



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.113 OF 2015

ANNE WAIRIMU WAIRAGU..... CLAIMANT

VERSUS

JARIS ENTERPRISES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday, 25th November, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 09.07.2015 through Gori, Ombongi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. General damages Kshs. 180,516.00.
- b. 3 months pay in lieu of notice Kshs. 45, 129.00.
- c. Terminal benefits.
- d. Dues for public holidays.
- e. Unpaid annual leave for 4 years.
- f. Overtime worked Kshs. 131, 789.00.
- g. Unpaid NSSF from the month of April 2010 to August 2011 Kshs. 2,000.00 and December 2013 Kshs. 400.00.
- h. Costs of the claim.
- i. Interest on (a) and (b).

The respondent filed the defence on 27.07.2015 through Ng'ang'a Munene & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent employed the claimant as a secretary at the respondent's shell fuel and oils outlet at Nanyuki. The claimant served from April 2011 to 11.01.2015. Her duties included stock taking and banking.

The claimant testified as follows:

- a. On 11.01.2015 the claimant reported on duty as usual and she was summoned by her boss one Alice Muthoni Muiruri.
- b. The claimant's said boss explained to the claimant that certain entries were not adding up in the respondent's books of account.
- c. In particular engine oil valued at Kshs. 7, 370.00 was not accounted for.
- d. The claimant explained to her said boss that the brother to her boss known as Muiruri had been buying stocks outside the business stocks and he was in a position to explain the discrepancy. The said brother had refunded only Kshs. 6, 710.00 upon admitting his mistake but failed to refund the

- business Kshs. 7, 370.00 that was in issue.
- e. The boss then told the claimant that she could not work with her because the Kshs. 7, 370.00 had to be reconciled. The claimant secured the oils at the store and her boss told her to go home and that she would be recalled after the reconciliation.
 - f. After 2 to 3 weeks the brother to her boss told her that he had refunded the Kshs. 7, 370.00 to the respondent.
 - g. Later on 12.02.2015, the claimant went to withdraw money from her bank's ATM service. She failed to access the money and was told by the bank that she could not access her money due to a loan she had guaranteed but she denied offering anyone such guarantee.
 - h. When she visited the bank later as a follow up and as advised she was arrested by the police, her advocates wrote to the bank and she was subsequently allowed by the bank to access her money.
 - i. The claimant was told by the police that it was alleged that she had stolen Kshs. 1, 000, 000.00 from the respondent and she was to await an audit report. She denied having avoided arrest by the police.
 - j. She worked from 7.30am to 8.00pm and she claimed overtime. She had taken leave only in August 2013 and not allowed to go on leave all other years. She worked on public holidays and had no offs. Further no NSSF contributions were made on her behalf as claimed in the memorandum of claim.
 - k. The said brother to her boss was the manager and she was the secretary and he would buy stocks outside the business using the business money and return later. Such stocks bought outside the business were not part of the respondent's undertaking and the claimant did not know if the manager was doing the correct or wrong thing.
 - l. At employment she was paid Kshs. 8, 540.00 per month and at termination Kshs. 15, 043.00. The contract of employment was oral. She had to co-operate because he was the manager. He never interfered with the respondent's stock under the claimant's control but could take money from the fuel attendant and buy the external stocks.
 - m. Stock taking was done every January the last one being January 2015 and no malpractice had ever been reported.

The respondent's witness was Alice Muthoni Muiruri (RW), the claimant's boss and the managing director of the respondent. She admitted that on 11.01.2015 she had questioned the claimant about the Kshs. 7, 370.00 and Kshs. 6, 710.00. The related lubricants had been sold but not entered in the respondent's records as such. On 8.01.2015 the claimant explained to her that RW's brother and respondent's manager known as Kariuki Muiruri had taken the cash for his private purchase of some oils. RW noted that the claimant had authored the relevant invoices. The claimant worked during the day and the claimant had prepared an honest record but the records for 6.01.2015 and 07.01.2015 were misleading because they failed to show the sales for the 2 invoices in issue. On 2.03.2015 RW called the claimant and they met on 3.03.2015 in presence of an accountant but who the claimant said was a police officer meant to arrest her. RW testified that since 3.03.2015 she never saw the claimant until at the hearing of the case. She denied ever firing the claimant. RW admitted that on 11.01.2015 the claimant was at work and, RW and the claimant met on 3.03.2015. RW testified that she did not know why the claimant never came to work since 11.01.2015. She admitted she went on leave only in 2013 and not all other years served. NSSF for June, July and August 2011 was not paid because the claimant had not provided her NSSF account number.

The **1st issue** for determination is whether the claimant was terminated from employment. The claimant testified that she was asked by RW to leave employment on 11.01.2015. RW has testified that the claimant absconded duty effective 11.01.2015. The court finds that there is no reason to doubt that RW terminated the claimant's employment effective 11.01.2015 as per claimant's account because if the claimant absconded, the respondent was at liberty to institute disciplinary process for termination on account of desertion. That was not done and no reasonable ground has been advanced for the respondent for that failure. While making that finding the court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority

to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination."

The 2nd issue for determination is whether the termination was unfair. The court finds that the respondent denied ever dismissing the claimant but which the court has found not to have been the position; RW orally dismissed the claimant on 11.01.2015. The dismissal was without a valid reason as envisaged in section 43 of the Employment Act, 2007 as it was without due process of a notice and a hearing under section 41 of the Act. Accordingly the court finds that the dismissal was unfair for want of a valid reason and for want of due process.

While making that finding the court observes that the respondent failed to put in place efficient and effective operational policies and system to guide the claimant in the performance of her duties. The claimant cannot be visited with the respondent's failures in that regard which essentially lead to the alleged losses or the invoices in issue. The claimant was bound to co-operate with her manager, RW's brother one Kariuki Muiruri and in absence of such efficient and effective operational policies and systems together with absence of a genuine institutionalized grievance management process, it is difficult to see how the claimant would be held liable for the alleged deficiencies in her performance while it appears she was doing her best in the circumstances. The court upholds its opinion in Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR as follows,

"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

The court has considered the family proximity between RW and the claimant's supervisor or respondent's manager one Kariuki Muiruri. That family proximity was not denied on the part of the respondent and the interplay between the relations on the one hand and the employment relationship entailing the respondent, claimant and RW on the other was not explained. In such circumstances, the court finds that it would be unfair to visit the claimant with adverse consequences in a circumstance where the boundaries of the competing relationships were not defined by the respondent through clear operational policies and systems. The court has further noted that no disciplinary action was shown to have been taken out against the manager and the court finds that the claimant was entitled to the position that she did not know if the manager's actions were wrong or right.

The 3rd issue for determination is whether the claimant is entitled to remedies as prayed for. The court makes findings as follows:

- a. The court has considered the claimant's service of 4 years, the insensitive and unfair manner RW orally dismissed the claimant and that the claimant was willing to continue in employment. The court finds that 12 months' salaries at Kshs. 15, 043.00 making **Kshs.180, 516.00** will meet the ends of justice in this case.
- b. The claimant is awarded one month pay in lieu of the termination notice and under section 35(1) (c) of the employment Act, 2007 making **Kshs. 15, 043.00**.
- c. RW admitted that the claimant took only one year leave out of the 4 years' service and the court awards the claimant 3 months salaries in lieu of 3 annual leaves making **Kshs.45, 129.00**.
- d. The claimant claimed and prayed for overtime and dues for public holidays. The particulars were not set out and being special damages they ought to have been set out in the pleadings but that was not done. The court finds that in such circumstances where the specific computations were not stated in the memorandum of claim and the submissions, the same shall fail.
- e. The claimant is entitled to the costs of the suit.

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

- a. The respondent to pay the claimant **Kshs.240, 688.00** by 01.01.2016 failing interest at court rates to be payable thereon from the date of this judgment till full and final payment.
- b. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Wednesday, 25th November, 2015.**

BYRAM ONGAYA

JUDGE