



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 77 OF 2016

AGNES WANJIRU MUTHONI..... CLAIMANT

VERSUS

KING'UKU & COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 25th November, 2016)

JUDGMENT

The claimant filed the statement of claim on 16.04.2016 through Warutere & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) General damages for unlawful dismissal.
- b) 1 month's salary in lieu of the termination notice Kshs. 11, 200.00.
- c) Unpaid salary for 2 months Kshs. 22, 400.00.
- d) Unpaid leave for one year Kshs. 11, 200.00.
- e) Costs of the suit.

The response to the statement of claim and counterclaim was filed on 24.06.2016 through Muchiri Wa Gathoni & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs and judgment be entered for the respondent for:

- a) Kshs. 49, 955.00 being amount stolen by the claimant (Kshs.61, 155.00) plus pay by the claimant in lieu of termination notice Kshs.11, 200.00 and less unpaid salary for October and November 2015 Kshs. 22, 400.00.
- b) The respondent also prayed for costs and interest on the amount of the counterclaim.
- c) Any other relief the court may deem just to grant.

The claimant testified that she was employed by the respondent as an accountant on 14.11.2014 – but the respondent while admitting the employment stated that the claimant was employed as a receptionist. On 10.12.2015, the claimant testified that she reported on duty and she was summoned by the respondent's director one Juliet Wahome who informed the claimant that her services were no longer required. On 27.11.2015 the claimant wrote a letter of apology addressed to the respondent's director as follows:

“RE: APOLOGY LETTER

First I would like to apologize for what has happened. I never thought all this would happen after carrying out various transactions via m-pesa and visa payments.

My request is that my salary should be deducted Kshs. 2,000.00 per month whereby I will pay back the missing money in 15 months time starting from November due to my school fees payment.

I promise that this will not happen again and I promise to work and cooperate with each and everyone in the company.

All look forward to hear from you.

Thank you.

Yours faithfully,

Signed

AGNES WANJIRU”

The claimant testified that she had been threatened to sign the letter. The particulars of threats were not pleaded and the claimant offered no evidence in that regard.

The **1st issue** for determination is whether the termination was unfair. The claimant testified that she was summoned by the director on 10.12.2015 and told that her services were no longer required. The respondent’s evidence (which the claimant admitted to in cross-examination) is that on 27.11.2015 the claimant requested for leave effective 30.11.2015 to 07.12.2015 to sit for examinations. The claimant then resumed work on 08.12.2015. The letter dated 14.12.2015 by the labour officer to the respondent shows that the dispute that the claimant reported was about a claim for salary for October and November 2015. There was no claim for unfair termination. The ensuing conciliation proceedings before the labour officer did not mention unfair termination. The respondent’s witness No.1 (RW1) one Juliet Muthoni King’uku testified that on 10.12.2015 the claimant reported at work and disappeared at around 11.00am or earlier and RW1 had learned about the said claimant’s disappearance from work when RW1 received a report from a customer that the reception area the claimant had been deployed and assigned to serve was not attended to because the claimant had taken off without notice. Since that date, RW1 testified that the claimant had not reported back to work and instead the claimant had reported to the labour officer the dispute about unpaid salary for October and November 2015.

The court considers that if the claimant suddenly left duty as testified by RW1, the respondent was entitled to initiate a disciplinary process for the misconduct of absence without permission – but which was never done by the respondent. The respondent has also testified that the claimant was responsible for loss of Kshs. 61, 155.00 and that is yet another reason which, in the opinion of the court, entitled the respondent to initiate a disciplinary process, but was not so initiated. Section 41 of the Employment Act, 2007 required the respondent to invoke notice and a hearing in view of such serious and alleged misconducts. In view of the absence of such lawful disciplinary procedure, the court returns that as per the claimant’s testimony she was verbally fired by the said Juliet on 10.12.2015 and the termination was unfair for want of due process under section 41 of the Employment Act, 2007.

The **2nd issue** for determination is whether the claimant is entitled to 12 months compensation under section 49 (1) (c) of the Employment Act, 2007. The claimant signed admitting a liability of Kshs.30, 000.00. By reason of that admission the court considers that the claimant substantially contributed to her dismissal. The court has considered that the claimant had served for only one year and in view of her contribution the court returns that she is not entitled to compensation as prayed for. However, the claimant is awarded one month pay of **Kshs. 10, 200.00** in lieu of the termination notice and one month

pay in lieu of annual leave (24 pending days) **Kshs. 10, 200.00** as prayed for. She is also entitled to pay for November and October 2015 as prayed for and as admitted for the respondent making **Kshs. 20, 400.00**.

The **3rd issue** is whether the respondent is entitled to the prayers as per the counterclaim. The claimant signed admitting to owe Kshs. 30, 000.00. The claimant did not subject the claimant to a disciplinary process with respect to the further claims totalling to Kshs. 61, 155.00 as alleged in the counterclaim. Final report on missing monies was said (by RW1) to have been lost from the respondent's desk. Accordingly, the claimant is found liable to refund the respondent only the admitted Kshs.30, 000.00. The other prayers in the counterclaim will fail as they are not justified.

The claimant having been found entitled to Kshs. 40, 800.00 and the respondent Kshs. 30,000.00, judgment will be entered for the respondent to pay the claimant Kshs. 10,800.00. The court has considered the parties' margins of success and returns that each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the parties in the suit for:

- a) The declaration that the claimant's dismissal by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs. 10, 800.00** by 15.12.2016 failing interest to be payable at court rates from the date of this judgment till full payment.
- c) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 25th November, 2016**.

BYRAM ONGAYA

JUDGE