



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2135 OF 2012

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 14TH OCTOBER, 2015)

JUDITH MUGURE MBOROKI.....CLAIMANT

VERSUS

KENYA NUT COMPANY LIMITED RESPONDENT

JUDGMENT OF THE COURT

- 1.The Claimant herein filed her Memorandum of Claim on 22/10/2012 through the firm of Lucy Njiru and Company Advocates. It is the Claimant's case that she was employment by the Respondent as a casual employee on March 2002 at a salary of Kshs.4,420/=.
2. In May 2009 however, it is the Claimant's case that the Respondent orally and unlawfully terminated the Claimant's employment. 3.
- 3.The Claimant wants the Respondent to pay her, her termination dues amounting to Kshs.371,280/= being service pay for 7 years, holiday pay for 9 years and salary in lieu of notice. She also seeks for payment of damages plus costs of this suit. As proof of her employment relationship, the Claimant annexed her treatment notes from the Respondent's dispensary to show she worked for the Respondent as a casual worker.
- 4.The Respondents filed a response to the claim on 14/4/2013 through the firm of Mbugwa Atudo & Macharia Advocates. They deny the Claimant's claim and aver that the Claimant was procedurally terminated. They deny owing her any terminal dues. The defence was a mere denial.
5. I have considered evidence from both parties and submissions filed herein. From the evidence of Claimant, her employment was verbal and so was the dismissal.
- 6 .The Respondents seem to deny Claimant's averments in their defence but they are attempting to give evidence in the submissions briefing in issues that were not pleaded in their defence.
7. Going by the claim and defence, the issues for determination is whether:
 - i. The Claimant was fairly and unlawfully terminated bby the Respondent.***
 - ii .The Claimant is entitled to prayers sought.***
8. In consideration of the issue of whether the termination was fair or not, there is no evidence as to

how the termination occurred other than the Claimant's averment that she was verbally told to go away. No reasons for the decision are given in the defence.

9. Under Section 43 of Employment Act:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

10. The Respondents have a duty to prove reasons for the termination which they didn't even plead other than giving reasons, under Section 41 of Employment Act:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

11. The Respondents should also follow due process. No process as provided under Section 41 of Employment Act was also followed.

12. That being the case, I find that the termination of the Claimant was unlawful and unfair in terms of Section 45 of Employment Act 2007 which provides as follows:

“(1) No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

13. In the circumstances, I find for Claimant and I award her as follows:

1. 1 months salary in lieu of notice = 4,420/=

2. 12 months salary as compensation for unlawful and unfair termination = 4,420 x 12 = 53,040/=

TOTAL = 57,460/=

The Claimant will also be issued with a Certificate of Service.

Respondents will pay costs of this suit.

Read in open Court this 14th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Karua for Claimant

No appearance for Respondent