



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.147 OF 2014

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS.....CLAIMANT**

VERSUS

**MERU CENTRAL DAIRY CO-OPERATIVE UNION
LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 11th December, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 20.11.2014 claiming the unfair termination of its member one Mercy Kathure Magaju, the grievant. The claimant prayed for judgment against the respondent for:

- a) The respondent to pay the grievant terminal benefits as provided for in the collective agreement.
- b) The respondent to pay the claimant full compensation for loss of employment.
- c) Costs of the suit to the claimant.

The response to the claim was filed on 16.02.2015 through Kiautha Arithi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. By the notice of change of advocates filed on 20.11.2015, the respondent changed its advocates to Mwenda Mwarania, Akwalu & Company Advocates.

The grievant was employed by the respondent on 8.07.2008 at Kshs. 6,900 per month plus 15% of basic pay as house allowance being Kshs.612.00. She was paid on monthly basis and her salary was deposited on her bank account. On promotion she was transferred from the production to quality control department and her salary increased to Kshs.12, 000.00. Prior to the promotion the claimant had a clean record of service without warnings or disciplinary matters.

Sometimes in January 2012 the grievant was serving on a night shift and the head of quality control department one Festus Mutheiti approached her at the laboratory and told the claimant that she was the only casual in that department and that he would help her get confirmed. The grievant testified that the said Festus, who was also her supervisor, asked her for a love affair for the favour of the confirmation but she declined. The grievant testified that since that day Festus would call her at odd hours in the night and he changed the work schedule so that the claimant was on night shift throughout. She worked on night shift for 2 weeks and the pressure was overwhelming because the claimant had a young family. Thus, she verbally reported the matter to the human resource manager called Maryanne Gitonga. She initially

reported about the overwhelming unbroken night shift then later the sexual harassment. The human resource manager asked Festus to change the night shift schedule and the sexual harassment continued. Festus asked the grievant to write an apology letter in view of the grievant's report to the human resource manager but the grievant refused to write the apology as was demanded.

The human resource manager having failed to take action on the sexual harassment report, the grievant verbally reported the same to the general manager. The general manager promised to discuss the matter with Festus. She did not know if such discussion took place but soon thereafter she started receiving warning letters. She was then transferred from the quality control department to returns department. She was not invited to any disciplinary action but was told on 23.11.2012 by the human resources manager Maryanne to go home and that she would be recalled. She was never recalled and so she filed the suit praying as per the memorandum of claim. Upon termination she was paid Kshs. 8, 700.00 for work done up to 23.11.2012. She was not given any termination letter. It was the grievant's case that though she was not a saint at work, she had done nothing to warrant her unceremonious termination. She admitted receiving the caution letter but she received no warning letters. She attributed the letters and the subsequent termination to her report about sexual harassment by the said Festus.

The respondent's witness (RW) was Freda Mbaya, the respondent's human resource manager at the time the case was heard. She was employed by the respondent on 7.04.2014. She testified that the grievant was employed on 19.09.2011 as a casual employee and the claimant was given a show cause letter dated 26.05.2012 and the caution letter dated 17.07.2012 was the only one on record. She had not seen a report of sexual harassment on the grievant's personal file. She denied seeing the letter dated 7.07.2008 appointing the claimant to work in the yoghurt packaging section effective 7.07.2008. She admitted that house allowance was paid to permanent staff and not casuals. Before termination, RW confirmed that the claimant was not invited to a hearing. She confirmed, during re-examination that the grievant worked without a break from 7.7.2008 to 23.11.2012 by signing various contracts some of which had been filed.

After the close of the hearing on 09.06.2015 the parties, on diverse dates the matter thereafter came up for directions on submissions, agreed to negotiate an out of court settlement but none was reached. Parties filed written submissions.

The **1st issue** for determination is the period the grievant served in the respondent's employment. The court has considered the evidence and finds that the grievant served from 07.07.2008 to 23.11.2012. As the service was without a break and the job to be performed was permanent as available throughout the period she served, the court finds that her service was not casual and purported casual service converted to service subject to the minimum terms and conditions of service in the Employment Act, 2007 as per provisions of section 37 (1) of the Act. As the contract converted as such, the court further finds that the terms of service in the collective agreement, as they applied to permanent staff, also applied to the grievant.

The **2nd issue** for determination is whether the claimant is entitled to the reliefs as prayed for. The court makes findings as follows:

a) The claimant prayed for the respondent to pay the grievant terminal benefits as provided for in the collective agreement. The respondent has submitted that at the time of the termination the collective agreement had lapsed, it had not been extended by notice as provided therein and the grievant's termination was therefore governed by the provisions of the Employment Act, 2007. The claimant has not opposed that position and accordingly the court finds that the prayer will fail.

b) The claimant prayed that the respondent to pay the claimant full compensation for loss of employment. The court finds that the parties' evidence including by RW was that the grievant was not given the termination notice and the hearing as envisaged in section 41 of the Act. The respondent has not established the reason for termination as provided for in section 43 of the Act. The court finds that the termination was unfair in substance and procedure. The grievant desired to continue in employment, she suffered wrongly imposed casual service throughout her employment. She is awarded Kshs. 144, 000.00 at Kshs.12,000.00 per month under section 49 (1) (c) of the Act

and a further Kshs. 12, 000.00 being pay in lieu of the termination notice under section 35 (1) (c) of the Act. The employer failed to institute and issue the policy statement on sexual harassment as provided for in section 6(2) of the Act. The respondent failed to take disciplinary action against the said Festus after the grievant reported the sexual harassment. The court finds that in absence of any other evidence, there is no reason to doubt the grievant's account that she was sexually harassed by her supervisor which eventually lead to her termination. The respondent was by section 6 of the Employment Act, 2007 obligated to take measures to prevent sexual harassment at the work place and was required to take disciplinary action against the supervisor but failed to do so and exposed the grievant to persistent sexual harassment. In the circumstances the court finds that the respondent would be liable for the grievant's sexual harassment that was persistent and in the opinion of the court it would amount to unfair labour practice in contravention of Article 41(1) of the Constitution and further would amount to contravention of the grievant's inherent human dignity and the right to have that dignity respected and protected. The claimant pleaded that the grievant's troubles started when Festus K. Mutaiti wrote a caution letter to the grievant (per paragraph 8 of the claim). The court considers that the evidence on record would establish that the grievant's rights were violated in that regard but as the matter was not specifically pleaded and the submissions were throughout silent on that aspect, the court will not make an award of compensation in that regard. However, the court directs the respondent to issue the policy statement on sexual harassment as envisaged in section 6 of the Act and to file the same in court by 01.03.2016 in line with the respondent's statutory obligation as an employer.

c) The claimant is entitled to costs of the suit.

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

- a) The declaration that the termination of the claimant's employment by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs.156, 000.00** by 01.01.2016 failing interest to be payable thereon at court rates from the date of the suit till full payment.
- c) The respondent to issue the policy statement on sexual harassment as envisaged in section 6 of the Employment Act, 2007 and to file the same in court by 01.03.2016; and the matter to be listed for mention on 11.03.2016 to confirm compliance accordingly.
- d) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 11th December, 2015.

BYRAM ONGAYA

JUDGE