



**REPUBLIC OF KENYA**

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

**CAUSE NO. 249 OF 2016**

**DORCAS KAWIRA KABURU.....CLAIMANT**

**VERSUS**

**SANA INDUSTRIES LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 8<sup>th</sup> December, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 01.11.2016 through Mwaura Kamau & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from her employment was wrong, unfair, and unlawful.
- b) The respondent to pay the claimant a sum of Kshs. 275, 865.00 being Kshs.15, 900.00 notice pay, prorated leave pay Kshs.5, 565.00, service gratuity for 8 years served Kshs.63, 600.00 and 12 months' compensation Kshs. 190, 800.00.
- c) Costs of the suit and interest.

The respondent was served but failed to enter appearance, to file a response, and to attend the mentions and the hearing.

The claimant testified to support her case. The respondent employed the claimant as a general worker from June 2006 to 14.01.2015. NSSF was not remitted. The claimant's evidence was that she was locked out on 14.01.2015 as per instructions by the respondent's manager one Yuhn. She was asked to report after 2 weeks and when she did, she was told to stay away until further notice.

To answer the **1<sup>st</sup> issue** for determination the court returns that the lock out and the indefinite suspension amounted to constructive termination that was unfair for want of due process of a notice and a hearing under section 41 of the Employment Act, 2007 and further want of a valid reason per section 43 of the Act. If the claimant wished to terminate the claimant's employment on account of poor performance, namely low production of braids, then the legitimate procedure was the one set out in section 41 of the Act. In any event, the claimant had explained that the low production had been due to a slow member of staff on one of the production tables and it was unfair to terminate the claimant's employment in such circumstances of the case.

To answer the **2<sup>nd</sup> issue** for termination the court returns that the claimant is entitled to the prayers as made. In awarding 12 months' compensation as prayed for under section 49(1) (c) of the Act, the court has considered that the claimant had served for a long term of over 8 years, she was desirous of continuing in employment and she did not contribute to her termination. The court has considered the claimant's evidence and returns that in absence of any other material on record she has established her other claims and prayers. Further, in allowing the prayer for gratuity, despite section 35(6) of the Act, the court considers that the claimant's membership of NSSF served no purpose for social and old age protection because, no remissions were made in that regard.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs. 275, 865.00** by 15.01.2018 failing interest to be payable thereon from the date of the judgment and at court rates till full payment.
- c) The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at Nyeri this **Friday, 8<sup>th</sup> December, 2017.**

**BYRAM ONGAYA**

**JUDGE**