are supposed to send a resignation letter giving one Months (sic) notice in case you are leaving the company.

Yours faithfully

Betty Cherotich

Human Resource Assistant"

23. This letter accused the Grievant of absconding duty. While denying the accusation, the Grievant told the Court that the Respondent's Managing Director, Mona Chopra told her to stay at home from 28th February 2013 and wait to be called back. She was not called back and on 3rd March 2013 she received a

termination letter. The Respondent did not call Mona Chopra as a witness and the Grievant's testimony on this account remained unchallenged.

24. In any event, if the Grievant had indeed absconded duty, the right procedure would have been for the Respondent to issue a show cause notice before termination. This was not done and the Court therefore finds that the Respondent not only failed to establish a valid reason for the Grievant's termination as required under Section 43 of the Employment Act, 2007 but also ignored the mandatory disciplinary procedure set out under Section 41 of the Act.

25. In reaching this verdict, I have ignored the Respondent's attempt to introduce the additional charge of working for a competitor company, post termination.

Remedies

26. In light of the foregoing findings I award the Grievant eight (8) months' salary in compensation. In making this award, I have taken into account the Grievant's length of service as well as the Respondent's conduct in the termination process. I also award the Grievant one (1) month's salary in lieu of notice.

27. In the absence of evidence that the Grievant was a contributing member of the National Social Security Fund, she is entitled to service pay.

28. Regarding the claim for leave pay, the Grievant testified before the Court that her claim was for period between 2008 and 2010 and that she had taken all her other leave. In terms of Section 90 of the Employment Act, this claim being in the nature of a continuing wrong ought to have been brought within one (1) year after cessation date being 2010. It is therefore statute barred and is dismissed.

29. The claims for underpayment and overtime compensation were not proved and are dismissed.

30. Finally I enter judgment in favour of the Grievant as follows:

- a. 8 months' salary in compensation.....Kshs. 96,000
- b. 1 month's salary in lieu of notice.....12,000
- c. Service pay for 5 years (12,000/30x15x5).....30,000
- Total.....138,000**

31. This amount will attract interest at court rates from the date of judgment until payment in full.

32. The Respondent will pay the costs of this case.

33. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JUNE 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyumba (Union Representative) for the Claimant

Mr. Kinyanjui for the Respondent