



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 8 OF 2014

(BEFORE D. K. N. MARETE)

HELLEN KASUVO ASAVA.....CLAIMANT

VERSUS

JAMES FINLAY KENYA.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 2nd July, 2014 and filed in this court at Nakuru. Another set of Memorandum of Claim was filed under ELRC No.219 of 2014 at Kisumu. Both filings are similar and do not disclose a cause of action on their faces.

The respondent likewise made responses to both suits denying liability in all and praying that the same be dismissed with costs.

This court chooses to pursue and determine the later cause (Kisumu) in an attempt to obviate duplicity or even occasion injustice to the parties. Pleadings are intended to be specific in form and intent for these purposes.

The claimant's case is that she was an employee of the respondent from the year 2002 to 5th November, 2012 when she was terminated from service without reasonable cause or notice. This was unlawful as follows;

- a. The claimant trade union was not informed of the intention to declare the claimant redundant.*
- b. No leave pay was given.*
- c. No two month's salary in lieu of notice was paid.*
- d. The required severance pay was not paid.*

It is the claimant's further case that during her employment with the respondent she was grossly underpaid having regard to the regulation of wages (general) (amendment) order, in force, worked overtime without payment, she worked on rest days without pay and also worked on public holidays without due pay.

She prays as follows;

a. Two month pay in lieu of Notice Gross salary = basic + house allowance

$Kshs. 11,550 \times 2 \text{ months} = Kshs. 23,100/=$

b. Service benefits

$31 \text{ days} \times \text{yrs worked} \times \text{basic}/30 \text{ days}$

$30 \times 9 \times 11,550/30 = Kshs. 103,950$

c. Compensation for unfair termination

Gross pay x 12 months

$11,550 \times 12 = Kshs. 138,600/=$

TOTAL CLAIM KSHS. 265,650/=

She in the penultimate prays for;

- a. A declaration that the termination process as carried out by the respondent is unlawful and that during her employment with the respondent, he was not remunerated as required by law.
- b. Payment of the sums of money claimed under paragraph 9 above.
- c. Costs and interests.
- d. Any other relieve the honourable may deem fit to grant.

The respondent's case is that the claimant was an employee of the respondent as a tea

plucker on a temporary basis with effect from 1st January, 2003 and was confirmed to full time employment on 1st March, 2003 at a salary of Kshs.159.75 per day. The pay was in accordance with a collective agreement between herself and the union.

The respondent's further case is that she performed her duties until 4th April, 2012 when she was found with stolen tea leaves by a security officer as she was headed to her residence. On further search at her place of residence, more tea bags were recovered. She admitted theft of tea.

The respondent's further case is that she issued the claimant with a show cause letter to which the claimant responded by admitting the theft - Appendix 2 of the Statement of Response. She was thereafter issued with a show cause letter she was offered an open opportunity to do her defence but failed to exonerate herself and was therefore issued with a letter of dismissal from service. The respondent further denied and disclaimed liability as follows;

13. She was issued with a show cause which she responded and admitted the misconduct. She was later called to the Managers office whereby she was accorded an opportunity to make a verbal representation in the presence of a shop steward. She had no explanation and the respondent found her to have committed a gross misconduct and an action was taken of dismissing her.

14. It was the respondent's evidence that the union appealed against the decision to have her services dismissed. After the hearing the representation from the union and the management, it was agreed that the decision taken by the respondent was fair and equitable. This is as per the appendix 4 page 11 of the defence.

15. The claimant prayed for payment of service pay. In court both witnesses agreed that the respondent was contributing to the NSSF where the claimant was a member. We pray that the prayer be disallowed.

16. The notice period in case of termination of the contract was 1 month as per the contract of service signed by both parties. In the instant case the claimant was summarily dismissed and therefore she lost the right to notice. We pray that the said prayer be disallowed too.

The matter came to court variously until the 18th February, 2016 when it was heard. The parties also agreed on a disposal of the matter by way of written submissions.

The claimant testified in favour of her case, reiterating the same. She *in toto* denied the allegations of theft by the respondent and maintained her innocence. It is her case that she was dismissed for seeking pay for overtime. A demeanor of lack of co-operation was clearly evident during her cross-examination.

The respondent through DW1 Peter Kibet Biwott the Human Resource Officer testified in reiteration of the defence.

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawfully.
2. Whether the Claimant is entitled to the relief sought.
3. Who should pay costs of the suit?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawfully. The claimant forments a case of unfair dismissal but does not verify this by evidence. Her list of documents in support of the claim enlisted hereunder do not in any way bring out a case of unlawful termination of employment on their face or content. These are;

1. Demand letter by M/s Chepkwony & Co. Advocates dated 17/3/2014
2. Computation letter dated 10/3/2014
3. Letter dated 12/11/2012 from KPAWU
4. Letter of appointment dated 1/3/2003
5. Summary dismissal dated 5/11/2012
6. Employment card
7. National identity card (copy)
8. Any other documents to be relied on with leave of the court.

The respondent in his defence adduces the following documents in support of her case;

1. Letter of appointment.
2. Appointment letter (ungraded staff)
3. Letter by the claimant admitting theft of tea and other interactions with the security officer over theft of tea dated 4th November, 2012.
4. Letter of summary dismissal.
5. Demand letter from KPAWU dated 12th November, 2012.
6. Letter of agreement between KPAWU and the respondent on summary dismissal.

The evidence of the parties tilts this case in favour of the respondent. This is because the respondent displays a clear cut case of misconduct by the respondent and an agreement with the claimant's union on the way forward. The claimant admits theft of tea but in evidence denies the same. I deem this an afterthought on her part. It is not possible to rebut the defence case as established and I therefore find a case of lawful termination of employment. The claimant had only herself to blame for the eventualities and consequences of her misconduct.

On a finding of lawful termination, the claimant would not be entitled to the relief sought. And this closes the 2nd issue for determination.

I am therefore inclined to dismiss this claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 14th day of November ,2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Rugut instructed by Chepkwony & Company Advocates for the Claimant.
2. Mr. Masese instructed by the Federation of Kenya Employers for the Respondent.