



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1704 OF 2012

JOYCE NYAMBURA WAINAINA1ST CLAIMANT

EDWIN KINE WAINAINA 2ND CLAIMANT

VERSUS

NAIVAS LIMITED RESPONDENT

Kimani for the claimants

Kiiru for the respondent

JUDGMENT

1. Causes No. 1704 of 2012 and 2513 of 2012 were consolidated by consent of the parties. The witnesses for the respondent were common though the claimant cases are quite different. The court has considered the two matters distinctly therefore.

2. The 1st claimant was employed by the respondent on 21st July 2007 as a clerk on three months probation earning a salary of Kshs.10,000 per month. She worked continuously and diligently until 30th July 2012, when the chairman of the respondent orally suspended her from work on grounds that the 1st claimant's brother, who also worked for the respondent at Eldoret branch had been charged with alleged misconduct and that she had to await the outcome of the investigations against her brother.

3. On 2nd August 2012, the 1st claimant wrote to the respondent requesting for a formal communication on the reasons for her suspension. The respondent did not respond to the letter produced as exhibit 3. The letter of appointment was produced as exhibit I and the payslip showing her current salary at the time of termination, at Kshs.38,720 per month was marked exhibit 2.

4. The letter was not responded to and on 17th August 2012, the 1st claimant's Advocates wrote to the respondent seeking clarification on her suspension. See exhibit 4.

5. On 18th August 2012 the 1st claimant received a letter from the respondent terminating her services on grounds of desertion / absconding from work. Letter is marked exhibit 5.

6. On 23rd August 2012, the respondent wrote to the 1st claimant reinstating her to her employment and at the same time deployed her to serve in Mombasa Branch of the respondent.

7. The 1st claimant wrote through her Advocates to the respondent to consider re-deploying her to a

branch near or within Nairobi taking into consideration her personal and family circumstances. The respondent was adamant and the 1st claimant requested for some reasonable time to relocate vide a letter dated 25th August 2012 marked exhibit 8.

8. On 3rd September 2012, the 1st claimant went to report to Mombasa and met Mr. Waweru, the branch manager who informed the 1st claimant that the branch would communicate to her when to commence work at the branch. The 1st claimant returned back to Nairobi on the same day in the evening. The claimant had arrived in Mombasa on Saturday 1st September 2012 and was booked in a hotel for two days i.e. 1st and 2nd September 2012 where she paid Kshs.8,600. She produced receipts marked 'exhibit 9' in respect of the relocation expenses.

9. The 1st claimant waited for further communication from the Mombasa branch in vain until she came to court. The respondent did not pay the 1st claimant's salary for August 2012.

10. The 1st claimant avers in her statement of claim and stated in a sworn testimony before court that she was dismissed from employment unlawfully and without following a fair procedure. That she was victimized for alleged wrong done by her brother to which, if indeed is true, she was not a party and had no knowledge of.

11. That she was mistreated and harassed before the dismissal by being suspended without a justification, refusal to consider a genuine request for appropriate deployment, failure to facilitate her relocation to Mombasa and keeping her in limbo unaware of her fate until she came to court.

12. The 1st claimant seeks the reliefs set out in paragraph 18 and 19 of the memorandum of claim including interest and costs of the suit.

Response

13. The respondent admits all particulars of employment of the 1st claimant.

14. The respondent states in the memorandum of response and in the sworn testimony of RW1, RW2 and RW3 that the 1st claimant was not dismissed from employment but absconded duty after she was transferred to Mombasa.

15. The respondent further denies that, the chairman had at any time suspended the 1st claimant from employment.

Analysis of evidence

16. The 1st claimant filed an amended memorandum of claim with leave of court in which the claim for overtime was amended from Kshs.404,040.00 to Kshs.2,577,170. The amended memorandum of claim was accompanied by computation of the overtime claim.

17. The respondent did not file an amended statement of response to the amended memorandum of claim. The 1st claimant testified at length on this matter. She told the court under oath that she worked for thirteen (13) hours for five (5) days a week from Monday to Friday and worked from 7 a.m. to 1 p.m. on Saturdays. She also worked one Sunday per month.

18. She testified that as a clerk she was not in a supervisory position nor was she in management. That she remained a clerk at all material time as is indicated in her letter of appointment. That her payslip shows that she was not paid any over time at all. She got a gross salary of Kshs.38,720 which included basic pay and house allowance.

19. RW3 Aggrey Njau the former human resource manager of the respondent told the court the 1st claimant was not paid salary for August 2012 since she had absconded. That data entry clerks such as the 1st claimant are in management category and do not get overtime. That they report at 7 a.m. and leave at 5 p.m. work is extended at times but they are not entitled to overtime.

20. RW2 confirmed that the 1st claimant was not paid in lieu of leave for the year 2012 and is therefore entitled to payment.

21. On compensation RW1 said that the 1st claimant absconded, was not dismissed and is not entitled to compensation nor payment in lieu of notice.

22. RW3 said that company policy was to refund a maximum of Kshs.8,600 for relocation and could pay the claimant if she proves she travelled to Mombasa. RW1 Johnson Kiguaru, made an attempt to discredit the receipts produced by the 1st claimant in respect of accommodation at Pride Inn hotel Mombasa on 1st and 2nd September 2012.

23. RW1 said the receipts No. 1327 and 1215 were not genuine receipts of the hotel.

24. That the hotel at Nyali branch does not have nos. 205 and 302 in which the claimants purport to have stayed on 1st and 2nd September 2012 respectively.

25. That they do not have the address on the receipt though it is their address. That the layout of the receipt is different.

26. RW1 produced a sample of genuine receipt for the hotel and was marked “RW1 (a)”.

27. It however came out under cross examination that the 1st claimant stayed at the Haile Selassie branch of Pride Inn hotel. The witness said he had no information about the Haile Selassie branch and only testified about Nyali branch of the hotel. He said he had no identification to show that he worked for Pride Inn hotel. RW1 also said he was unable to tell if the claimant was a guest at pride Inn hotel Haile Selassie branch on 1st and 2nd September 2012. He said that there was a mix-up in the instructions he was given.

28. The evidence of RW1 was therefore wholly discredited and the court could not rely on it to discredit the testimony of the 1st claimant that she travelled to Mombasa on 31st September 2012 and slept at Pride Inn Haile Selassie branch on 1st and 2nd September 2012 and on 3rd September 2012 reported at Nyali branch of the respondent but was told to go away and await to be called by the branch manager Mr. Ibrahim Waweru (RW2).

29. RW2 Ibrahim Waweru told the court that he had joined the respondent in January 2012 and in the month of September 2012 he was based at the Nyali branch and left in October 2012. That he received an email on 23rd August 2012 that the 1st claimant had been transferred to the branch. He produced the letter he received. RW2 told the court that the 1st claimant did not report at the branch as alleged or at all on 3rd September 2012. He denied having sent her away to await to be called back.

30. Under cross examination however, it came out that the 1st claimant was supposed to have reported between 18th August 2012 and 23rd August 2012. However the 1st claimant had on 18th August 2012 received a letter terminating her service and was reinstated and transferred on 23rd August 2012.

31. RW2 said he did not know the 1st claimant and had not met her before. However, the 1st claimant had according to the respondent been dismissed for desertion but the decision was later reversed and she was deployed to Mombasa but failed to report to work.

32. The respondent denies all the particulars of claim set out in the memorandum of claim and puts the 1st claimant to strict proof thereof.

33. That the respondent does not owe the 1st claimant any terminal dues sought by the claimant. The respondent prays that the suit be dismissed with costs. The respondent relied on testimony of RW1, RW2 and RW3.

Determination

34. The issues for determination are;

- i. Whether the 1st claimant was dismissed from employment or she absconded from duty.
- ii. If the 1st claimant was dismissed from employment, whether the dismissal was for a valid reason and the dismissal was in terms of a fair procedure.
- iii. Whether the claimant is entitled to the reliefs sought.

Issue i

35. The 1st claimant produced in court a letter dated 2nd August 2012 written to the respondent through the human resources office, seeking to be informed of the reasons for her suspension. She insisted that the mistakes of her brother could not be visited on her. The 1st claimant told the court that the respondent did not respond to her letter. The respondent did not respond to this letter and did not candidly confront this issue in court. It is common cause that the 1st claimant's brother worked for the respondent and was dismissed from work at around the same time as the 1st claimant is alleged to have absconded.

36. On 18th August 2012, the respondent purported to terminate the employment of 1st claimant for desertion when in actual fact, the chairman of the respondent had suspended the 1st claimant from work. The chairman did not come to court to refute these allegations by the 1st claimant.

37. On 22nd August 2012, the respondent purported to reinstate the 1st claimant to her work without any explanation why the respondent had changed its mind. It is in the same letter of reinstatement, that the respondent transferred the 1st claimant from Nairobi head office to Mombasa.

38. The narrative by the respondent does not add up and is not credible in the court's view.

39. The 1st claimant produced air tickets from Nairobi to Mombasa issued on 31st August 2012 on the date the 1st claimant told the court she travelled to Mombasa with a view to report to Mombasa branch of the respondent on Monday 3rd September 2012. The 1st claimant further produced receipts for accommodation at Pride Inn hotel Mombasa Haileselasie on the 1st and 2nd September 2012.

40. Attempts by the respondent to discredit the 1st claimant's evidence that she travelled to Mombasa by air, was accommodated at Pride Inn and reported on the morning of 3rd September 2012 did not bear much fruit.

41. The testimony by the 1st claimant was candid and consistent and the court accepted her testimony as a reflection of what actually took place.

42. The court therefore finds that the 1st claimant has proved on a balance of probability, that she reported to work on the morning of 3rd September 2012 but the branch manager asked her to await to be called to report, which never happened at all, until the 1st claimant filed this suit.

43. Accordingly, the court finds that the employment of the 1st claimant was terminated for no valid reason because the 1st claimant had not committed any offence nor had she underperformed in her work. She was victimized on account of an alleged misconduct committed by her brother who worked for the respondent in another branch of the respondent.

44. That the 1st claimant was not subjected to any disciplinary action but was sent on a false transfer to Mombasa, which branch refused to admit her to work for the respondent until she filed this suit.

45. The respondent did not make any averments challenging the terminal benefits set out under paragraph 18 of the memorandum of claim except with regard to overtime.

46. The 1st claimant is entitled to compensation in terms of section 49 (1) (c) as read with subsection 49 (4) of the Employment Act, 2007.

47. In this regard, the 1st claimant had served the respondent diligently for the period of five (5) years.

48. The alleged mistakes of her brother were wrongly visited on her. She was until this time a diligent employee who served the respondent with dedication.

49. She was not paid any terminal benefits upon dismissal. She had been placed on suspension unlawfully prior to the dismissal. The 1st claimant did not contribute to her dismissal but was indeed callously victimized. The respondent was not candid at all and falsely sent her to Mombasa on purported transfer which was not to be.

50. The 1st claimant suffered loss and damage. She was not provided a certificate of service to help her get alternative employment quickly. As at the time of the suit she remained unemployed and indigent.

51. The court considers this an appropriate case to award ten (10) months salary as compensation for the unlawful and unfair dismissal from employment in the sum of Kshs.387,200.

52. The final award by the court to the 1st claimant as against the respondent is as follows;

a) Kshs.38,720 in lieu of notice;

b) Kshs.38,720 being arrear salary for August 2012;

c) Kshs.38,720 in lieu of leave days not taken;

d) Kshs.8,600 proved travelling and accommodation expenses to and from Mombasa;

e) Kshs.387,200 being equivalent of ten (10) months salary compensation for unlawful and unfair dismissal;

Total award Kshs.511,960;

f) interest at court rates from date of filing suit till payment in full;

g) costs of the suit;

h) respondent to provide certificate of service to the 1st claimant within thirty (30) days from date of this judgment.

2nd claimant

53. The 2nd claimant, Edwin Kibe Wainaina is a brother of the 1st claimant.

54. The 2nd claimant was also employed by the respondent. He commenced work on 28th September 2005 and worked continuously until 30th July 2012. The 2nd claimant worked in the position of supervisor and was stationed at the Kisii branch of the respondent. He earned Kshs.32,500 per month.

55. The 2nd claimant seeks payment of;

- i. unpaid salary for August 2012 in the sum of Kshs.32,500;
- ii. one month salary in lieu of notice;
- iii. accrued overtime as per (computation filed) in the sum of Kshs.41,892,940;
- iv. payment in respect of 53 public holidays worked Kshs.114,480;
- v. payment in lieu of leave days Kshs.45,500;
- vi. service pay Kshs.65,000; and
- vii. compensation for unlawful and unfair termination of employment.

56. The 2nd claimant told the court that he was registered with NSSF and was not owed in that respect.

57. That on 30th July 2012, Mr. Paul Kibe, a manager of the respondent told the 2nd claimant to go home.

58. The 2nd claimant was accused of losing cash at the work place. The 2nd claimant states that he worked for 13 hours daily instead of 8 hours for 7 days a week. He also worked during weekend which was all overtime but was not paid as such. That the company did not have a reporting register but they were given a job card when they reported to work and returned it when they left for home.

59. The 2nd claimant filed computation of overtime due and owing on 7th March 2013.

60. The 2nd claimant explained that he worked for 53 holidays and was not paid double rate in terms of the law.

Leave

61. With regard to the claim for leave days, 2nd the claimant told the court that he took leave in 2009 and 2011. That the company paid in lieu of leave days not taken at the end of the year. It is only in 2012 the 2nd claimant was not paid in lieu of 21 days leave.

62. From 2005 up to 2010, the 2nd claimant was paid in lieu of leave except in 2009 and 2011 when he took leave.

Service pay

63. With regard to this claim the claimant stated that he had no letter of appointment with this requirement. That he was registered with NSSF from the beginning.

Notice pay

64. The 2nd claimant testified that he was sacked without notice. He was simply told to go home without notice. He seeks one month's salary in lieu of notice.

Compensation

65. The 2nd claimant says that the respondent did not have a good reason to terminate his employment nor was due procedure followed in sending him home. He claims compensation for unlawful dismissal. He told court that he was now 29 years, had studied upto form four (4) and had training in information technology and had enrolled in a marketing course. That he was now self-employed in Kisii town where he sold clothes. He states that just like his sister, he was victimized just because they were related to a brother who was an employee of the respondent at Eldoret who was accused of theft of cash.

66. Under cross examination the 2nd claimant told the court that Mr. Paul Kibe told him to go home and wait communication from the chairman stationed in Nairobi. He went on several occasions to seek the promised communication but it was not forthcoming.

67. The 2nd claimant also met the human resource manager Millicent Njeri and explained to her that his employment was terminated by the branch manager. She did not help him either.

68. The 2nd claimant got a certificate of service from the branch manager.

69. The 2nd claimant explained that the total claim he sought was Kshs.1,132,544.20 and not 5,572.920 as reflected under Clause 12 of the memorandum of claim. That the tabulation of overtime totaled Kshs.3,872,448. This explains the variation in the original memorandum of claim.

Response

70. The respondent filed a memorandum of reply on 26th February 2013. The salary of Kshs.32,500 is admitted. The respondent states however that the 2nd claimant worked as a shop attendant. The respondent admits that termination of employment was upon giving one month notice by either party or payment in lieu thereof.

71. The respondent states that the employment of the 2nd claimant was terminated on 18th August 2012 lawfully for absconding duty from 29th July 2012 to 18th August 2012 without giving an explanation as to his whereabouts. The respondent denies that it sent the claimant home as alleged or at all.

72. Furthermore, according to the respondent all terminal dues were paid to the 2nd claimant upon termination of his employment. The respondent states that the claimant is not entitled to any of the reliefs sought.

73. The issues for determination are;

- i. Whether the 2nd claimant employment was terminated or did he abscond from duty.
- ii. If the employment was terminated, was it for a valid reason and in terms of a fair procedure?
- iii. Whether the 2nd claimant is entitled to the reliefs sought.

Issue i

74. The claimant narrated how on 30th July 2012 he was asked by Paul Kibe, his branch manager to go home because his brother, George Njuguna, who worked at Eldoret as a chief cashier had caused loss of cash. That he was to stay at home to await communication from the chairman. That he severally made follow up of the outcome until he was given a letter terminating his services on 15th August 2015. That there was no good reason to terminate his employment nor was he given opportunity to explain why his employment ought not to be terminated.

75. That his sister also lost her job in a similar way on allegations that she had absconded work by failing to report to work after a transfer to Mombasa.

76. The 2nd claimant denies these allegations and says that himself and his sister were victimized due to allegations made against their brother George Njuguna, based in Eldoret, whereas he was stationed at Kisii while his sister was based at the head office, Nairobi.

77. The human resource manager, Godrick Alfa Itua (RW3) had no personal knowledge of the two cases and relied on the company records. He told the court that the case of the 2nd claimant was not clear to him because the circumstances of his termination were not found in the file.

78. The explanation by the 2nd claimant that he was simply told to await home and had committed no offence at work nor was he subjected to any disciplinary process went unanswered.

79. The 2nd claimant has proved on a balance of probability and in terms of section 43 as read with section 45 and 47 (5) of the Employment Act, 2007 that his employment was terminated for no valid reason, no fair procedure was followed.

80. Accordingly, the 2nd claimant is entitled to compensation in terms of section 49 of the Employment Act 2007. The 2nd claimant had served the respondent for a period of seven (7) years with a good record, was victimized for alleged mistake by his brother. He lost his source of income without notice and without payment of any terminal benefits.

81. The court awards the claimant ten (10) month's salary as compensation for unlawful and unfair termination of employment in the sum of Kshs.325,000.

82. Terminal benefits

The court has considered the evidence adduced on the various terminal benefits and has reached the following finding;

i. Arrear salary for August 2012:

The 2nd claimant's employment was terminated on 18th August 2012.

The 2nd claimant has established that he was not paid salary for the days worked. The court awards him eighteen (18) days salary in the sum of Kshs.19,500.

ii. It is evident from the testimony of the 2nd claimant and that of the respondent that the 2nd claimant was not given a month's notice nor was he paid in lieu thereof. The court awards the 2nd claimant Kshs.32,500 in lieu of notice.

iii. Accrued overtime hours:

From the payslip of the 2nd claimant, he was paid overtime as and when he worked extra hours.

This claim has not been proved and same is dismissed.

iv. Fifty three (53) holidays:

Similarly, the 2nd claimant was unable to show on a balance of probability that he worked on any specific public holiday and the respondent failed to pay him double salary as is stipulated by the law.

The claim is dismissed.

v. Accrued leave:

The 2nd claimant established that he was owed twenty one (21) days leave by the respondent and was not paid in lieu thereof. The court awards the 2nd claimant, a month's salary in lieu of leave days not taken in the sum of Kshs.32,500.

vi. Service pay:

The claimant admitted he had no letter of appointment providing this benefit and the same could not accrue by operation of section 35 of the Employment Act, 2007 because, the 2nd claimant was fully registered with NSSF and the respondent remitted the NSSF dues from his date of employment. The claim for service pay has no merit and is dismissed.

83. In the final analysis, the court awards the 1st and the 2nd claimant as follows;

(a) 1st claimant

i. Kshs.38,720 in lieu of notice;

ii. Kshs.38,720 being arrear salary for August 2012;

iii. Kshs.38,720 in lieu of leave days not taken;

iv. Kshs.8,600 proved travelling and accommodation expenses to and from Mombasa;

v. Kshs.387,200 being equivalent of ten (10) months salary compensation for unlawful and unfair dismissal;

total award Kshs.511,960;

vi. interest at court rates from date of filing suit till payment in full;

vii. costs of the suit;

viii. respondent to provide certificate of service to the 1st claimant within thirty (30) days from date of this judgment.

(b) 2nd claimant

i. ten (10) months salary as compensation for the unlawful termination in the sum of Kshs.325,000;

ii. Kshs.32,500 in lieu of notice;

iii. Kshs.19,500 salary for August 2012;

iv. Kshs.32,500 in lieu of leave;

total award Kshs.409,500;

v. the award is payable with interest at court rates from date of filing suit till payment in full;

vi. respondent to pay costs of the suit.

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

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE