



**REPUBLIC OF KENYA**

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

**CAUSE NO.1083 OF 2015**

**MARY NANGILA WACHOLONGA.....CLAIMANT**

**VERSUS**

**SUPERFOAM COMPANY LTD.....1<sup>ST</sup> RESPONDENT**

**BAERA SERVICE LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The claimant filed memorandum of claim on 23<sup>rd</sup> June, 2013 and served the respondent and affidavit of service filed on 4<sup>th</sup> August, 2015 confirming the same. The court directed fresh service which was done by an officer of the Court and affidavit of service filed on 22<sup>nd</sup> October 2015. On 5<sup>th</sup> February, 2016 the respondent filed defence but without entering appearance. The claimant secured a new hearing date and served the respondent's advocates on 30<sup>th</sup> January, 2017 but on the hearing day, 12<sup>th</sup> June, 2017 the respondent and the advocates were absent. Satisfied that the respondents were aware of the hearing, the court heard the claimant and closed the case.

2. On 18<sup>th</sup> July, 2017 the court heard the respondent's application dated 15<sup>th</sup> June, 2017 seeking to set aside the proceedings and which application was allowed and the claimant recalled. The respondent was also heard in defence

3. The claim is that in 1997 the claimant was employed by the 1<sup>st</sup> respondent as a Sewing Machine Operator at a wage of Kshs.197 per day which increased to Kshs.472.00 per day in June, 2014. There was no written letter of employment and on 16<sup>th</sup> March, 2015 the respondent appreciated the claimant had worked well for the respondent

4. In June, 2014 the claimant became ill and was admitted in hospital. Despite the sickness the claimant was not given any sick leave. In January 2015 the claimant was wrongfully terminated from her employment and was not paid any terminal dues.

5. The claim is for;

a) Notice pay at kshs.14, 160.00;

b) Sick leave 472 x 7 days Kshs.3, 304.00;

c) Leave pay for 17 years Kshs.168, 504.00;

- d) Underpayments for 2013 Kshs.322.20;*
- e) Underpayment 2014 Kshs.161, 296.00;*
- f) House allowance at 15% for 17 years Kshs.433, 296.00;*
- g) Compensation for unfair termination Kshs.169, 000.00*
- h) Costs of the suit.*

6. The claimant also testified that upon employment she worked diligently but in 2013 she started feeling unwell. She went to hospital and was admitted. She was advised to stop machine work. She resumed work but after one (1) year the respondent returned her to machine work. she could not work as walking became a problem.

7. In 2014 the claimant got very sick. On 6<sup>th</sup> May, 2014 while at work the claimant could not undertake her duties and colleagues had to intervene. She was admitted at Nazareth hospital for two weeks. The NSSF card had a problem on the grounds that the respondent had not been remitting deductions. The claimant was transferred to Kiambu district hospital for further treatment. Since the NHIF card had not been updated she was forced to source for monies from friends to pay for her hospital bills.

8. While on sick leave the respondent was not paying her wages. The claimant was also not able to pay for her house rent.

9. The claimant then went to the respondent and asked for her service pay for the 17 years. She was told to go home until she was well and that while working at the machine she had not been productive and her last day at work was 5<sup>th</sup> June, 2014. No letter of termination was given. No terminal dues were paid.

10. The claimant reiterated her claims set out in the memorandum of claim.

#### Defence

11. In defence the respondent deny the claimant was never employed with them or by the 1<sup>st</sup> respondent as alleged. The claimant was an employee of the 2<sup>nd</sup> respondent which was an outsourcing company from which the respondent outsourced some of its labourers, including the claimant. All due salaries and statutory deductions were effected by the 2<sup>nd</sup> respondent.

12. The claimant was taken ill in 2013 when she was working as a sewing machine operator. In 2014 the claimant requested for alternative lighter duties due to her condition and was assigned such light duties of preparing the corner guards. The claimant performed her duties until June, 2014 when she left on her own volition to seek further treatment. The 2<sup>nd</sup> respondent visited her in hospital only for the claimant to fail to give the sick leave application to enable the 2<sup>nd</sup> respondent process the same.

13. The 1<sup>st</sup> respondent was kind and through the 2<sup>nd</sup> respondent allowed the claimant ample time to recuperate as her illness was not within the scope of Work Injury benefit Act.

14. The claimant never resumed duty since June, 2014 and the 1<sup>st</sup> respondent was shocked to receive a demand letter on 28<sup>th</sup> February, 2015 detailing events that led to the suit herein.

15. The claimant was employed on a daily basis and paid a daily wage at Kshs.473.00.

16. The claimant voluntarily left her employment and the claims made are not due and should be dismissed with costs.

17. The respondent called its witness Mr Reuben Nyaberi who reiterated the defence. However no records with regard to the evidence that the claimant's labours were outsourced through the 2<sup>nd</sup> respondent were filed. The averments that the claimant had been outsourced though the 2<sup>nd</sup> respondent is devoid of any evidence. However, the claimant has not set out any case against the 2<sup>nd</sup> respondent. what is clear and admitted by the 1<sup>st</sup> respondent is that the claimant offered her labour to the 1<sup>st</sup> respondent. without any evidence submitted by the 1<sup>st</sup> respondent with regard to work records of the claimant, the duty placed on the employer under section 10(6) and (7) of the Employment Act, the claimants evidence must be believed.

18. The claimant testified that on 5<sup>th</sup> June, 2014 she got sick and was admitted in hospital. She was not able to resume work until sometime in 2015 when she went to claimant for her 17 years of service from the respondent.

19. The claimant evidence is that she was away from work due to sickness and admission in hospital. She was admitted at Nazareth hospital and Kiambu District hospital. The claimant has attached medical records on her admission and discharge from Nazareth hospital on 10<sup>th</sup> May, 2014. There are treatment cards from Ruiru Sub District hospital on 13th April, 2014; and cards for therapy sessions ending 19<sup>th</sup> May, 2014. A medical account from 19<sup>th</sup> May, 2014 to the point of going back to the respondent to make demand for service pay in 2015 is not attached.

20. Section 30 and 34 of the Employment Act give an employee a right to take sick leave and to seek medical attention. However such leave is conditional. The employee must inform the employer of the sickness or illness within a reasonable time and even have a third party communicate to the employer on such illness. The employee is also required to submit a medical certificate with the employer. Such certificate must be from a recognised medical practitioner. see **Dorothy Ndung'u versus Machakos University College [2016] eKLR.**

21. An employee who is therefore absent from work and fails to submit the requisite medical certificate to confirm illness, such amount to absence from work without due cause and is gross misconduct as defined under section 44(4) of the Employment Act and a matter for summary dismissal.

22. The absence of the claimant without information to the respondent or submission of the medical certificate removes the claimant from claiming unfair termination. Absence from work without the responsibility to communicate or submit the relevant certificate removes the claimant from the protection of the law.

23. With regard to the employment of the claimant, the 1<sup>st</sup> respondent admits at paragraph 3(viii) that she was paid a daily wage of Kshs.473.00 as a Sewing Machine Operator but such duties were changed following her illness. As noted above, without the work records with regard to the claimant being submitted, I take it the evidence of the claimant is correct to the extent that she had served the respondent for a period of 17 years until her departure on 5<sup>th</sup> June, 2014.

24. For the long service of the claimant, by operation of the law, and provisions of section 37 of the Employment Act and without any evidence to controvert it, the claimant became a permanent employee of the respondent with full benefits.

25. On the remedies sought, the claim for notice pay; pay during sick off; and compensation for unfair termination do not arise. Such are declined on the grounds that the claimant failed to inform the respondent on her absence due to illness and even where she did the duty is placed on her as the employee to submit the medical certificate with the employer to confirm that she was absence from duty due to her illness.

26. On the claim for leave pay, the same is based on the 17 years of service. The claimant was however not honest in this regard. Even where leave is lawfully due whatever the reason(s) leading to termination

of employment, where there are no work records submitted, the testimony of the employee becomes very important. The claimant testified that she went on Christmas holiday but insisted that she never took any day off for the 17 years of work. Such cannot be true. Account must be taken of all days out of work and rationalised as to the nature of the same. To make a general claim that the claimant worked continuously for 17 years without break and then acknowledge that she was not at work during certain dates is not an honest testimony to justify the grant of the orders sought.

27. Claimant for underpayment for 2013 and 2014 is confirmed in that the claimant was paid kshs.472. per day. On the wage orders and regulations, the underpayment is by kshs.25/- per day all being Kshs.89, 250.00 for the duration of 17 months and 5 days worked in June, 2014. The underpayment awarded at kshs.89, 250.00.

28. house allowance is claimed for 17 years. On the daily wage thus addressed above and the underpayment award, this claim is addressed.

**Judgement is entered for the claimant for the sum of Kshs.89, 250.00 for underpayment. No orders to costs.**

Dated and delivered in open court at Nairobi this 20<sup>th</sup> day of July, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

Lilian Njenga and David Muturi – Court Assistants

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