



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 17 OF 2015

MARGERIE MUTHONI NDWIGA.....CLAIMANT

VERSUS

DAIMA SAVINGS & CO-OPERATIVE SOCIETY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th October, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 12.02.2015 through Ndemo Mokaya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Wrongful termination of employment.
- b. Unlawful deduction of Kshs.10,405.00.
- c. Damages for wrongful dismissal.
- d. Damages for the unilateral termination of the services.

The memorandum of defence was filed on 11.03.2015 through Dickens M. Ouma, Legal Officer, Federation of Kenya Employers. The respondent prayed for a finding that the claimant's termination was lawful and the suit is dismissed with costs.

The claimant was employed as a messenger on 17.09.1997. She was promoted to the position of a general clerk and at termination she earned Kshs.25,374.00. The claimant testified that before the termination she was invited to a board meeting. Prior to the termination the claimant received a suspension letter dated 25.05.2013. The allegations related to events of 7.05.2013 when the claimant served as a clerk at the respondent's M-Pesa shop.

The evidence was clear. The claimant encountered a customer who was not the owner of the cell phone the customer was using to withdraw some cash. The claimant as per the customer's request reversed the transaction but again, the reversal had trouble because the customer had given the wrong cell phone number for the purpose. The claimant became angry and she screamed at the customer not to spoil her day. In the process, the claimant dropped on the floor, the cell phone she was using for the transaction. That conduct, in the respondent's opinion, amounted to rudeness and was actionable indiscipline.

The claimant was subsequently dismissed with effect from 6.06.2013 by the letter dated 10.06.2013 on account of rudeness and abusive language against staff and customers, failure to properly perform duties as per the numerous previous warning letters, mishandling of respondent's property such as throwing the phone on the ground on 7.05.2013 in presence of customers, lack of respect to her seniors, and withdrawal of money from customers' accounts without their consent. The claimant's appeal against the termination was declined.

The **1st issue** for determination is whether the termination was unfair. It has been established that the claimant was given a notice and was heard as envisaged in section 41 of the Employment Act, 2007. The court has considered the evidence and finds that the respondent has established the reason for termination as envisaged in section 43 of the Act. The court finds that the reason was valid as it was established that on 7.05.2013 the claimant's conduct in presence of staff and customers was unbecoming because she screamed and dropped the cell phone in presence of staff and customers as was established during the disciplinary process. The court finds that the termination was not unfair.

The **2nd issue** for determination is whether the claimant is entitled to Kshs.10,405.00 being unfair deduction from the final dues on account of alleged shortages. The shortages were never raised while the claimant was in employment. In the opinion of the court such alleged shortages would constitute grounds for an administrative disciplinary process but which never took place so that the allegations were not administratively established. The court finds that the claimant is entitled as claimed.

As the termination has been found not to have been unfair, the court returns that the claimant is not entitled to all other remedies as prayed for.

In conclusion, judgment is entered for the parties for orders as follows:

- a. The termination of the claimant's employment by the respondent was not unfair.
- b. The respondent to pay the claimant Kshs.10,405.00 by 1.11.2015 failing interest at court rates to be payable from the date of termination 6.06.2013 till full payment.
- c. Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 9th October, 2015.**

BYRAM ONGAYA

JUDGE