



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 700 OF 2014

HELLEN MWANZA MULE.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 30th April 2014 and averred that she was employed on 3rd June 2008 as a data entry clerk on casual terms and worked without a break till 19th December 2013. She averred that she was called by her boss the Director of Alumni Programme Dr. Wambui Wambugu who informed the Claimant that she had been directed by the Human Resource officer in administration to direct the Claimant to stop working and proceeds home to await a phone call to resume duty. It was averred that the Claimant sought to know the reasons for this move but the Director insisted that the directives had been given by the HR manager. She averred that she noted she had been sacked when she received pay for 18 days worked in December 2013 and in January 2014 she went to see Dr. Wambugi who directed the Claimant to Ms. Bhoke Chacha the Administrative Assistant Alumni Programme who gave her a recommendation letter. She averred that the termination was unlawful and sought one month in lieu of notice, balance of 12 days in December 2012, unlawful deduction of Kshs. 1,200/- in October 2012 and compensation for leave not taken for 5 years in service, compensation for house allowance that was not paid for 5 years, compensation for the unlawful dismissal at 12 months, costs of the suit plus interest as well as a declaration that the employment of the Claimant on continued casual terms was from 3rd June 2009 was illegal hence should be converted to permanent employment for her to enjoy the benefits of her employment. The Respondent filed a memorandum of reply on 4th September 2014 and in the reply averred that the Claimant was employed as a casual and that the Respondent complied with the law and terms of employment until the time the Claimant absconded duty without notice. The Respondent denied that the Claimant's employment was terminated and averred that the Claimant absconded duty in December 2013 and has not resumed her duties to date. The Respondent averred that the letter by Ms. Bhoke Chacha was without its authority and therefore lacked evidential value. The Respondent averred that the Claimant was not entitled to the terminal benefits sought.

2. The Claimant testified on 20th September 2017 and stated that she was employed by the Respondent on casual terms on 3rd June 2008 as a data entry clerk department of alumni programmes until 19th December 2013. She testified that her boss Dr. Wambugu asked her to pack and go and that she would be called back. She was escorted to her desk and asked to pack and leave. She testified that she was not issued with a show cause notice and neither was she afforded a disciplinary hearing. She stated that she waited till 6th January 2014 when she went to enquire about her employment and was referred to Ms. Bhoke Chacha who issued her with a recommendation letter. She showed the court her staff card and testified that she received her pay through the bank as exhibited by her payslips. She stated that she was not given any house allowance and that in October 2012 there was a deduction of Kshs. 1,200/- which on enquiry was told was tax. She stated that she never got a letter terminating her services and that she never absconded her duty but was told to leave. She testified that she directed to Ms. Bhoke Chacha and saw a letter of termination which she photocopied.

3. In cross-examination by the Respondent's lawyer, she testified that she was employed in June 2008 and the letters and certificates are in files at the Respondent. She stated that she worked in the Alumni Department and that Dr. Wambugu was her supervisor and that she worked alongside Christine, Stella Mwihiaki, Winston Mukunzu and that Stella Mwihiaki was employed at the same as she was. She testified that she earned Kshs. 8,000/- at the time she joined and was earning Kshs. 18,000/- at the time she left in accordance with the announcements on Labour Day. She stated that her pay was Kshs. 14,852/- in May and in October it was Kshs. 14,052/- while in November it was 18,016/-. She testified that there were deductions and that is why the sum varied. She stated that there was a time she sought leave and was given one week to get her baby while maternity leave should be 3 months. She testified that she would attend Alumni functions and had attended a function in Nakuru and graduations at Kenyatta University. She stated she was advised to await a call and in January she went to check and was told to wait and that to date she had not received any communication. She testified that she saw a termination letter on her file and by the time she got a copy the case had already been filed in court. She stated that she was not paid a house allowance and that she had not made an application for the said house allowance. She denied that she was a casual and indicated that the NSSF and NHIF dues were deducted from her pay and that she worked all through.

4. In re-examination she testified that she was not given payslips and at the time she left her salary was Kshs. 18,000/-. That marked the end of the Claimant's oral testimony.

5. The Respondent called Nderitu Gikaria the Human Resource Manager of the Respondent. He testified that the Claimant was a casual that the Respondent hired on and off when work was available. He stated that he was not aware of the oral instructions to leave and that he had not issued instructions for the Claimant to leave. He testified that he came to know that the Claimant was no longer with the institution when a letter came to his office that the Claimant had filed a claim alleging that she had been sacked. He stated that the Claimant was paid a daily rate strictly for the days she worked. He testified that he knew Bhoke Chacha who was an Administrator in another section, not Human Resources. He stated that he knew that Bhoke Chacha had written a letter which she ought not have written as such a letter should only come from the Human Resources Manager. He testified that according to the head of the directorate, the Claimant absconded duty, was absent for a long time after which a claim was filed. He stated that the Claimant was never given leave or asked to go and that he was not aware of any leave applied for. He testified that it was casual employment and the rate paid includes 15% housing as it is consolidated pay inclusive of housing element.

6. In cross-examination, he testified that he had a Masters Degree in Human Resource Management and that he was aware of labour laws. He stated that the Respondent kept records of staff while personal records are kept by individual employees. He testified that the Claimant was not a labourer but a casual employee whose engagement was on casual terms. Her tasks were not of a permanent nature and that the Claimant was paid when work was available and there was no payslip. He stated that casual is on and off and that there were other times the Claimant was not employed. He testified that speaking of specifics it would be difficult to compile the data for days worked as the Claimant could work for one day go off and then come later and work for 3 days. He stated that the house allowance was paid on casual rates which are inclusive as per the law. He stated that the daily rate was around 600/- per day at the time. He testified that the Claimant was given tasks, duties but she ran away from work. He stated that they do not issue show cause to a person who is not a regular employee. He testified that if she was on duty the Respondent could give notice but if she absconded, he wondered where the Respondent would find her so that they could ask her to show cause. He stated that Bhoke Chacha worked for the Respondent and by the time she wrote the letter she was not in the department where the Claimant worked and that in fact the letter was fraudulent. He testified that there were records and he could easily go back to the records. He stated that the daily rate was 600/- or thereabouts.

7. In re-examination he testified that there was a function at Laico Grand Regency and a phone was stolen and as fingers pointed to the Claimant she absconded duty. That marked the end of oral testimony for the Respondent.

8. The parties were to file written submissions and the Claimant filed her written submissions on 2nd October 2017. In her submissions it was stated that given the oral and documentary evidence availed to Court, she had proved her case on a balance of probabilities. The Claimant asserted that the termination from employment was not fair as the Claimant was not issued with any notice as required in law. The Claimant submitted that the provisions of Section 37 the Employment Act applied to her case as she had worked continuously for 5 years. The Claimant submitted that the Claimant was entitled to the protections of Section 45 and that her termination was unfair as per the provisions of Section 45(4)(b) of the Employment Act 2007 as she was not given reasons as to why her services were terminated nor notice given before termination. She submitted that she was entitled to all the reliefs she had sought in her memorandum of claim as well as costs of the suit together with interest on the terminal dues from the date of filing the suit till payment in full.

9. The Respondent filed its submissions on 19th October 2017 and in the written submissions submitted that there was no dispute that the Claimant was an employee of the Respondent. The Respondent isolated the issues for determination as whether the Claimant was terminated from employment or she absconded duty; whether the Claimant who both parties acknowledged was employed as a casual is entitled to have her terms of employment changed; and whether the Claimant is entitled to the compensation sought in her memorandum of claim. The Respondent submitted that the Claimant absconded from duty and was not terminated from employment as claimed. It was submitted that the Claimant testified that she was informed by her immediate supervisor to go home in December 2013 and that she would be summoned back. She testified that on returning to the Respondent in January 2014 she saw her termination letter when she visited the office of Bhoke Chacha who wrote her a recommendation letter. The Respondent submitted that the Claimant alleged to have copied the termination letter but did not produce a copy. The Respondent submitted that its witness who was the person who would have written the termination letter denied issuing one and that he also did not issue instructions to the Claimant not to report to work. The Respondent submitted that Section 47(5) of the Employment Act places a burden on the employee to show that an unfair termination of employment had occurred and that the Claimant had not shown this. The Respondent submitted that the Claimant was not entitled to any of the terminal benefits claimed. The Respondent submitted that the Claimant was a casual throughout her employment. The Respondent submitted that was the reason her pay varied over time as she would only be paid when she worked. The Respondent submitted that the Claimant had accepted her terms of employment for over five years and seeking to change them after she had left the Respondent's employment is not fair and just. As regards the compensation sought, the Respondent submitted that the Claimant had failed to prove that she was entitled to notice and further that the Claimant earned different sums in different months and therefore had not proved she was entitled to the sum claimed under notice. Regarding balance of pay, the Respondent submitted that the Claimant was only paid for the time worked and therefore she could not be paid for days not worked during the month of December 2013. The Respondent submitted that there was no evidence produced by the Claimant to show there was a deduction of pay in October 2013 of Kshs. 1,200/-. The Respondent submitted that if leave was not sought then it cannot be carried forward and that the Claimant had not produced proof of leave applied for and denied. The Respondent submitted that the house allowance was calculated as part of the pay made each month since it was included in the daily rate. The Respondent submitted that the Claimant absconded from duty and therefore cannot claim the compensation that would be sought if one is unlawfully terminated.

10. The parties are in agreement as to the employment of the Claimant. The only divergence is the nature of the employment and whether the Claimant absconded work or was terminated. On her part, the Claimant asserts that she was an employee of the Respondent and that she did not receive notice prior to her termination nor did she receive house allowance. On its part, the Respondent asserts that the Claimant was a casual employee who was paid her wages for work done on the days when she worked. The Respondent asserts that the Claimant was not dismissed but that she absconded from work. It is clear that the Claimant stopped working sometime in December 2013. In her version, the supervisor, one Dr. Wambui Wambugu told her to stop reporting to work and that she would be summoned to return. In the version by the Respondent, the Claimant was not dismissed but absconded duty and that her pay for December was therefore for the days worked. Section 47(5) provides as follows:-

47.(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Under Section 47(5), it is amply clear that the burden of proving that an unfair termination of employment or wrongful dismissal has occurred lies on the Claimant. This burden does not shift as the burden to justify the grounds for the dismissal rests on the employer. The Claimant was required to demonstrate the termination, if any termination or dismissal took place, was wrongful or unfair. The Claimant testified that she was able to copy a letter of dismissal from her file. She did not however produce it or exhibit the said letter. It is undisputed that the Respondent has a Human Resource Manager whose duties would *inter alia* include the authority to hire and dismiss employees of the Respondent. The Claimant is stated to have absconded work and it was her responsibility to demonstrate that she was dismissed unfairly. She failed to discharge her burden. She had worked for a period in excess of 5 years and her contract of employment was therefore one which had been converted in terms of Section 37. She would have been entitled to notice prior to dismissal and the attendant safeguards under the Employment Act. In view of the fact that she did not prove unfair dismissal, the rest of her claims collapse. In regard to the claim for Kshs. 1,200/- wrongly deducted from her October 2013 salary, the Court is not persuaded that the sum was due as the Claimant earned different sums at different times and this discrepancy cannot be inferred to be a deduction unless evidence is adduced. No correspondence was adduced in regard to the sum either by way of an enquiry and therefore on balance of probabilities the same is not awardable as it is not proved. The claim is therefore dismissed but each party to bear their own costs. The Claimant is however entitled to receive a Certificate of Service for her 5 years of service to the Respondent from 2008 to 2013. Certificate to be issued in strict compliance with the provisions of Section 51 of the Employment Act

It is so ordered.

Dated and delivered at Nairobi this 2nd day of November 2017

Nzioki wa Makau

JUDGE