



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 407 OF 2016

SARAH ANGIENDA OYANGE.....CLAIMANT

v

ONE HEART CHILDREN HOME & SCHOOL.....RESPONDENT

JUDGMENT

1. The parties filed the following *Agreed Issues* as arising for determination

1. Whether the Claimant was employed by the Respondent.
2. Whether the Claimant was unfairly, wrongfully and unlawfully terminated by the Respondent.
3. Whether the Claimant deserted duties.
4. Whether the Claimant was not given any valid reason for the said unfair, unlawful and wrongful termination?
5. Whether the Claimant was a member of any trade union if yes was the union informed of the intended termination.
6. Whether the Claimant was issued with any notice before his termination.
7. Whether as a result of unlawful, wrongful and illegal termination the Claimant is entitled to
 - i. Underpayment
 - ii. Annual leave.
 - iii. Overtime.
 - iv. Cost of the suit.
8. Whether the Claimant is entitled to an award as claimed in the memorandum of claim.
9. Whether the Claimant is entitled to an award of certificate of service.

2. A perusal of the pleadings leaves no doubt that the *Agreed Issues* were not only casually but also incompetently drawn. As an illustration, *Issues 2, 4 and 6* are substantially the same.

3. Both parties led oral evidence on 27 March 2017, when both the Claimant and the Respondent's Manager testified and produced documents.
4. The Claimant filed her submissions on 24 April 2017, while the Respondent filed its submissions on 25 May 2017.
5. The Court has given due consideration to the pleadings, evidence and submissions.

Whether Claimant was employed by the Respondent

6. Although the Respondent denied that the Claimant was its employee in the Response, its Manager Benson Koech who testified, confirmed that he recruited her as a cook.
7. It beats legal logic why the Respondent denied in the Response that the Claimant was its employee while it had even filed in Court employment records attesting to the employment relationship.

Whether Claimant was a member of a Union

8. The question of whether the Claimant was a member of a Union did not arise from the pleadings and the Court is baffled as to why it was made an *Issue for Determination* or its relevance to the Cause.

Whether Claimant deserted duties

9. Strictly speaking, this *Issue* goes to the fairness and/or validity of substantive reasons for termination of employment.
10. The Respondent had contended that the Claimant gave notice of resignation effective 30 November 2015, but did not report to work from September 2015.
11. During oral testimony, the Respondent's witness stated that the Claimant worked for only 2 weeks in August 2015 and on 31 August 2015 she brought a resignation letter and asked for a recommendation letter and thereafter left again.
12. The witness also stated that the local Chief had attempted to arbitrate over the case and produced a letter dated 24 August 2016 written by the Chief.
13. The Claimant on her part admitted that she wrote a resignation letter and was given a recommendation letter on 17 September 2015, and also stated that she was overworked.
14. However, she did not disclose whether she reported to work after giving notice of resignation.
15. From the scanty details by the Claimant as to whether she reported to work after submitting her resignation, the Court can conclude that it is more probable that the Claimant had formed an intention not to report to work and that she frustrated/repudiated the contract by her conduct.

Whether termination was unfair

16. Failure to report to work without lawful cause or permission is *misconduct* which is subject to the procedural fairness safeguard provisions of section 41 of the Employment Act, 2007.
17. The Respondent therefore ought to have given the Claimant an ultimatum to report to work or risk termination of contract.
18. There is nothing on record to suggest that the Respondent took any disciplinary action against the Claimant for failing to report to work during the notice period, because technically, the Claimant was still an employee.

19. Further a repudiated contract does not end automatically, the innocent party must opt to accept the repudiation.

20. Repudiation of contract, as a general rule in common law, does not terminate an employment contract. The innocent party should accept the repudiation (see my decision in *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).

21. The Court also wishes to observe that in *Geys v Societe Generale, London Branch* (2012) UKSC 63, the Supreme Court of the United Kingdom confirmed the principle that a repudiated employment contract does not end until the repudiation is accepted.

22. In the *Geys* decision, the Supreme Court rejected the *automatic termination principle* that repudiated employment contracts are ended immediately upon repudiation in favour of the *election principle*.

23. In this sense, the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.

24. The Respondent did not demonstrate that it accepted the repudiation of contract and on that account the Court finds there was procedurally, an unfair termination of contract.

Underpayments

25. The Claimant was earning Kshs 7,500/- and according to her, she was underpaid because the prescribed minimum wage in terms of the Regulation of Wages (General)(Amendment) Order, 2015 was Kshs 10,496/-.

26. The Claimant in effect sought underpayments for 1 year.

27. The Legal Notice sought to be relied on was not applicable before 1 May 2015 and therefore it cannot support the claim for underpayments prior to 1 May 2015.

28. Any underpayments would be for May to August 2015.

29. However, the Claimant did not prove the exact area or location of the performance of the contract for the Court to determine whether there was in actual fact underpayments.

Overtime/public holidays

30. The Claimant did not disclose or lead any evidence as to the prescribed working hours in the sector the Respondent operated in and the Court finds this head of claim not proved.

Leave

31. The Respondent's witness testimony that the employees took leave during school holidays was not interrogated or challenged and considering the nature of work of persons such as the Claimant (cook), within the school environment, the Court will give the benefit of doubt to the Respondent.

Compensation

32. Compensation is a discretionary remedy. The Court has technically found there was unfair termination of employment.

33. However, considering the circumstances of this case, the Court declines to award compensation.

Conclusion and Orders

34. Although technically there was unfair termination of employment, the Court finds and holds that the Cause herein lacks merit and orders that it be dismissed with no order as to costs.

35. It is so ordered.

Delivered, dated and signed in Nakuru on this 20th day of July 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Morande instructed by Chepkwony & Co. Advocates

For Respondent Ms. Karuga instructed by Karuga Wanjiru & Co. Advocates

Court Assistant Nixon