



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 233 OF 2014

HARRIET K. MUTESHI.....CLAIMANT

VERSUS

**ORTHODOX DEVELOPMENT SAVINGS AND CREDIT SOCIETY
LIMITED.....RESPONDENT**

JUDGMENT

1. By consent of the parties, the respondent herein was substituted with Miliki Savings and Credit Society Limited hence reference to the respondent shall be deemed as reference to the substituted party.
2. The claimant was employed by the respondent on 14th October, 2008 as a Public Relations and Marketing Officer. She was later reassigned to the position of loans officer and later promoted to the position of FOSA Manager.
3. She claimed that she worked for the respondent until she was constructively dismissed by the respondent through unlawful deductions of Kshs.20,000/= per month from her salary without her authority and or consent as well as demoting her from the position of FOSA Manager to Loans Officer.
4. According to the claimant, following the findings of a taskforce, the board of the respondent purported to demote the claimant at the same time making deductions from her salary. She responded to the action via a letter dated 22nd August, 2013 giving a detailed explanation as to how and why charges arose and gave evidence of meetings and resolutions approving her actions and or instances when she made reports of the losses ascribed to her in the report.
5. Unable to bear the harsh and unconscionable working terms imposed by the respondent on her, effectively constructively terminating her employment, the claimant via a letter dated 5th October, 2013 gave a resignation notice citing inability to meet her running costs. She thereafter demanded for payment of her terminal dues prior to filing of the present action.
6. The respondent on the other hand refuted the claimant's allegations and averred that the claimant was unable to work as per the Personnel Policies and she was asked to show cause why disciplinary action should not be taken against her. Despite the deficiency, the claimant was promoted to FOSA Manager by a letter dated 10th September, 2011. According to the respondent the deficiency continued to be noted and the claimant was called upon to explain the anomalies which she did by her letter dated 20th September, 2012.

7. The respondent averred that it was forced to form a Task Force to know the root cause of the poor performance of the respondent while under care and management of the claimant. The Task Force gave its report and the same was adopted by the respondent's Board which it proceeded to implement hence the claimant was asked as a Loans Officer to give way for the implementation of the report and the amount lost be recovered directly from the claimant's salary.
8. The respondent denied that its action in anyway constructively dismissed the claimant from work.
9. In her oral evidence in Court, the claimant stated that as FOSA Manager she was in charge of recruiting organizations to open FOSA accounts for processing workers' salaries. Once the accounts were opened they would deduct ATM and registration fee. This amounts according to her were automatically deducted and the individual salary account would be overdrawn to this extent. She stated that the Task Force found overdrawn accounts whose salaries were never deposited by employers.
10. She was consequently issued with a letter that a monthly sum of Kshs.20,000/= would be levied on her account with effect from August, 2013. She objected to the deductions but never got a response from the respondent. She therefore applied for leave to think about the issue but was also refused leave hence she resigned. It was her complaint that the deductions were harsh and that her views were never sought prior to effecting them. Life became unbearable for her and her dependants.
11. In cross-examination she stated that she was aware of the findings of the Task Force on the deleted accounts. She admitted that she had no right to delete accounts and only the system administrator could do that. She denied involvement in any anomalies but admitted they happened when she was around.
12. The respondent's witness Mr. Patrick Iravo informed the Court that the claimant was transferred to another department because she was found not to be performing well. According to him, the claimant processed ATM Cards without recovering the charges and was admitting members without charging registration fees.
13. Concerning transfer, it was his evidence that the respondent had discretion to transfer a member of staff to any department the employee could serve in. He further stated in cross-examination that FOSA Manager was the one who oversees that the funds are secure or available before cheques are issued.
14. In his closing submissions, Mr. Wambugu for the claimant submitted that in September, 2011, the claimant got promotion to FOSA Manager and she was not involved in monitoring the bank accounts and finding out which cheques had not been paid. Regarding the Board meeting of 17th August, 2013, Counsel submitted that the claimant was not present to defend herself on the adverse remarks.
15. Concerning constructive dismissal, Counsel submitted that the claimant was forced to leave her job against her will as a result of respondent's conduct of imposing unconscionable working conditions on her thus constructively dismissing her. According to counsel, the respondent did not seek and obtain the claimant's consent prior to varying her terms of service and making deductions from her salary.
16. Counsel further submitted that the claimant by her letter dated 20th September, 2012 gave details on the SACCO anomalies experienced. The claimant further gave report of the loses most of which occurred during a period when she was on maternity leave and had no control over the said accounts.
17. The respondent on its part through Mr. Mumbo submitted that the claimant voluntarily issued a resignation notice dated 5th October, 2013 and informed the respondent that she was proceeding on leave after which she failed to return. According to Counsel, the claimant's exit from the respondent was after she was transferred to another department within the respondent's company, a decision which was reached by the respondent's Board members acting on recommendation of the Task Force, an exercise which was well within the powers of the respondent and which was exercised lawfully. Counsel further submitted that the transfer was prompted by finding of anomalies which resulted to the respondent incurring losses and that the claimant was part and parcel of the investigations committee and even wrote a letter apologizing for the anomalies.

18. Having reviewed the evidence, pleadings and documents in support of the claim as well as submissions by Counsel, it would seem that the only issue to be resolved by this Court is whether the respondent created circumstances in its relationship with the claimant that left her with no option but to resign from her employment and seek compensation for constructive dismissal.

19. I have reviewed the issues and circumstances that resulted in the claim for constructive dismissal by the claimant and I am persuaded that in terms of issues and procedure for handling the issues the claimant was accused of being responsible for, the respondent acted fairly and in accordance with procedures contemplated in the Employment Act and rules of natural justice.

20. The claimant in her evidence in Court elaborately explained the issues that led to the anomalies and how they could have arisen. She further testified that she was part of the committee that carried out investigations to establish the cause of the anomalies. What the claimant did not seem to be happy about was the recommendation that she be demoted and that she be surcharged for loss arising from the anomalies.

21. Under section 19(1) of the Employment Act, an employer is permitted to make deductions from an employee's salary, a reasonable amount for any damage done, or loss of, any property lawfully in the possession or custody of the employee occasioned by the willful default of the employee. Section 19 (1) (d) further permits an employer to deduct an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with receipt, custody and payment of money. The foregoing provisions of the law well permits an employer, where there exists credible and factual evidence that the loss of money or property is attributable to the negligence or willful action of such employee, to make **reasonable** deductions from such employee's salary. Such deductions however must not exceed two thirds of the employee's salary. In this context, the respondent was well within the law to make deductions from the claimant's salary once it established that the claimant was culpable for the anomalies that led to the loss.

22. The question then is: were the deductions reasonable and if not were they of such severity that could reasonably be considered as a repudiation of the contract of employment to amount to constructive dismissal? The claimant's salary as per the attached payslip for September 2013 was Kshs.48,158. The total deductions for that month including deduction for overdrawn accounts was Kshs.33,801. The total deductions therefore contributed 70% of the claimants monthly pay. That is to say 3% over and above the authorized 67% (two thirds). It is noted that the Kshs.20,000/= formed the bulk of these deductions.

23. On a salary of Kshs.48,158, the claimant had a lifestyle which revolved around it. It was therefore incumbent upon the respondent to take into consideration this fact in order to come up with a reasonable deduction from the claimant's salary. The amount alleged to have been lost was Kshs.166,344 and could have been liquidated by the claimant by reasonable instalments which did not have to significantly reduce her income from a net of 34,357/= to a paltry sum of Kshs.14,357/= per month. To this extent the Court finds that the respondent's conduct was not only in breach of the Employment Act but amounted to fundamental breach of the contract of employment with the claimant for which she was justified to resign on account of constructive dismissal.

24. The Court therefore awards her as follows:-

Kshs.

(a) One month's salary in lieu of notice.....48,158.00

(b) Refund of part of salary for August and

September withheld.....40,000.00

(c) Six month's wages for unfair termination

of employment.....288,948.00

377,106.00

(d) Costs of the suit.

25. This judgment shall be subject to taxes and statutory deductions.

26. The respondent shall further issue the claimant with a certificate of service if not already.

27. It is so ordered.

Dated at Nairobi this 10th day of July 2015

Abuodha J. N.

Judge

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge