



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 509 OF 2013
CELESTINE SHISIA WASWA.....CLAIMANT
VERSUS
THE FAITH HOMES OF KENYA.....RESPONDENT
JUDGMENT

Introduction

1. The Claimant's claim brought by Memorandum of Claim dated 12th April 2013 and filed in court on even date is for unlawful termination of employment. The Respondent filed a Memorandum of Reply on 21st May 2013.

2. When the matter came up for hearing, the Claimant testified on her own behalf and the Respondent called Lucy Adoyo Wanjawa. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a cleaner on 6th May 1993. She was later confirmed as a general worker by letter dated 18th September 1993. She was deployed at Sunflower Nursery School at a monthly salary of Kshs. 8,500. She states that when she started complaining about underpayment, the Respondent accused her of selling snacks to pupils and thereafter terminated her employment. She termed this as a witch-hunt against her.

4. The Claimant states that she worked for 52 hours per week without any overtime compensation. Her claim is as follows:

- a) One month's salary in lieu of notice.....Kshs. 8,579.00
- b) Annual leave for 2011-2012
- c) Underpayment (basic salary).....1,896.00
- d) Underpayment (house allowance.....15,444.00
- e) Underpayment (overtime).....356,886.40

- f) Severance pay for 19 years.....94,039.00
- g) 12 months' salary in compensation
- h) Certificate of service
- i) Costs

The Respondent's Case

5. In its Memorandum of Reply filed in court on 21st May 2013, the Respondent admits having employed the Claimant but states that her employment was terminated for grave breach of the terms of her employment.

6. In particular, the Claimant was accused of being a chronic absentee from work. Further, she engaged in other businesses while on duty contrary to her letter of appointment. The Respondent states that despite several written and verbal warnings, the Claimant persisted in this undesirable behaviour.

7. The Respondent denies underpaying the Claimant and states that she took her leave as it fell due. The Respondent adds that the Claimant was not declared redundant and her claim for severance pay is therefore without basis.

8. The Respondent further states that the Claimant is not entitled to house allowance as it was not part of her employment contract. Similarly, there was no agreement for overtime compensation and the Claimant did not work beyond normal working hours.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

10. The Claimant's employment was terminated by letter dated 24th March 2012 stating as follows:

"Dear Celestine Waswa,

RE: TERMINATION OF EMPLOYMENT

With reference to terms and conditions of Letter of Appointment signed by you, I regret to inform you that your services as a cleaner in Sunflower Nursery School has been terminated from the date of this letter.

It has come to light that you have been selling snacks to the school children in our nursery school since this term began. Even after being cautioned, verbally warned and asked to stop by your immediate supervisor and school headteacher-Madam Lucy Adoyo, you still chose to defy the instructions and continue with the business.

Did it ever occur to you the health risk you have been subjecting the children to? Would you have come out clean and own up and say that you are to blame? Or would you have kept quiet as the school administration go through blame and may be prosecution? Do you have a legal document from the council allowing you to sell food stuff and especially to small school children? Your designation with the organization clearly states that you have been employed as a cleaner-when

did it change for you to engage in another form of business? This has been in contradiction to your letter of appointment duly signed and well known to you and also in conflict with your well stipulated and clearly stated job description.

*Reference is made to the letter of Appointment duly signed by you on the section of standing orders part b) which clearly states that **“You will not, without the consent of the organization, engage in any other business which would be in conflict with your duties as a full time employee of the organization or occupation except that of the organization.”** and e) which clearly states that the management reserves the right terminate (sic) your services summarily **“If you knowingly fail or refuse to obey any lawful and proper command which was within the scope of your duty to obey, issued by the organization or any person placed in authority over you by the organization.”***

You will be paid for the days worked in the month of March 2012 and 1 (one) month salary in lieu of notice at the Chief Accountant’s office after proper handing over has been done to Madam Lucy Adoyo, Sunflower Nursery School Headteacher.

Yours faithfully

(Signed for)

Dr. N.B. Fride Nilsson

Director

Faith Homes of Kenya.”

11. The termination letter was preceded by a warning letter dated 22nd March 2012 on the same subject. It would appear that the Respondent changed its mind and decided to terminate the Claimant’s employment on account of the same charges, for which she had been warned.

12. A warning is by itself a disciplinary action, which once executed, dispenses with the case at hand. It follows therefore that by issuing a termination letter on the heels of a warning letter on the same subject matter, the Respondent subjected the Claimant to double jeopardy.

13. Further, there was no evidence that the Claimant was ever given a chance to respond to the charges leveled against her, either before the warning or the termination. The questions posed in the termination letter ought to have been put to the Claimant in the course of an internal disciplinary process, which evidently did not take place.

14. The charges against the Claimant were therefore untested and the Court finds that the Respondent failed to establish a valid reason for terminating the Claimant’s employment, as required under Section 43 of the Employment Act, 2007. Moreover, the Respondent failed the procedural fairness test set out under Section 41 of the Act.

Remedies

15. For the foregoing reasons, the Court awards the Claimant twelve (12) months’ salary in compensation. In making this award, I have taken into account the Claimant’s length of service as well as the Respondent’s conduct prior to the termination.

16. From the evidence on record, the Claimant was paid one (1) month’s salary in lieu of notice. This claim is therefore superfluous. Regarding the claim for leave pay, the Respondent produced leave records showing that the Claimant had exhausted her leave for 2011. Having left employment on 24th March 2012, the Claimant had not earned any leave for the year 2012. This claim therefore fails and is dismissed.

17. The claims for underpayment and overtime compensation were not proved and are also dismissed. The Claimant was not declared redundant and the claim for severance pay is therefore without basis.

18. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 102,948, being 12 months' salary in compensation for unfair termination of employment. This amount will attract interest at court rates from the date of judgment until payment in full.

19. The Claimant is also entitled to a certificate of service and costs of the case.

20. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF OCTOBER 2017

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JUDGE

Appearance:

Mr. Wangira for the Claimant

Mr. Makori for the Respondent