



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 55 OF 2013

GRACE NJURA IRERI.....CLAIMANT

VERSUS

KETNNO SACCO LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 9th June, 2017)

JUDGMENT

The claimant filed the statement of claim on 21.05.2013 in person. The memorandum of response was filed on 04.06.2013 through Njeru R. Ngari & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant filed on 14.03.2016 the amended statement of claim through Waweru Macharia & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) House allowance from 01.01.2009 to April 2013 at 15% of basic salary making Kshs.106,050.00.
- b) Service payment Kshs.106,050.00.
- c) Unpaid leave for 4 years Kshs.46,000.00.
- d) Unpaid overtime for 4 years Kshs.192,000.00.
- e) One month salary in lieu of notice Kshs.11,500.00.
- f) Public holidays at Kshs.500.00 per day at 20 days unpaid Kshs. 10,000.00.
- g) 12 months' compensation for unlawful or unfair termination at Kshs.11,500.00 per month making Kshs.138,000.00.
- h) Unpaid wages from the date of suspension to date i.e 34 months times Kshs.11,500.00 making Kshs.391,000.00.
- i) A declaration that the respondent is in constructive unfair dismissal of the claimant.
- j) Certificate of service.

k) Costs of the suit.

l) Interest on a, b, c, d, e, f and i at court rates.

m) Any other or better relief the honourable court may deem fit and just to grant.

The respondent's further amended memorandum of response was filed on 05.05.2016 and prayed that the claimant's claim be dismissed with costs.

It is not in dispute that the respondent employed the claimant effective January 2009 as an office attendant at a monthly salary of Kshs.11, 500.00 being basic pay without house allowance.

The **1st issue** for determination is whether the claimant's employment was terminated and if yes, whether the termination was unfair.

The claimant testified that her employment was terminated on 09.03.2013 at about 11.00am when the respondent's chairman called the claimant on the cell phone and notified her that there was an on-going meeting and that a decision had been made to dismiss the claimant from the respondent's employment. The claimant testified that she demanded a letter of termination but the chairman disconnected the phone call. Her testimony was that she was not given a letter of termination.

The claimant further testified as follows:

a) On 06.03.2013 she fell sick, reported at work and the respondent's chairman gave her a verbal permission to attend treatment.

b) On 07.03.2013 and 08.03.2013 she was at work.

c) On the night of 08.03.2013 she fell very ill and was admitted at hospital at 3.00am on 09.03.2013.

d) She was discharged from hospital on 16.03.2013 and given a one week sick off which she delivered to the respondent on 16.03.2013 and she resumed duty on 23.03.2013 - but on 09.03.2013 the chairman had called to say that the claimant had been dismissed.

e) That her last day at work was on 08.03.2013.

f) In cross-examination, the claimant confirmed that the medical documents on record showed that she was admitted at hospital on 09.04.2013 (and not 09.03.2013) and the same was dated 16.04.2013. In re-examination, she testified that it was on 09.04.2013 that the chairman called her to say that she had been terminated.

g) In September 2013 the respondent's Chairman, Treasurer, and Secretary visited her home and asked her to resume duty but she refused.

h) On the other hand, the respondent's case was that the claimant voluntarily absconded duty when she failed to surrender delivery books and bank slips as was required of her by the respondent. That was in March, 2013. Instead of making an account, she filed the present suit. The respondent's witness(RW1) and chairman one Patrick Mwendia Warui testified that the claimant had been asked to deliver the respondent's books of account sometimes in April 2013 but she failed to do so. On 19.04.2013 a case of missing books of accounts was reported at Embu Police Station but, according to RW1, the report had not been prosecuted out of humanitarian considerations. RW1 testified that the claimant had not been sacked but that she would be readmitted at work if she was willing to come back at work.

The court has considered the parties' respective evidence. The court finds that the claimant's account of

circumstances leading to her separation with the respondent was most incredible. First she had insisted that the chairman called her on 09.03.2013 to convey the termination decision and later said it was on 09.04.2013. Second she admitted that the respondent's officials visited her home requesting her to resume work but she declined to do so – and the court finds the offer to resume work was inconsistent with the claimant's alleged termination and it was not that a termination was being set aside but she confirmed the request was to resume work – so that the court returns that there had been no prior termination. Third, the court finds that the claimant set out to make most scandalous allegations but for which no evidence and submissions were provided. Thus, at paragraph 6 of the amended statement of claim she stated thus, **“6. The claimant states that the respondent's chairperson terminated the services on 9th April 2013, unlawfully, unreasonably and summarily without any reasons or cause. The claimant shall state that the respondent orchestrated the same since the respondent's chairman had made sexual advances to the claimant but the claimant had resisted the same.”**

The court has revisited the record and returns that there was no evidence to support the allegation and the claimant's case for unfair termination crumbles as it was incoherent and founded upon that scandalous allegation that was not established at all.

Finally, the claimant contradicted herself about her last day at work stating that it was on 08.03.2013 then again that it was on 23.03.2013.

Accordingly, the court returns that there is no reason to doubt the respondent's account that the claimant was not dismissed from employment, that she voluntarily absconded when she failed to deliver the respondent's books of accounts, and despite being asked to resume duty, she failed to do so. The court returns that the respondent did not terminate the claimant's contract of employment.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The evidence is that parties agreed on the consolidated pay of Kshs.11,500.00 per month. They also agreed upon the working hours and days as well as the duties the claimant was to perform. There was no evidence that there had been a dispute or grievances about the agreement. There was no evidence that there were grievances about overtime and work on public holidays. There was no agreement about payment of house allowance and there was no claim that the consolidated pay could not secure the claimant reasonable housing accommodation. In the circumstances, the prayers in those regards will fail.
- b) As there was no termination, the prayer for 12 months' pay in compensation for unfair termination will fail just as the prayer for one month pay in lieu of the termination notice.
- c) The claimant confirmed that she was a member of the National Social Security Fund and the court returns that she was not entitled to service pay in view of section 35(6) of the Employment Act, 2007.
- d) The claimant is entitled to a certificate of service as prescribed in section 51 of the Employment Act, 2007.
- e) The claimant is entitled to pay in lieu of annual leave and is awarded **Kshs.46,000.00** as prayed for.

In conclusion, judgment is hereby entered for the parties for:

- a) The declaration that the respondent did not terminate the claimant's employment at all material time.
- b) The declaration that as the claimant refused to resume duty, her contract of employment with the respondent is deemed to have terminated on the last day she was on duty.

c) The respondent to pay the claimant **Kshs.46,000.00** by 01.07.2017 failing interest to be payable thereon from the date of the suit till final payment.

d) The respondent to deliver to the claimant a certificate of service in the statutory form by 01.07.2017.

e) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 9th June, 2017**.

BYRAM ONGAYA

JUDGE