



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 158 OF 2015

ANNE MUTHONI MACHIRA.....CLAIMANT

VERSUS

RAGATI TEA FACTORY COMPANY LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 24th June, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 15.09.2015 through Anne Thungu & Company Advocates. The claimant prayed for judgment against the respondent for:

1. Payment of Kshs.211, 305.00 being the claimant's half salary, house allowance and other benefits that the respondent deducted from the claimant when they had wrongfully interdicted her, general damages for wrongful dismissal to be assessed by the court and reinstatement of the claimant to her job.
2. Costs and interest.

The respondent's response to the claim was filed on 16.10.2015 through Lucy Mwai & Company Advocates. The respondent prayed for an order dismissing the claimant's claim with costs.

The claimant was employed by the respondent from 01.08.1989 until her termination on 02.12.2013. The claimant was employed as a supervisor in the respondent's processing section involved in drying, sorting, parking and marketing the tea leaves.

On 02.12.2013 the respondent alleged that the claimant had stolen three bags of tea leaves. It was the claimant's case that in fact, she had purchased the bags at Kshs. 540.00 and she had kept them at the security gate to go away with them after work. Instead, the security guard accused her of theft. Without an administrative opportunity to explain her case, the respondent reported the case to the police and the claimant was arrested and charged with the offence of stealing by servant contrary to section 281 of the Penal Code in criminal case No. 748 of 2013 at Karatina. It was alleged that the claimant being the respondent's servant stole 2 sachets of tea leaves weighing 500 grammes and all valued at Kshs.630.00, the property of the respondent, which came in the claimant's possession by virtue of her employment. The case went to full trial. The trial court dismissed the prosecution's case under section 215 of the Criminal Procedure Code and ordered that the claimant be set at liberty forthwith unless otherwise lawfully held. The trial court delivered the judgment on 22.02.2014.

Upon the initiation of the criminal case against the claimant, the respondent suspended the claimant from duty by the letter dated 09.12.2013 on account of the criminal proceedings. The letter placed the claimant on half pay effective 09.12.2013 pending investigation and action. The claimant testified that the

respondent did not pay the claimant the half salary as promised in the suspension letter because she received only Kshs. 3, 883.00 per month at the bank instead of Kshs. 11, 217.00 per month so that she claimed the monthly difference of Kshs.7, 334.00 withheld throughout the suspension period. The claimant testified that during the suspension the respondent withheld the claimant's medical allowance Kshs.500.00; house allowance Kshs.4, 000.00 both due on monthly basis; and annual December pay of Kshs.5, 000.00.

The claimant testified that after the acquittal, the respondent failed to reinstate her by lifting the suspension. The respondent's manager told the claimant to leave the premises on the date the claimant had visited seeking reinstatement in view of the acquittal. Subsequently, the claimant received the letter dated 14.01.2015 terminating her employment. The letter addressed to the claimant by the respondent stated as follows:

“RE: TERMINATION OF SERVICES

We make reference to the Factory Unit Manager's letter Ref. RG/DN/SF/12/13/408 dated 5th December 2013 wherein you were charged for being in possession of 1 3/4 Kgs of made tea without authority as you left the factory premises on 2nd December 2013 at 1.40pm. You were placed on suspension vide Factory Unit Manager's letter Ref.RG/DN/12/2013 dated 9th December 2013.

Further reference is made to your defence/explanation letter dated 6th December 2013 and your presentation at the Staff Disciplinary Committee meeting on 13th May 2014.

It has been noted that on 2nd December 2013 you were found in possession of 1 ¾ Kgs of made tea without authority as you left the factory premises on 2nd December 2013 at 1.40pm. Being in possession of company property without authority is an act of gross misconduct that renders you liable to summary dismissal.

Without prejudice to the right to summarily dismiss you from employment, the company has terminated your services with effect from 14th January 2015.

Upon compliance with the formal clearance procedure, you will be paid terminal dues as follows:

- i. Salary for days worked but not yet paid.**
- ii. Pay in lieu of accrued leave on pro-rata basis.**
- iii. Two (2) months' salary in lieu of notice.**
- iv. Gratuity for years served as per the current CBA where applicable.**

Signed

S.M. NGURE

HUMAN RESOURCE MANAGER(F)”

The claimant's testimony was that after the termination she was not paid any terminal dues. However, the claimant in re-examination testified that the termination letter showed her terminal dues and the same was paid. Respondent's exhibit at page 17 of the response bundle showed that the claimant's net dues were Kshs. 175, 239.90. The claimant testified that she signed that document but did not receive the money. However, the bank statement filed for the respondent on 29.05.2015 showed that the claimant had indeed been paid that money. The claimant testified further that she was not paid medical and house allowance for December 2013 to 14.01.2015, the date of the termination.

The respondent's evidence is as follows. First, that the claimant has been paid all the monies now claimed. Second, she was paid Kshs. 652, 804.25 for gratuity and in lieu of notice per page 16 of the response bundle. After deductions the net pay was Kshs. 268, 282.50. Third, as per union advice, all

withheld salaries during the suspension being Kshs.175, 239.90 were paid except for 01.01.2015 to 14.01.2015 which was missing in the computation but which was later established by documentation to have been paid.

The main issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

1. The claimant prays for payment of Kshs.211, 305.00 being the claimant's half salary, house allowance and other benefits that the respondent deducted from the claimant when they had wrongfully interdicted her. The court returns that the respondent has showed that all withheld salaries were paid. In the submissions the claimant has urged that the payment was on the basis of the pay in 2014 and not the revised pay per 2015 CBA so that the claimant prays for the difference of Kshs. 33, 501 over the 13 months of suspension at Kshs. 2, 577.00 per month. The court returns that the claimant did not specifically plead that claim and amount and the relevant CBA was not filed to establish the claims. The prayer will therefore fail as already satisfied by the respondent.
2. The claimant prayed for general damages for wrongful dismissal to be assessed by the court. The claimant has not urged or pleaded a case for unjustified or unfair termination as envisaged in section 49(1) of the Employment Act, 2007. The claimant pleaded wrongful termination which is essentially based on breach of contract. The claimant cannot therefore get damages except as flowing naturally from the breach of contract. The respondent has already established that the claimant was paid in lieu of notice and the compensation as urged for in the submissions will fail.
3. The claimant prayed for reinstatement to her job. The prayer was not urged in the final submissions and in the circumstances of this case, the court returns that the prayer is not justified or appropriate. The evidence is that the claimant was paid and she accepted her terminal dues. The court finds that the parties have effectively and fairly separated and the prayer for reinstatement was an unreasonable belated afterthought.
4. The court has considered the belated and piecemeal manner in which the respondent filed documents in this case. It could be that had the respondent been transparent in dealing with the claimant after the termination then the claimant might have not come this far in this matter. The court returns that each party shall bear own costs of the suit.

In conclusion judgment is entered for the respondent against the claimant for dismissal of the memorandum of claim with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 24th June, 2016.

BYRAM ONGAYA

JUDGE