



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 821 OF 2014

JANET ADEMA ADEBE CLAIMANT

VERSUS

KENYA FRESH PRODUCE EXPORTERS LTDRESPONDENT

Claimant in person

Mr. Gakaria for respondent

JUDGMENT

1. The suit was filed on 16th May 2014 seeking maximum compensation for unlawful and unfair termination of employment and payment of terminal benefits amounting to Kshs.588,853 comprising, one month in lieu of notice, payment in lieu of five years leave, gratuity for four (4) years and eight (8) months period not covered by NSSF, public holidays worked and not paid; leave travel allowance and overtime for work done from 7 a.m. to 5 p.m. everyday for six (6) days amounting to 78 hours per week instead of 52 was per week instead of 52 per week in the sum of Kshs.440,437 set out in annex 3 to the statement of claim.

2. The claimant testified under oath in support of the claim. She told the court that she was employed as a quality checker in May 2008 and was given a contract in 2013 December. That she earned Kshs.14,500 per month.

3. The respondent dealt with fresh produce, and her work was to check the quality of the produce, record performance of graders and marking of the master roll.

4. That she worked five years and eleven months and was dismissed on 21st March 2014 vide a letter of the same date. The letter was produced as appendix 2 to the statement of claim. The letter states the reason for termination to be;

“This is because you marked a staff present when you fully knew she was not present.”

5. The claimant told the court that, the staff in question was Ruth Nthenya. That she was present on the material day but asked for permission to be away in the afternoon. The claimant admitted that she inadvertently did not indicate the afternoon absence in the master roll. She told the court that she was not given a notice to show cause or any chance at all to explain the circumstances of the case and no disciplinary hearing was held. She said she had no previous warning. She had a good record at work and the dismissal was wrongful and unfair. The claimant explained each of the claims set out in the statement of claim.

Notice pay

6. That she was not given any notice prior to the termination and was not paid in lieu.

Gratuity

7. That she worked for eight (8) months without any NSSF deductions and contribution by the employer until August 2012.

Public holidays

8. She worked public holidays that were not paid for double salary and claims Kshs.24,166 in respect thereof.

Leave travelling allowance

9. She did not go on leave and was no paid leave travelling allowance in the sum of Kshs.10,000.

Overtime

10. She got to work at 7.30 a.m. and worked up to 10 p.m. in the night. When others went home she was left computing cost of labour. At times she went home at mid-night. She claims Kshs.440,437.

11. She states she worked for five years and eleven (11) months.

Defence

12. Respondent filed a statement of defence on 19th August 2014 and called RW1 Jose Kigundu in defence of the respondent.

13. The respondent admits that the claimant worked for the respondent on the terms contained in the statement of claim and was dismissed from work for fraudulent activities in that she changed the master roll and added days to someone who was not at work.

14. That the claimant worked as table-head and quality controller. That she supervised packing of produce, filled the register and oversaw the work done.

15. That she added a lady called Ruth Thenya Wambua in the master roll and Ruth admitted to the manager that they were to share the money in respect of the unserved hours.

16. That Ruth admitted to the supervisor that this had gone on from November 2012 to March 2013.

17. That the claimant was called by the production manager to explain, but her explanation was unsatisfactory and she was dismissed from work. The respondent solely depended on an alleged admission by Ruth.

18. Respondent stated that the claimant was a seasonal employee and worked on three (3) months contracts. That she did day or night shift and did not do overtime.

19. Respondent admitted that the claimant had a clean record and had no previous written warning prior to her dismissal. The respondent, however, insisted that the claimants conduct amounted to gross misconduct and dismissal was justified.

20. The respondent did not produce any records to show the shifts worked by the claimant.

Determination

21. The issues for determination are;

- (i) Whether the dismissal of the claimant from work was for a valid reason and in terms of a fair procedure.
- (ii) Whether the claimant is entitled to the reliefs sought.

Issue i

22. The claimant worked for the respondent from my 2008 and worked continuously until 21st March 2014, when she was dismissed from employment without notice.

23. The claimant has satisfied the court that she was not given any show cause letter or opportunity to explain why her employment should not be terminated contrary to section 41 of the Employment Act.

24. The claimant gave a reasonable explanation to the court that she had marked an employee by the name Ruth who was present at work on the day but the employee had sought permission to leave in the afternoon and she failed inadvertently to indicate that in the master roll. The allegations of fraud by RW1 were completely unsubstantiated and based on hearsay evidence of Ruth who was not called to testify.

25. The claimant denied that the omission was intended to defraud the respondent as alleged or at all. She told the court, which fact is admitted by the respondent that she had served the respondent for a period of over five (5) years and eleven (11) months diligently and had no written warning at all during the entire period.

The claimant was employed as a quality controller of fresh produce and that was her main work. That the omission she made ought to have been sanctioned by a warning and did not warrant a summary dismissal.

27. The court is satisfied that the sanction meted on the claimant was not warranted. That the respondent failed to justify its action and consequently the claimant has discharged the onus placed on her in terms of section 47 (5) to prove on a balance of probability that the dismissal was wrongful and unfair. The claimant is entitled to compensation in terms of section 49 (1) (c) of the Employment Act, 2007.

28. Section 49 (4) provides factors to consider in assessing compensation. In this regard, the claimant had faithfully served the respondent as a fresh produce quality controller for over five (5) years. She worked for prolonged hours and was not paid overtime and was not given leave because the respondent wrongfully considered her a seasonal worker when evidence shows that she worked continuously for over five (5) years.

29. The claimant lost prospects of gainful employment and suffered loss and damage.

30. The claimant had minimal contribution to the dismissal and ought to have been given better consideration by the respondent. The respondent sought to demonise the claimant using hearsay evidence which is not admissible before court since they did not call Ruth to testify. The court is satisfied that the claimant had performed her work very well for the five (5) year period she served the respondent under very difficult conditions.

31. The claimant was paid only for four days worked upon termination and was not paid gratuity for the period she had not been registered with NSSF.

32. This is a proper case for the claimant who earned a meagre salary for the nature of work she did to be awarded ten (10) months salary being compensation for the wrongful and unfair dismissal in the sum of Kshs.145,000.

Terminal benefits

33. The respondent offered no credible evidence to counter the claims made by the claimant. The claimant has in the circumstances proved on a balance of probability the following claims;

Notice

Kshs.14,500 in lieu of notice, having been summarily dismissed by a letter purporting to terminate her employment on the same date it was issued.

Gratuity

The court awards the claimant, fifteen (15) days salary for the eight (8) months she worked without NSSF contribution by the employer in terms of section 35 (5) and (6) of the Employment Act, in the sum of Kshs.58,000.

Public holidays

The claimant did not show in respect of which particular public holidays she was not paid and the claim was therefore not sufficiently proved and is dismissed.

Leave travelling allowance

Leave travelling allowance is not payable where an employee does not go on leave. The claimant did not go on leave and this claim has no merit and is dismissed.

Overtime

The claimant has proved that she worked continuously from 7.30 a.m. up to 10.00 p.m. and at times for longer hours without payment of overtime. No cogent evidence was offered by the respondent to counter this claim by the claimant.

34. The court finds that the claim for Kshs.440,437 in respect of overtime has been sufficiently proved and is so awarded.

Leave for five (5) years

35. The claimant has also proved on a balance of probability, there being no evidence to the contrary that she was not granted annual leave for five (5) years and the court awards the claimant Kshs.50,750 as claimed in lieu of leave days not taken.

36. In the final analysis judgment is entered in favour of the claimant as against the respondent for a sum of Kshs.694,187.

37. Interest on the award at court rates from date of filing suit till payment in full in respect of the terminal benefits and from date of judgment in respect of compensation.

38. Costs to follow the outcome.

Dated and delivered at Nairobi this 31st day of July, 2017.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE