



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA T KISUMU**  
**INDUSTRIAL CAUSE NO. 202 OF 2013**

**(Before Lady Justice Maureen Onyango on 11.12.2015)**

**JACKLINE OCHANGO .....CLAIMANT**

**VRS**

**GODRICK S KHISA**

**T/A KAKAMEGA FARMERS AGENCY .....RESPONDENT**

**J U D G M E N T**

The Claimant Jackline Ochango, a former employee of the Respondent Godrick S. Khisa trading as Kakamega Farmers Agency filed this suit alleging unlawful termination and refusal to pay her full terminal benefits by the Respondent. In her statement of claim filed on 16th July, 2013, she seeks the following remedies:-

- (i) A declaration that the Claimant's dismissal was wrongful
- (ii) The Claimant be paid special damages as set out in paragraph 6 hereinabove, and more particularly in appendix 3
- (iii) The Respondent be ordered to compensate the Claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary.
- (iv) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- (v) The Respondent to pay the costs of this claim
- (vi) Interest on the above at Court rates.

The Respondent filed a Statement of Defence on 21st July, 2013. He admitted employing the Claimant but denied owing her the sum of Shs.177,350/= . He however admitted owing her a sum of Shs.18,893 made up of salary for days worked in February, 2013, Shs.7,000/= one months salary in lieu of notice Shs.7,000/= and accrued annual leave of Shs.4,893.00

The case was heard on 19th February, 2014 when the claimant testified and on 7th July, 2015 when the Respondent (RW 1) and his two witnesses Jacinta Kptanui and (RW 2 ) and Elfias Angatia (RW 3) testified.

Parties thereafter filed and exchanged written submissions.

The main facts of the case are not disputed. The Claimant was employed by the Respondent in his retail shop known as Kakamega Farmers Agency on 11th February, 2011 at a monthly salary of Shs.5,000/= which was increased to Shs.7,000/= per month in 2012.

In 23rd February, 2013 there was a fight between the Claimant and Jacinta Kiptanui (RW 2) who was her supervisor. They were separated by Elphas Angatia (RW3) who was also an employee of the Respondent. After the fight the Claimant reported to her family and her mother, father and brother came to the Respondent's retail shop where she was working and created a commotion. The Respondent was not at the shop on that day which was a Saturday. The incident was reported to him on telephones by RW) 2. According to the Claimant on Monday the 23rd February, 2013 when the Claimant went to the office she was sent back home by the Respondent and advised to collect her salary the following day. She was however never paid.

The Claimant contends that the termination of her employment was unfair.

The Respondent on the other hand states that he summoned the Claimant together with the other staff and asked her to show cause why she should not be dismissed for gross misconduct but the Claimant walked out on him. He stated that it is the Claimant who refused to collect her terminal dues. The Claimant thereafter reported to the Kenya Union of Commercial Foods and Allied Workers who summoned the Respondent to their offices where he met the claimant. It is after the meeting in the union office that he issued the letter of dismissal to the Claimant.

The Claimant contends that she worked as a storekeeper while the Respondent states she was a shop assistant. Neither the Claimant nor the Respondent led sufficient evidence on the duties of the Claimant to enable me determine her job grader. The Claimant was not issued with a letter of appointment.

### **Determination**

I have considered the pleadings and evidence as well as the written submissions.

In my opinion the issues for determination are the following

1. Whether the Claimant was a shop assistant or storekeeper
2. Whether the termination of the Claimant's employment was unfair.
3. Whether the Claimant is entitled to the reliefs sought.

The Claimant contended that she worked as a storekeeper while the Respondent insisted she worked as a shop assistant. It is the responsibility of the Claimant to prove her case. In the absence of a letter of appointment and clear evidence capable of determining the Claimant's designation, and taking into account the Claimant's admission under cross examination that she had no formal training as a storekeeper, I am inclined to find that she was a shop assistant.

Section 41 of the Employment Act provides for the procedure for termination of employment while Section 43 provides for proof of valid reason for termination. In the present case there was sufficient reason for termination of the Claimant's employment. She fought with the supervisor then called her father, mother and brother who created a commotion by threatening to beat up the supervisor and caused disruption of work at the shop.

The Respondent stated that he questioned all employees on Monday 25th February, 2013 and came to the conclusion that it is the Claimant who was on the wrong. The Claimant admitted speaking to the Respondent on 23rd February, 2013 after the fight and being told to go to work on Monday so that the Respondent can resolve the problem. She also admitted going to the work place on Monday 25th February, 2013 but states that she was told to go back home and collect her salary the following day.

The Respondent testified that he carried out investigations, questioned all the employees and also got a call from a customer who witnessed the incident and came to the conclusion that it was the Claimant who was at fault.

Section 44 (4) (d) provides that use of abusive or insulting language or behaving in an insulting manner to the employer or a person placed in authority over the employee by the employer is gross misconduct justifying summary dismissal.

I am satisfied that the Respondent had justifiable grounds to dismiss the Claimant. I however find that the procedure adopted by the Respondent did not offer the Claimant sufficient opportunity to defend herself.

The Claimant seeks payment of salary underpayments. The Respondent admitted having been aware that she was underpaying the Claimant. Based on the statutory minimum rates of pay for a shop assistant, the Claimant was entitled to Kshs.9,450 per month 2011 to April, 2012 Shs.10,687.95 per month for May 2012 to February, 2013 excluding 15% House Allowance. She was therefore underpaid as follows: Shs.30,600.00 from May, 2011 to April, 2012 and Shs.36,879.50 from May, 2012 to February, 2013. I award her Shs.77,601.40 on account of underpayments. This figure is inclusive of 15% House Allowance.

The Respondent did not deny that the Claimant did not take annual leave. She worked for a total of 21 months. She is entitled to 36.75 days leave at 1.75 days per month worked. At a salary of Shs.10,687.95 per month the Claimant is entitled to Shs.13,092.75 in lieu of leave.

The Claimant worked for one completed year of service and is entitled to service pay of 15 days which amounts to Shs.5,344. She is entitled to one month's salary in lieu of notice at Shs.10,687.95.

On overtime the Claimant testified that originally she worked from 8 a.m. to 6 p.m but later was working from 8 a.m. to 5 p.m. According to the Regulation of Wages (General) Order an employee's working hours per week is 52 hours. The Claimant did not state the number of days she worked per week. Assuming she worked 6 days and took a 30 minutes lunch break, she worked 51 hours a week.

I therefore find that there was no overtime worked.

The Claimant alleged that she worked on public holidays. She however did not specify which public holidays she worked as not all public holidays fall on working days.

I find that the Claimant has not proved that she worked on any public holiday.

The Claimant prayed for 12 months salary as compensation for wrongful termination. Since the Respondent had valid reason to dismiss the Claimant she is not entitled to any compensation.

In summary therefore I award the Claimant the following:-

1. Underpayments.....Shs.77,601.40
2. Annual leave ..... Shs.13,092.75
3. Service pay .....Shs. 5,344.00
4. Salary for 25 days worked .....Shs. 8,906.60
5. Pay in lieu of notice .....Shs.10,687.95

**Total**

**Shs.115,632.70**

I award the Claimant the said sum of Shs.115,632.70. The Respondent will pay claimant's costs for the suit. There will be no interest on decretal sum or on costs.

**Dated signed and delivered this 11th day of December, 2015**

**MAUREEN ONYANGO**

**JUDGE**