



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1646 OF 2014

CATHERINE KATHINA KELLY CLAIMANT

VERSUS

ILKISONKO SACCO LIMITED RESPONDENT

Mr Masavilo for claimant

M/S Khafafa for respondent

JUDGMENT

1. The claimant worked for the respondent as a secretary earning a monthly salary of Kshs. 13,050.
2. The claimant was taken ill on 1st January 2014 until the 13th January 2014. The claimant sent a message to the manager Mr. Emmanuel Samingo reporting the sickness on 2nd February 2014. She reported back to work on 6th January 2014 and worked upto 9 p.m. in the evening. She fell sick again at night and was taken to hospital and was given a sick-off. The claimant could not submit the sick-off immediately until she reported back to work on 13th January 2014.
3. Upon reporting on 13th January 2014, the manager requested her to wait outside the office and later was told to go back home. The manager complained that the claimant ought to have reported to work first before going to hospital.
4. The claimant states that she did not have opportunity to report to work first before being taken to hospital as she was taken ill on the night of 6th January 2014.
5. The claimant did not have an adverse record at work and had diligently provided service to the respondent.
6. The claimant did not receive a show cause letter, a letter of suspension nor was she given notice of termination. She also did not get a certificate of service.
7. She claims the reliefs set out in paragraph 10 of the statement of claim as follows;
 - a) one (1) month salary in lieu of notice;
 - b) twenty one (21) days untaken leave;

- c) twelve (12) months salary as compensation for unlawful termination;
- d) fifteen (15) days salary as gratuity for each year served;
- e) half salary for the entire period of suspension;

8. From the payslip, it is clear that the claimant was registered with NHIF and NSSF and the dues were remitted by the employer.

9. The claimant prays that the claim be allowed with costs.

Response

10. The respondent filed a statement of reply on 21st November 2014 in which it admitted the employment of the claimant at a monthly salary of Kshs.13,050 but denies that the claimant was in permanent employment.

11. The respondent avers that the claimant absented herself from work variously and did not offer diligent service to the respondent.

12. The respondent admits it sent a text message to the claimant guiding her on how to seek sick-offs.

13. The respondent further denies that the claimant is entitled to the reliefs sought or at all.

14. The respondent called Emmanuel Samingo to testify in support of its case as RW1. RW1 testified that he was the General Manager of the respondent and on 2nd December 2013 he sent a notice to show cause to the claimant why disciplinary action should not be taken against her. The reason for this was several absenteeism from work by the claimant without justification or any reason.

15. RW1 explained to the court that on 2nd December 2013 the claimant was warned for late coming and poor work performance. On 2nd January 2014, she wrote an 'sms' saying she was unwell and RW1 asked her to pass through the office and to get a Doctor's sick-off.

16. She reported on 6th January 2014 and brought a sick-off sheet that had expired on 5th January 2014. RW1 told her to await the decision of the board. RW1 states that the claimant deserted work and her services were not terminated.

17. The letter was posted to the claimant and was not required to respond to the same. She was to stay at home and await a verdict. The respondent did not communicate to the claimant any further todate.

18. RW1 admitted that two years had elapsed but justified the delay by stating that the board had not yet been constituted.

19. RW1 added that the claimant was paid salary for all days worked. RW1 adds that the suit has no merit and same be dismissed with costs especially because the claimant had not been confirmed into employment.

Issues for determination

20. The issues for determination are;

- i. whether the claimant was a protected employee;
- ii. whether the claimant was terminated from employment or she deserted work;

- iii. if it was a termination, whether it was done for a valid reason and in terms of a fair procedure;
- iv. whether the claimant is entitled to the reliefs sought.

Issue i

21. The parties filed written submissions on 15th March 2016 and 31st March 2016 respectively on the aforesaid issues. The respondent contends that the claimant failed to produce KCSE certificate to be confirmed as a permanent employee. She was appointed on 7th January 2013 on probationary basis which was to expire in July 2013. The letter provides that probation can be extended for a further period of six months.

22. That as at 7th January 2014, the claimant was still on probation and her employment was not protected by the Employment Act, 2007 and is not entitled to the reliefs sought.

Section 42 of the Act, provides;

“(1) the provision of Section 41 shall not apply where a termination of employment terminates a probationary contract.

“(2) The probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.

“(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2)”.

23. The claimant pleaded and testified that she was permanently employed and produced a letter of appointment dated 7th January 2013 which placed the claimant on six month’s probation.

24. The letter states that;

“after the six months of probation period the management will issue a letter of confirmation depending on your performance.”

25. The probation period was due to end on 6th June 2013.

The respondent did not write to the claimant to confirm her employment but the claimant continued to work until 9th January 2014.

26. There is no requirement for a letter of confirmation upon expiry of probationary period. It suffices that the employee continues to work under the contract of employment granted to the employee upon expiry of the probationary period and in the absence of a letter of confirmation, the employee converts to a permanent employee by operation of the law.

27. The court finds that the claimant was no longer on a probationary contract at the time of her separation with the employer.

Issue ii

28. As to whether the claimant deserted her employment or the employment was terminated by the respondent, the court need not go further than her own testimony and that of RW1.

29. The claimant narrated the events, which the court found credible regarding the termination of her employment by the respondent.

30. It has been established on a balance of probability that on 13th January 2014, the claimant who had been taken ill reported back to work with a sick-off sheet from the Doctor. RW1 told her to wait outside her office and later told her to go home until the respondent considered the matter and would communicate its decision accordingly. As at the time of filing the suit, no communication had come from the respondent, a fact confirmed by RW1 in his sworn testimony before court.

31. The respondent's conduct amounted to an unlawful termination of employment in that, the claimant was kept in limbo at home under the pretext that her case was being considered until she brought the matter to court. The procedure under Section 41 of the employment Act, was not followed in that the claimant was not given opportunity to explain in the presence of a fellow employee why her employment ought not to be terminated.

32. The claimant was not given a valid reason for terminating her employment, it being clear that the claimant had been taken ill and was not in a position to get prior approval of her absence until when she reported to work.

33. The respondent was under mistaken belief that the claimant was still serving probation and therefore her employment could be terminated without notice, without any valid reason and without following a fair procedure.

34. The court finds that the termination was in violation of section 41, 43 and 45 of the Employment Act, 2007 and was therefore unlawful and unfair.

35. With regard to the remedies sought by the claimant, and in view of the finding that the termination of the claimant was not for a valid reason and was not conducted in terms of a fair procedure the claimant is entitled to compensation in terms of section 49 of the Act.

36. In terms of section 49 (1) (c) the court may award to the claimant equivalent of a maximum twelve (12) months salary for the unlawful and unfair termination of employment.

37. Sub-section 49 (4) guides the court in the measure of compensation. The consideration include the wishes of the employee on the remedies provided under section 49 (1) and (3) whether the employee contributed to the termination, practicality of recommending reinstatement or re-engagement, employee's length of service, the reasonable expectation of the employee as to the length of time she could have served the respondent, whether there are similar opportunities readily available to the employee; the value of terminal benefits payable to the employee, expenses reasonably incurred by the employee and whether the employee has taken reasonable steps to mitigate her loss.

In this respect, the claimant did not seek re-instatement or re-engagement, had served for only one year, was not paid in lieu of notice or given any notice prior to the termination of employment.

38. The claimant was kept for many months at home without pay, without any clarity whether she was still in employment or not and was not given a certificate of service to help her obtain alternative employment quickly.

39. In short, the claimant lost her means of livelihood for the reason that she had fallen ill and in the court's view she did not contribute to the loss of her employment.

40. The court, upon considering all the factors awards the claimant;

- i. Ten (10) month's salary as compensation for the unlawful and unfair termination of employment in the sum of Kshs.130,500.00;
- ii. Kshs.9,135.00 in lieu of twenty one (21) days leave not taken for the year served;
- iii. Kshs.6,525 being equivalent of ½ month salary as gratuity for the year served; and

iv. a certificate of service to be granted to the claimant within thirty (30) days from the date of this judgment;

v. the claim for payment of $\frac{1}{2}$ salary for the period of suspension is refused since the claimant's employment was simply terminated verbally and she was not placed on suspension;

the total award to the claimant is Kshs.146,160;

vi. respondent to pay costs of the suit.

Dated and delivered in Nairobi this 23rd day of September, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE