



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1254 OF 2013

MARY M MWANGI CLAIMANT

VERSUS

SOFIA MANGINA T/A ATHENS LEATHER PRODUCTS RESPONDENT

JUDGEMENT

1. The issue in dispute is the wrongful and unfair termination of the Claimant and failure to pay terminal benefits.
2. Both parties were in Court on 10th February 2015 and 17th February 2016 when the claimant's case was heard and concluded. Defence hearing date was allocated for 22nd March 2016 with the consent of both parties but on the due date the Respondent did not attend. Such defence was therefore closed for non-attendance and matter allocated a date for judgement.
3. The Claimant was employed by the Respondent on 27th January 2006 in the business trading as Athens Leather products based at the Village Market. The Claimant was employed as a Shop Attendant as a salary of kshs.9, 000.00 a month. On 30th March 2013 the Claimant was terminated from her employment without notice or being given reasons. The Claimant was not given a hearing and was simply told to pack her belongings and never to report back to work again. At the time of termination, the Respondent had not paid the NSSF dues for the claimant.
4. The claim is for;
 - a. Notice pay at Kshs.15, 500.00;
 - b. Accrued leave for 2 years at kshs.21, 700.00;
 - c. Service pay for 7 years all at kshs.54, 250.00;
 - d. Balance of salary for December 2012 at Kshs.8, 000.00;
 - e. Balance of salary for February 2013 at kshs.6, 000.00;
 - f. Balance of salary for March 2013 at Kshs.2, 000.00; and
 - g. House allowance at kshs.195, 300.00.
5. The Claimant is also seeking compensation for unfair termination, costs and interests on due amounts.
6. In evidence, the Claimant testified that upon employment by the Respondent she served diligently until 30th March 2013 when she was terminated. She was not paid her salary arrears, there was no notice given and had not taken annual leave for 2 years.
7. On 30th March 2013 the Claimant reported to work with her 3 year old child and worked all day until

5pm. The Respondent called her while at work and in the course of the conversation heard the child at the background and demanded to know why she had brought the child to the workplace. The Respondent did not want to listen to the Claimant as to why she had brought her child with her to work. She was told to leave and never to return to the Respondent work place. The Claimant had been forced to carry her child to work as she had no house help and did not want to miss work. She was a salesperson and this did not affect her duties as the child was kept outside the shop at the playground and she would regularly check on the child without work disruptions.

8. The Claimant also testified that in 2012 and February 2013 she had been sick and asked for time off but the Respondent reused to pay her salary despite giving her permission to attend to her illness. She asked the Respondent to deduct her leave days but her salary was deducted for the days she was away.

9. The Claimant was not given an employment contract or any pay slips. The Respondent had a report book where the Claimant signed for duty attendance and the manager also signed. The book had a record of time at work. The Respondent has not produced this book in defence as it was essential to confirm employment; work attendance; days worked and date of termination.

10. In cross-examination, the Claimant testified that she was forced to carry her child to work as she had no house help and the Respondent did not give her a chance to explain her case before termination. Employer colleagues would bring their children to work and the Respondent had a field where children could play at the back of the shop. Such did not affect staff duties as there was a lunch hour that they could attend to the children. A colleague called the Respondent and when the call was passed to the claimant, she admitted that there were 3 children at the shop and one was her child. On this confirmation, the Claimant was told to leave immediately. The Respondent manager was also terminated on the spot for allowing the Claimant to bring her child to work.

11. The Claimant also testified that she was the longest serving staff of the Respondent at 7 years. The Respondent did not see her child but when asked, the Claimant admitted to having brought her child to work. Miriam, the manager at the time confirmed the events leading to the termination and is a witness in this case.

12. The Claimant also called Miriam Wairimu Wathungi who testified that she worked with the Claimant as her manager. On 30th March 2013 she was at work when the Claimant brought her child to work with her on the grounds that she did not have a house help and did not want to miss work. This was on a public holiday. The child was left at the playground. This was a common practice for the employees to bring children to work and place them at the playground. In the evening, the Respondent called and heard children crying and demanded to know whose child was in the shop. The next day the Respondent came and terminated the Claimant and the witness. The Respondent demanded for the shop keys. It was on a Sunday, and the witness and the Claimant were required to be at work. The Claimant was also called and told not to every report to work again.

13. Upon cross-examination, the witness testified that she had suffered humiliation from the Respondent on various occasions. She would call and scream at staff and threaten to fire each every time she became unhappy. That she did not file suit upon termination. She has no grudge with the Respondent as she took the option not to sue and has only been called as a witness by the claimant.

Defence

14. The defence is that the failure of the Respondent to issue a letter of employment is not fatal to the claimant's employment as such is protected in law. The employment of the Claimant was erratic and irregular as she was either absent from duty without leave; unwell or absconded her duties after taking salary advances. The Claimant was not dismissed from her employment but she absconded voluntarily and hence not entitled to notice pay.

15. The defence is also that the Claimant is not entitled to any of the reliefs on the grounds that in 2011 she took 13.5 days off and left a balance of 17.5 days quantified at Kshs.3, 750.00;

- a. In 2012 the Claimant took 4.5 days and balance of 16.5 days is kshs.8, 250.00;
- b. There was no salary balance for December 2012 as the Claimant only worked for 20 days;
- c. There was no balance due in 2012 as the Claimant only worked for 20 days and resumed on 16th February 2013; and
- d. There is no balance due in March 2013 as the Claimant only worked until 31st March 2013 and was paid.

16. The claim for house allowance is not due in this case. The Claimant cannot be compensated as she wilfully left her employment without notice. The claim should be dismissed with costs.

17. The Respondent did not call any evidence as they opted to be absent at the scheduled hearing date.

Determination

18. It is trite that an employer is required to issue a written contract of employment to an employee employer for periods of over 2 months in accordance with section 8 read together with section 10 of the Employment Act. Such a written contract is supported to contain the terms and conditions of employment. Equally section 20 of the Act requires that an employer should issue a statement of payments made, even in cases where salary advances are paid thus;

20. (1) an employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.

(2) The statement specified in subsection (1) shall contain particulars of—

(a) The gross amount of the wages or salary of the employee;

(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and

(c) Where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

19. Therefore it cannot be justified for an employer to state that they simply paid an employee and therefore no contract of employment was required. Such is a legal requirement as with it, terms and condition of employment are put on record. Such an employment contract and statement of payment of due salaries are relevant as with it, an employee can tell what is paid and what has been deducted. Such a statement also becomes necessary in a case such as this one to guide the Court in the arbitration of a dispute such as this one. See the case of **Evelyn Mumbi Ayub versus Zetu Kenya Limited, Cause No. 572 of 2014.**

20. A case of an absconding employee is a serious matter that warrant summary dismissal. Where an employee is absent from work without due cause, the employer must issue notice and where the employee does not oblige, section 44(4) of the Employment Act allow summary dismissal. However, where the employer has not issued such notice or the employer has no record of when the employee was absent and that absence was not with the permission of the employer, then the absence of the employee is deemed to have been lawful. The defence sets out various dates when the Claimant is alleged to have been away from work. The Claimant testified that she was absent due to illness and with the permission of the respondent. Such absence was not paid for. The Respondent only sets a chronology of dates that the Claimant is said to have been absent. There was nothing to support such averments. The Claimant asserted that they had a book where each would sign when at work. Such was not produced to confirm the days the Claimant was present or absent. Such record is in the possession of the Respondent and procedures before this Court requires that such a record be produced by the respondent. I take it that such a record was not produced for the simple reason that it contained evidence against the respondent. There is therefore no prove that the Claimant absconded duty and where absent, this was with the knowledge and approval of the Respondent.

21. I find sufficient evidence that the Termination of the Claimant was summary in disregard of the provisions of section 41 of the Employment Act which dictates that before termination or dismissal from employment, an employer must give an employee a hearing. At such a hearing, the employee must be allowed to state their case in defence and only then can the employer take the decision to sanction an employee as appropriate. Without such procedural adherence, the resultant termination or dismissal is procedurally unfair. As held by this Court in the case of **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited [2014] eKLR**; even in cases of gross misconduct which render an employee liable to summary dismissal, the procedural fairness requirements set out under section 41 of the Employment Act must be followed as they are mandatory. The requirement is to call the employee to attend hearing in the presence of a fellow employee of his choice where his defence is submitted for consideration by the employer. Also the Court in **Henry Ondari versus Top Security Systems Limited, Cause No.572 of 2011** held;

... Without such defence [before summary dismissal] being heard and discussed, the employee is left exposed to the whims of the employer to terminate at will. The right to terminate an employee is no longer unrestricted as section 41 of the Employment Act has created a safeguard to ensure natural justice is achieved at the shop floor where the facts are best established.

22. Where the Claimant absconded duty as alleged, the Respondent has not demonstrated any effort made to recall the Claimant back to work and she refused to oblige. Without any challenge of the claimant's evidence, I find her evidence was truthful. Her evidence is supported by that of Miriam Wairimu, her manager while employed by the respondent. Miriam confirmed the events leading to the termination of the Claimant and this was not challenged.

Remedies

23. On the finding that the Claimant was terminated unprocedurally and contrary to the provisions of section 421 of the /employment Act, compensation is due in accordance with section 49 of the Employment Act. Such compensation is based on her last gross salary at kshs.15, 500.00. Compensation is awarded at the 12 months gross salary all being Kshs.186, 000.00.

24. On the leave due, the Respondent did not submit the record of leave taken and what was due. The averments in defence were not supported with any material statements or leave schedules/balances. Section 28 of the Employment Act give provision for annual leave and where not taken and the employee has no contract of employment, section 35 requires that such be paid with the termination notice. Such leave should before 21 working days with full pay computed at one month gross salary. The Claimant is awarded leave not taken for 2 years all at kshs.31, 000.00.

25. Service pay where claimed is due under section 35 of the Employment Act. The failure to issue an employment contract and a salary statement stating the statutory deduction effect and particularly dues to NSSF and NHIF attract service pay. Such is computed at 15 days' pay for each year served. On the evidence that the Claimant worked for the Respondent for 7 years, where there is no record or evidence of statutory deductions service pay is hereby awarded at kshs.54,250.00.

26. Where an employee remains at work and has offered their labour, the salaries due are payable. Such can only be compromised where the employee is absent from work without due cause. Such is not the case here. Where the Claimant was absent from work due to illness, such time is regulated in law. The balance of salaries for December 2012, February 2013 and March 2013 are awarded at kshs.16, 000.00.

27. Section 31 of the Employment Act provides;

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

28. The duty is therefore on the employer to provide accommodation or an allowance to the employee so as to be able to source for reasonable accommodation near the work place. Without an employment contract stating how the parties wished to address the issue of housing or the allowance thereof, and without a salary statement setting out the employment benefits the Claimant had, house allowance is due as claimed. The Claimant served the Respondent from 27th January 2006 to 31st March 2013 being a period of 86 months. The house allowance due and based on the gross pay of kshs.15, 500.00 is kshs.2, 325.00. The Claimant is awarded kshs.199, 950.00 due for house allowance.

In conclusion therefore, the Court enters judgement for the Claimant against the Respondent in the following terms;

- a. **A declaration that the Claimant was unfairly terminated by the respondent;**
- b. **Compensation is awarded at kshs.186, 000.00;**
- c. **Leave due Kshs.31, 000.00;**
- d. **Service pay Kshs.54, 250.00;**
- e. **Salary arrears kshs.16, 000.00;**
- f. **House allowance kshs.199, 950.00;**
- g. **Interests on the due amounts at Court rates; and**
- h. **The Claimant should be issued with a Certificate of Service;**

Orders accordingly.

DELIVERED IN OPEN COURT AND SIGNED THIS 31ST DAY OF MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga