



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 954 OF 2011

LINET NYAGOHA KIVAYACLAIMANT

-VERSUS-

MANJI FOODS INDUSTRIESRESPONDENT

M/s. Makori for the Claimant.

Mr. Nziokia (Human Resource Manager) for the Respondent

JUDGMENT

This suit was brought by way of a Statement of claim dated 6th June, 2011. The Claimant seeks the following relief;

Payment of;

- a. *15 days salary for the month of September, 2010.*
- b. *One month salary in lieu of notice.*
- c. *Expected salary and allowances from October, 2010.*
- d. *Severance pay.*
- e. *Damage for unlawful dismissal.*

The claim is based on the following statement of facts;

That the Claimant was employed by a letter of appointment dated 27th February, 2009 by the Respondent in the position of a merchandiser earning a gross salary of Kshs.14,000/=.

She was entitled to 26 days leave annually. Each party could terminate the contract by giving one month's notice or payment in lieu. She could be summarily dismissed however, for gross misconduct.

She worked continuously doing sales work for the Respondent until her employment was terminated on 4th October, 2010 orally. At the time of termination her monthly salary had risen to Kshs.15,750/= per month.

There is conflicting evidence as to whether the Claimant's employment was terminated by the Respondent orally or that she had absconded duty in a huff and therefore effectively absconded from her employment leading to the termination.

The Respondent filed a Memorandum of Response stating that the Claimant deserted work and her services were terminated following the desertion.

The Respondent called two witnesses to support their version of the story.

Mr. Born eight Boge in his sworn testimony told the court that he worked for the respondent as a Marketing Executive from April, 2008 to-date and was the supervisor of the Claimant.

He recalled that on 15th September, 2010, the Respondent had a product promotion in which employees including the Claimant had been given float cash to facilitate them to sell the products.

The Claimant requested for more float cash without first accounting for the previous cash she had been allocated. The witness asked her to account for the money but instead she left and did not come back to him.

The witness reported the matter to his supervisor **Mr. Ravi** and she was summoned and asked what the problem was.

According to this witness, the Claimant stormed out of the office and did not come back. The following day she did not report to work and the witness learnt that the claimant had taken products from the personnel she supervised and left.

The Claimant came back to work after a few days with a letter of resignation. The witness asked her to clear with the Respondent but she did not. She was not dismissed, but had resigned and disappeared.

She was to be paid her terminal dues upon her clearance. This explains why she did not receive a salary for the days worked in September, 2010.

The 2nd witness for the Respondent was one **Mr. Christopher Nzioka**. He worked for the Respondent as a Human Resource Officer since 2003 to-date.

He told the court that the Claimant was employed by the Respondent on 27th February, 2009 and left her employment on 15th September, 2010.

He told the court that the Claimant came to his office holding a letter of resignation. He conducted an exit interview with her and she told him that she was fed up and could not work for the Respondent any longer.

The witness gave her a clearance form and gave her back the resignation letter and he directed her to the Sales and Marketing Department for clearance.

The witness was aware that the Claimant had an outstanding account arising from a sales float, equipment and unaccounted for products.

The witness was also aware that she had stormed out of a meeting. That was the last time this witness saw the claimant. Accordingly, he issued her with a letter of termination as she had clearly deserted work. The letter of termination is appended to the Memorandum of claim.

The witness told the court the Respondent usually paid 15 days salary for each completed year of service upon termination. Going by the evidence before court, the Claimant would be entitled to;

- a. 15 days salary for the month of September, 2010;
- b. 15 days salary for the one year completed year of serve;

According to the witness, the Claimant had taken a loan of Kenya Shillings ninety six thousand

(Kshs.96,000/=) with the UNISACCO and her colleagues had guaranteed it.

At the time she left, she had an outstanding loan of Kshs.95,000/=. The guarantors had painfully repaid the loan as she had not bothered at all to repay the same.

She had shares worth 48,000/= which was used to partly pay the loan.

Having evaluated the evidence by the Claimant *vis a vis* that told by the Claimant, the evidence by the Respondent regarding the circumstances of the Claimant's departure from work appears consistent and credible.

The court does not believe that the Claimant was dismissed from work by the Respondent.

The court is of the considered view that the Claimant absconded work upon failing to account for money and products given to her during a promotion exercise. This explains why she got a letter of termination for desertion days after.

The Claimant did not appear candid in her response and the court finds that she has failed to discharge her onus in terms of **Section 47 (5)** of the Employment Act in that she has failed to show a wrongful termination took place.

The Respondent has on the other hand shown on a balance of probabilities that the Claimant deserted work and her employment was justifiably terminated subsequently for desertion.

The amounts admitted by the Respondent as dues owing to the Claimant is Kshs;

- a. 7,875/= being 15 days salary for the month of September, 2010 and
- b. 7,875 being 15 days severance pay for the one (1) year completed service.

Total due Kshs.15,750/=.

This was not paid due to her failure to clear with the Respondent and not for reasons attributed to the Respondent.

The Respondent is directed to pay to the Claimant Kshs.15,750/=.

No order as to costs.

Dated and delivered at Nairobi this 8th day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE