



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1549 OF 2012

RACHAEL AKOTH ONYANGO.....CLAIMANT

VERSUS

RENTOKIL (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 4th September 2012. Her claim was that she was wrongfully dismissed from employment. She averred that she was employed on 1st March 2005 till her termination on 1st October 2010. The Claimant averred that the sacking had caused her loss and damage. She sought a declaration that the Respondent action of sacking her was illegal and unlawful and that she is entitled to severance pay, terminal benefits, 3 months in lieu of notice, unpaid leave, salary underpayments and gratuity all totaling Kshs. 110,000/-, general damages for wrongful dismissal, costs of the suit and interest.

2. The Respondent filed a Response to Claim on 24th October 2012. In it, the Respondent averred that the Claimant was not sacked but resigned after she was compensated for the accident. It was averred that she did not give notice, was unavailable and unreachable and did not report to work. The Respondent sought the dismissal of the suit with costs.

3. The Claimant testified before me on 29th January 2015. In her testimony she said that she was employed by the Respondent and on 30th December 2009 she had an accident where she broke both legs. She stayed in hospital for 6 months and after some stay at home was recalled to work. Her employer knew she had an accident and was discharged in June 2010. She went to work with crutches and was told to go back and return after recovering fully. She stopped using crutches in August and when she returned to work was told by the employer she could not continue working and was given a certificate of service. She was earning Kshs. 10,000/- at the time of termination and she never used to go on leave.

4. In cross examination by Mr. Simiyu for the Respondent she testified that the accident took place on 30th December 2009 and she was taken to St. Francis Community Hospital. She denied getting off duty for 90 days but admitted that she was given 90 days off after seeing the sick off sheet from St. Francis Community Hospital. She testified that she got salary till March 2010 then half salary was paid. She said she could not work as she had crutches. She went to the office in July and was told to go home and rest and get better. She did not have a document to show she was given more time. She said she was to be called back to work but instead of being called was later given a certificate of service.

5. In re-examination she said she was in hospital for 2 months and was to go for follow up for 6 months.

For the 6 months she did not get a document.

6. The defence called Geoffrey Ikungu Nyoro. He testified that he works for the Respondent in human resources as a Human Resources Officer. He stated that from the records the Claimant used to work for the Respondent up to September 2010. She used to work in the service department and there was no evidence of her termination. She had an accident in 2010 and had a certificate of incapacity from a doctor for 90 days. He said that the records the Respondent had did not indicate her return. After the expiry of the 90 days the Respondent expected another certificate in case of any extended period. The Respondent kept her in payroll till September 2010 without any record of incapacity. The certificate of service was made available to her at the point she requested for one. He presumed she sought the certificate to enable her look for work elsewhere. The Respondent did not sack her.

7. In cross examination by Mr. Omas for the Claimant he testified that he started working for the Respondent in May 2012. The Claimant had left by the time he joined. He admitted he did not have records that the Claimant was paid till September 2010. He was sure the Claimant took leave as there was a policy that employees take leave. He maintained that she was paid till September 2010 and there was no claim of the cash from her.

8. The parties filed written submissions. The Claimant filed hers on 12th February 2015. In the submissions, she submitted that the issues that had been presented were among others:

1. Whether the Claimant was terminated or resigned.
2. Whether the Claimant is entitled to severance pay, terminal benefits, salary in lieu of notice, unpaid leave and salary underpayments.

9. The Claimant submitted that she was verbally dismissed and issued with a certificate of service. She submitted that notice is required under Section 35. The issuance of certificate of service was equivalent to dismissal. She thus sought salary in lieu of notice, severance pay, annual leave and salary compensation. Reliance was placed on the case of **Gilbert Muchina v Scarce Commodities Ltd [2014] eKLR** where Radido J. granted compensation for unfair termination and salary in lieu of notice. She also cited the case of **Sylvester Oduor Othwila v Phoenix Aviation Limited [2014] eKLR** where Ndolo J. held that proper procedure ought to be followed even where there is overwhelming evidence of the employee's inability to work and proceeded to grant 12 months salary compensation.

10. The Respondent filed submissions on 26th February 2015. The Respondent submitted that the Claimant was involved in a road accident on 30th December 2009 and was given 90 days sick off with effect from 29th January 2010. The Respondent submitted that meant the Claimant would be on sick off till 29th April 2010 and was expected to resume work on 30th April. The Respondent submitted that the Claimant continued to receive salary till 30th September 2010 and she sought a certificate of service. The issues the Respondent identified for determination were

1. Whether the Claimant was dismissed by the Respondent
2. Whether or not the Claimant absconded duty

12. The Respondent submitted that absconding from work is a ground for summary dismissal and relied on the case of **Daniel Mueke v Bhogals Auto World [2014] eKLR**. The Respondent submitted that the Claimant was not dismissed but absconded from work.

12. The issues that emerge for determination by the Court are

1. Whether the Claimant absconded from work or was dismissed
2. What relief is the Claimant entitled to if she was dismissed from work?

13. The Claimant testified that she was injured in a road traffic accident on 30th December 2009. She testified in her examination in chief that she was in hospital till 30th June. In cross examination she initially denied being given 90 days off but after being referred to her sick sheet she admitted that she was given 90 days off. In re-examination she stated that she was in hospital for 2 months and was to go for follow up for 6 months. The Respondent's witness testified that the Claimant was paid salaries till September 2010 when she sought a certificate of service. She spoke of salary paid till March 2010 and thereafter half salary payment in her testimony in chief. She did not specify until when. In her testimony she did not allude to underpayments of salary.

14. Whereas the Claimant alleges wrongful dismissal from employment, the Claimant did not prove there was any dismissal. She did not deny that the Respondent paid her salary till September 2010. She obtained a certificate of service but was not dismissed. The Claimant was dishonest in her testimony before Court. Was she in hospital for one month then on sick off for 90 days or was she in hospital for 6 months or was she in hospital for 2 months then on follow up for 6 months? This conundrum is of the Claimant's own making.

15. Weighing her testimony against the documents she has availed against the Respondent's witness testimony and the documents the Respondent availed, I find and hold that the Claimant has failed to discharge her burden under Section 47(5) of the Employment Act. She failed and thus did not prove her case on a balance of probabilities. The suit is dismissed but I make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of **March** 2015

Nzioki wa Makau

JUDGE