



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 39 OF 2012

(FORMERLY CAUSE NO.1440 OF 2012 AT NAIROBI)

JACKLINE K.MUCHIRI..... CLAIMANT

VERSUS

EVEREST ENTERPRISES LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th June, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 22.08.2012 through Mang'erere J. and Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Certificate of service.
- b. 1 month pay in lieu of the termination notice Kshs. 11, 500.00.
- c. Payment of monies due on unexpired contract Kshs. 57, 500.00.
- d. General damages for breach of contract.
- e. Costs of the suit.
- f. Any other relief the court shall deem fit.

The respondent filed the memorandum of defence on 01.10.2012 through Namisi and Company Advocates. The respondent prayed that the claimant's cause be dismissed with costs.

The respondent employed the claimant as an administrative assistant with effect from 06.08.2011 to 05.08.2012.

The claimant testified that on 24.02.2012 the respondent's manager called Robert summoned her to his office and handed her a list of 16 employees who were required to go on compulsory leave with effect from 28.02.2012. The claimant was instructed to fill leave forms in that regard. The claimant testified that she was amongst the 16 employees and she took 8.5 compulsory leave days so that she was to return at work on 17.03.2012. However, the claimant further testified that the manager informed her that the employees would not return at work. The claimant's evidence was that she was not paid for February 2012 and no terminal dues were paid.

The claimant testified that on 13.03.2012 she received a letter to show-cause why disciplinary action should not be taken against her for not reporting at work for the period the claimant was otherwise on the compulsory leave. Her evidence was that she replied to the letter in writing on 16.03.2012 and, on 17.03.2012 the respondent's Human Resource Manager wrote an email to the claimant asking her to report on duty on 19.03.2012. The claimant reported on duty as required and she testified that she worked

for 3 days and on 22.03.2012 she was locked out, she did a demand letter, and filed the suit.

Upon cross-examination, the claimant testified as follows:

- a. The leave started on 28.02.2013 and was to end on 06.03.2013.
- b. The leave form exhibit EEL1 did not indicate compulsory leave because the manager asked her to cross those words and to simply write "leave."
- c. That she was to return on 06.03.2012 but returned at work on 19.03.2012.
- d. On 22.03.2012 she was locked out and thus she did not sign the check in register for that day.
- e. She received the termination letter and the reasons for termination were unfair.
- f. The manager had at the time of taking the compulsory leave told the claimant that she would not return at work because the respondent was not performing well financially.

The respondent's witness (RW) was Zachary Mathenge Wahome, the respondent's Human Resource Manager and Administrator. He confirmed that the claimant reported at work on 22.03.2012 at 7.30AM and left at 8.15AM and he confirmed a check-in and check-out register existed but he had not looked at it or filed it in court. RW stated that there was a difference between Francis the respondent's Human Resource Manager at the material time, Robert the then Farm Manager and the Claimant but the difference was never resolved. RW further stated that the show-cause letter came after 22.03.2015.

The **1st issue** for determination is whether the dismissal was unfair. The letter of summary dismissal dated 27.03.2012 stated that the claimant because on 22.03.2012 the claimant reported at 7.30AM and left work at 8.15AM according to the gate register. Thereafter, the letter stated that the claimant could not be traced. The court has considered the evidence on record and finds that the claimant's evidence that she was locked out at the gate on 22.03.2012 is credible because the respondent has failed to establish its case based on the attendance register at the gate and as alleged in the dismissal letter. The court finds that there was no genuine reason for the termination as envisaged in section 43 of the Employment Act, 2007 and the termination was unfair for want of a genuine reason. With respect to circumstances leading to the compulsory leave then to the show cause letter of 13.03.2012 the court finds that the claimant's account clearly establishes that there was misleading instructions by the Farm Manager one Robert that the claimant would not report at work and RW confirmed existence of some differences and dispute between the claimant and her supervisor the Farm Manager and which was never resolved. The court finds that the claimant had a genuine grievance against the Farm Manager but which remained unresolved and the same could not constitute a valid reason for termination as envisaged in section 46 (h) of the Act.

To answer the 1st issue for determination, the court finds that the summary dismissal of the claimant by the respondent from employment was unfair.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The claimant is entitled to the certificate of service as provided for in section 51 of the Act.
- b. The claimant was not given a termination notice and is entitled to 1 month pay in lieu of the termination notice being **Kshs. 11, 500.00**.
- c. The claimant has prayed for payment of monies due on unexpired contract Kshs. 57, 500.00. It was submitted for the claimant that she served on a renewable one year contract and the last contract was running from 6.08.2011 to 5.08.2012 and the claimant's last monthly salary was Kshs. 11,500.00 so that she was entitled to 5 months unexpired term of service making **Kshs.57, 500.00**. The court finds that in absence of any material on record to make the award unjustified, the claimant is entitled to that pay as the due pay in view of the breach of the fixed term contract.
- d. The court has found that the dismissal was unfair. The court has considered the award of the full pay for the unexpired term of contract and considers that one month pay for the unfair termination will meet the ends of justice under section 49(1) of the Act being **Kshs. 11, 500.00**.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration that the summary dismissal of the claimant by the respondent from employment was unfair.
- b. The respondent to deliver to the claimant the certificate of service by close of 1.08.2015.
- c. The respondent to pay the claimant **Kshs.80, 500.00** by 1.08.2015 failing the respondent to pay thereon interest at court rates from the date of this judgment till full payment.
- e. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 12th June, 2015.**

BYRAM ONGAYA

JUDGE