



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
CAUSE NO. 520 OF 2014
EVERLINE KHAMETE.....CLAIMANT

v

NDUPAWA PRESTIGE COMPANY LTD.....RESPONDENT

JUDGMENT

1. The Claimant (acting in person) commenced legal proceedings against the Respondent on 17 October 2014 and they stated the issue in dispute as *unfair termination*.
2. The remedies sought were contractual/statutory entitlements and compensation for unfair termination of employment.
3. On 7 November 2014, the firm of Geoffrey Otieno & Co. Advocates came on record for the Claimant.
4. The Respondent filed a Response on the same day and the Cause was heard on 2 December 2015.
5. Although the Court directed the parties to file and exchange submissions within set timelines, the Claimant filed her submissions only on 21 March 2016. The Respondent had filed its submissions earlier, on 11 March 2016.
6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies* including whether the Claimant has made a case for the entitlements accruing from the employment relationship.

Whether dismissal was unfair

7. The Claimant in her testimony stated that she was dismissed on 14 June 2014 without being given a letter of dismissal.
8. On the circumstances surrounding the dismissal she stated that on 13 June 2014, the Respondent's Director took her phone and beat her up as a result of which she went to report to the Police and on returning to work the next day, the Director sent her away.
9. The Claimant denied being served with a suspension letter.
10. The Respondent's Manager testified on its behalf.

11. He stated that the Claimant was not dismissed on 14 June 2014 but that she (and other employees) had been suspended pending investigations on allegations of theft and that she acknowledged receipt of the suspension letter.

12. According to the witness, the Claimant and others were found with phones during an impromptu search conducted on 13 June 2014, and after suspension reported to their union which in turn reported a trade dispute to the Labour office, but before the dispute could be resolved she moved to Court.

13. The witness admitted that the Respondent received demand letters from the Claimant's union, and letters from the Labour office on conciliation but it did not respond to the letters.

14. He further admitted that a Director was arrested and charged with a criminal offence and the case was still pending.

15. A copy of the suspension letter issued to the Claimant was produced in Court. It has a signature and identity card number purportedly belonging to the Claimant.

16. On the basis of the suspension letter, the Court is not satisfied that the Claimant has demonstrated that she was unfairly dismissed in terms of section 47(5) of the Employment Act, 2007.

17. The cause of action for unfair termination of employment therefore fails.

18. Because of the conclusion, it is the view of the Court that it is not necessary to examine the legal consequence of failure to exhaust the conciliation process which had been commenced.

19. Despite the conclusion, the Claimant has sought other entitlements which accrue out of the employment relationship because of statutory intervention and the Court will examine them. This is on the basis that though the Claimant has not shown there was unfair dismissal, the employment is no longer in effect having been frustrated and rendered impracticable.

Leave days

20. The Claimant stated that she did not go on leave during the employment.

21. She informed the Court that she was employed in February 2005 but was not issued with a written contract.

22. The Respondent's Manager on his part stated that he joined the Respondent in 2008 and found the Claimant already working but that she was on 3 months renewable contracts.

23. The Court would therefore find that the Claimant was employed in February 2005.

24. Section 28 of the Employment Act, 2007 entitles an employee to at least 21 days annual leave with full pay each year.

25. Considering the section and the provisions of section 10(3) of the Employment Act, 2007 and considering that the Act commenced in 2008, the Court would find that the Claimant is entitled to pay in lieu of untaken leave for 2009, 2010, 2011, 2012, 2013 and 2014 which is roughly equivalent to 6 months wages.

26. The parties were agreed the Claimant was on a monthly wage of Kshs 10,000/- and the Court would assess the pay in lieu of leave as Kshs 60,000/-.

Wages for June 2014

27. The Claimant is entitled to wages up to 14 June 2014 and the Court assesses the same as Kshs 5,000/-.

Overtime

28. The Claimant testified that she used to work from 6.30 am to 6.30 pm without payment overtime. But she did not disclose the contractually agreed working hours (per day or per week). She equally did not address the Court on the relevant Wages Order prescribing minimum working hours for the sector she was working in.

Public holidays

29. No proper evidential basis for this head of claim was provided and the Court declines to make an award under the same.

Gratuity

30. Similarly no contractual or statutory basis was provided for an award of gratuity and it is declined.

Conclusion and Orders

31. The Court finds and holds that the Claimant has failed to prove that there was unfair termination and the cause of action thereto is dismissed.

32. However, the Court finds and holds that the Claimant is entitled to and awards her

a. Pay in lieu of leave	Kshs 60,000/-
b. Wages June 2014	Kshs 5,000/-
TOTAL	Kshs 65,000/-

33. The other heads of claim are dismissed.

34. The Claimant is denied costs, having failed to file and serve submissions within agreed timelines

Delivered, dated and signed in Nakuru on this 1st day of April 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Otieno instructed by Geoffrey Otieno & Co. Advocates

For Respondent Mr. Mogambi instructed by Wambua Kigamwa & Co. Advocates

Court Assistant Nixon