



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO. 106 OF 2012

RUTH WANJIKU THIGE CLAIMANT

VERSUS

MOBICOM (K) LIMITED.....RESPONDENT

Mr. Okao for the claimant

Mr. Kiboi for respondent

JUDGMENT

1. The suit was commenced by a statement of claim dated 13th January 2012 seeking a declaration that the termination of the employment of the claimant was wrongful and unfair. The claimant seeks relief set out in paragraph 7 of the statement of claim.
2. The respondent filed a statement of defence on 10th February 2012 stating that the suit by the claimant has no merit and it be dismissed with costs.
3. The parties did not adduce oral evidence and opted to rely on the pleadings and the documentary evidence annexed to the pleadings.
4. The claimant filed written submissions on 29th October 2015, whereas the respondent relies on the submissions contained under paragraph 10 to 16 of the statement of defence.

Facts

5. The claimant was employed on 1st June 2015 as a receptionist earning a monthly salary of Kshs.10,000.00. she was promoted to sales executive and her salary was increased to Kshs.30,000.00. The respondent transferred the claimant from Nairobi head office to Migori branch on or about August 2011 and on 12th August 2011, the claimant wrote a letter to the general manager of the respondent objecting to the transfer giving reasons that;
 - i. her baby was only six (6) months and she was breast feeding and relocation may affect her health;
 - ii. the elder child had health complications and would be affected by relocation;
 - iii. that she had been a loyal servant for many years and transfer without notice was unfair to her.
6. The claimant sought the respondent to consider her case and advice accordingly.
7. The employment of the claimant was terminated vide an email dated 13th August 2011 which was communicated internally. The letter simply stated that the claimant and five other employees named in the email were no longer employees of the respondent. No reason was provided for the decision.
8. The claimant wrote a letter of demand to the respondent vide her advocates Okao & Company

- Advocates on 18th October 2011. the respondent responded through Kiboi & Company Advocates on 21st October 2011, stating that the claimant was transferred from Nairobi to Migori in the capacity of stock controller with the same terms and instead of reporting to her new station she decided to abscond and refused to report to duty.
9. That the position held by the claimant was still there and she was free to report to duty immediately. The respondent reiterates the same in the statement of defence indicating that the claimant was not dismissed from employment and was free to return to work. The respondent states that the claimant was a competent employee and that is why the respondent required her services at the branch.
 10. The respondent prays that the suit be dismissed with costs.

Determination

11. It is plainly clear from the facts of the case that the claimant was transferred by the respondent from the head office in Nairobi, to Migori branch and the claimant refused to take the transfer up to the time of filing of the suit. The respondent in the response to the letter of demand asked the claimant to go and take up her job at Migori branch. The same offer was reiterated in the statement of defence.
12. The claimant has in the circumstances failed to prove on a balance of probability that her employment was terminated by the respondent. To the contrary, the claimant refused to take a transfer and absconded from work.
13. Accordingly, the claim for compensation for wrongful and unfair termination of employment has no merit and the same is dismissed.
14. However, the respondent confirms that the claimant was a good worker and they still wanted her services. The claimant does not seek reinstatement to her job but instead prays for terminal benefits outlined under paragraph 7 of the statement of claim as follows;

a. three (3) months salary in lieu of notice.

This claim lacks merit since the claimant was not dismissed from employment.

b. salary August 2011.

The claimant had served in August 2011 and is entitled to her salary for the month in the sum of Kshs.30,000.00

c. accumulated leave for seven (7) years served at twenty one (21) days for each year.

The respondent did not dispute this claim in the statement of defence and since no oral evidence was adduced in this matter to the contrary, the court finds that this claim has been proved on a balance of probability. The court awards the claimant Kshs.147,000.00 in lieu of leave not taken for a period of seven (7) years.

d. severance pay for seven (7) years

This claim for payment of severance pay for seven (7) years calculated at fifteen (15) days salary for every completed year of service has no merit in view of the evidence produced by the claimant herself in her payslip produced and marked "RWT B" in which it is clear that the claimant was registered with NSSF and the respondent deducted monthly contribution and remitted on her behalf. The claim for payment of severance pay is therefore dismissed.

15. In the final analysis, the court awards the claimant as against the respondent;

- i. Kshs.147,000.00 in lieu of leave;
- ii. Kshs.30,000.00 being salary for August 2011;

Total award Kshs.177,000.00;

- iii. the amount is payable with interest at court rates from date of filing the suit till payment in full;
- iv. both parties are partly successful and therefore each is to bear their own costs of the suit.

Dated and Delivered at Nairobi this 5th day of February 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE