



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 149 OF 2013
(Originally Nairobi Cause No. 1238 of 2010)

ELIDY WANJA GATURA.....1ST CLAIMANT

NAOMI WAHIGA MWANGI.....2ND CLAIMANT

v

JASON WANGOMBE (DIRECTOR AFYAMART).....RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent on 11 October 2010 in a needlessly verbose and incoherent pleading (pleadings should be concise and clear) and the issues in dispute were stated as

1. Unfair termination

2. Underpayment of wages.

2. On 6 January 2011, the Respondent filed a Statement of Defence and on 26 August 2011, he filed a Notice of Preliminary Objection. The preliminary objection was dismissed on 11 April 2012.

3. The Claimants filed a Response to the Statement of Defence on 7 May 2014 and this prompted the Respondent to file what he called *Respondents Response to the Claimants Response to the Respondents Statement of Defence*. As a result, the Claimants filed on 19 August 2014, *the Claimants Reply to the Respondents Response dated 31st July 2014 filed in Court on 6th August 2014* (it is not clear what rule of procedure or practice allowed this and since no leave was sought, the Court will not consider these 2 documents).

4. The Cause was fixed severally for hearing but could not proceed at the behest of either of the parties.

5. The Cause was eventually heard on 2 March 2015 and 3 June 2015. The 1st Claimant testified while the Respondent called 2 witnesses. The 2nd Claimant did not testify.

6. The parties filed written submissions.

7. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the termination of the Claimants employment were unfair, whether the*

Claimants were underpaid, whether claimants are entitled to overtime and leave and appropriate remedies/orders.

8. The Court will also consider 2 preliminary issues raised by the Respondent in his submissions.

9. Because the 2nd Claimant did not tender any evidence, the Court declines to consider her claim.

10. The Court will also narrate only the relevant and material part of the testimonies to enable it reach a determination of the identified issues.

Preliminary Issues

Verifying Affidavit

11. The Respondent submitted that the verifying affidavit in support of the Memorandum of Claim violated the provisions of Order 4 rules (2) and (3) and Order 1 rule 13 of the Civil Procedure Rules because the written consent/authority of the 2nd Claimant was not exhibited.

12. The said orders cited by the Respondent are inapplicable in the Employment and Labour Relations Court. The mode and manner of commencing legal proceedings before this Court are located in the Industrial Court (Procedure) Rules, 2010 and the parties did not specifically address whether they were violated.

Proper/correct Respondent

13. The Respondent further submitted that the proper and correct Respondent should have been Healthsmart Pharmaceuticals Ltd trading as Afyamart Chemists & Pharmacy.

14. The Respondent, Jason Wangombe admitted he was a Pharmacist trading as Afyamart Chemist. He also admitted that he employed the Claimants.

15. For purposes of employment law, and pursuant to the definition of *employer* in section 2 of the Employment Act, 2007, he was a proper and legal person to be sued. He qualifies as *an agent, manager or factor* of both Afyamart and Healthsmart Pharmaceuticals Ltd.

Whether termination of employment was unfair

16. The 1st Claimant in her testimony stated that on 6 February 2010 she was meant to attend a seminar arranged for employees by the Respondent at Kivu Resort. She attended the seminar but opted not to spend the night at the venue because she had not informed her parents. She could also not attend on Sunday due to a church function.

17. On reporting to work on Monday, the Respondent informed her and the 2nd Claimant that they were being suspended for 2 weeks for failing to attend the seminar on Sunday. She denied having been served with a suspension letter.

18. The 1st Claimant stated that when she reported back to work after 2 weeks she was told that her services were no longer needed and that no reasons were given as a result of which she reported a dispute to the labour office but no resolution was reached.

19. In cross examination, the 1st Claimant stated that she wrote to the Respondent on 18 February 2010 seeking to know the status of her employment.

20. The Respondent in his testimony stated that the Claimants did not report for the seminar on Sunday and when requested them on Monday to offer explanations, they did not give credible explanations so he

suspended them for 2 weeks.

21. He also stated that the Claimants did not pick up their suspension letters and did not report back after the suspensions but a Mr. Onyango who claimed to be a union official visited him. Later, the Claimants dropped letters in the pharmacy requesting to know their employment status.

22. Subsequently, he received letters from the Labour office and later met with the Labour officer but no agreement was reached.

23. The Claimants were paid by the month. Pursuant to section 35(1)(c) of the Employment Act, 2007, they were entitled to at least 28 days written notice of termination of employment. It was not suggested that any written notices were given.

24. On this ground, the terminations of employment would be unfair.

25. The Respondent however advanced a version that after the suspensions, the Claimants did not report back to work. The 1st Claimant stated that she reported back on 22 February 2010 but was verbally told her services were no longer required.

26. Although she did not name the person who informed her of such, considering her letter dated 18 February 2010 which the Respondent acknowledged, it is more probable that she reported back to work on 22 February 2010 and was then informed of the action to terminate her services.

27. The Court has also taken note of the Certificate of Service issued to the 1st Claimant and filed in Court by the Respondent. It shows the last date of employment as 9 February 2010.

28. And even if the Court were wrong on the above conclusion, if indeed the 1st Claimant failed to report back after her suspension, then she was in breach of contract, and the innocent party (the Respondent) should have elected to take action to terminate her services.

29. The legal and correct thing to do would have been for the Respondent to write to the 1st Claimant to explain her whereabouts/show cause why she her services could not be terminated because of being absent without leave or lawful cause.

30. That, in the view of the Court arises from the operation of section 41 of the Employment Act, 2007. Absence from work without leave or lawful cause is not only a breach of fundamental obligation but, a misconduct.

31. The Court therefore reaches the conclusion that the Respondent terminated the services of the 1st Claimant without complying with the statutory requirements of procedural fairness and also without valid or fair reasons.

Underpayments

32. The 1st Claimant stated that initially she was employed as a Shop Attendant selling drugs and receiving payments from clients and that she was not given a written contract and that later she became a cashier.

33. In cross examination, she admitted that she was not qualified to sell drugs.

34. The Respondent however stated that the Claimants were employed to carry out cleaning and messengerial duties and that the 1st Claimant was not a cashier but would get change.

35. He further stated that a shop assistant in a pharmacy required to be registered as a pharmaceutical technologist.

36. The Respondent's first witness in cross examination denied that the 1st Claimant was a cashier. His testimony was that he was the one who was handling cash while the Claimants were doing cleaning, fetching items from the store and looking for change

37. Because the Respondent did not issue a written contract to the 1st Claimant as required by sections 9 and 10 of the Employment Act, 2007, the Court relying on section 10(7) of the Act finds that she was a cashier.

38. Apart from pleadings that she was seeking Kshs 286,903/- (Kshs 236,181/55 in the Response to Statement of Defence) on account of underpayments, the 1st Claimant did not lead any tangible evidence in this respect and on how she arrived at the figures. Pleading figures without laying any basis in testimony is not enough.

Overtime

39. The 1st Claimant pleaded entitlement to both normal and double overtime. But she did not prove or demonstrate the prescribed statutory/contractual working hours over the week.

40. Further, apart from outlining the overtime claim in the prayers part of the Memorandum of Claim, the body of the pleading did not set out overtime as one of the claims.

Leave

41. This head of claim again was not pleaded in the body of the Memorandum of Claim but was only prayed for and stated as Kshs 27,335/70.

42. In her testimony, the 1st Claimant stated that she did not go on leave for 3 years but admitted that she would take breaks during Christmas.

43. The Respondent in his testimony stated that the employees would stagger their leave days and that he did not keep leave records.

44. The Court would award the 1st Claimant leave as sought.

Compensation

45. The 1st Claimant has succeeded in her claim for unfair termination of employment. Considering that she served the Respondent for about 6 years, the Court would award her the equivalent of 6 months wages assessed as Kshs 42,000/- (based on the wage of Kshs 7,000/-).

Conclusion and Orders

46. The Court finds and holds that the employment of the 1st Claimant was unfairly terminated and awards her and orders the Respondent to pay her

(a) 6 months wages compensation	Kshs 42,000/-
(b) Accrued leave	Kshs 27,335/70
TOTAL	Kshs 69,335/70

47. The 1st Claimant to have costs of Kshs 35,000/-. Previous costs orders if not complied with should also be paid.

48. The 2nd Claimants case is dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 13th day of November 2015.

Radido Stephen

Judge

Appearances

For Claimants Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mrs. Mukira instructed by Elizabeth Wangari & Co. Advocates

Court Assistant Nixon