



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 268 OF 2011

(Before D.K.N. Marete)

BRENDA KATHIKE WAMBUACLAIMANT

Versus

ONETEL COMPANY LIMITEDRESPONDENT

JUDGEMENT

The matter came to court vide a Memorandum of Claim dated 24th February, 2011 and filed on 13th August, 2011. The issue in dispute is therein cited as,

‘Salary arrears and terminal dues’

The respondent in his reply to memorandum of claim denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that at all material times she was employed by the respondent vide an oral contract in November, 2007 on permanent terms as an Office Assistant at a consolidated salary of Ksh.11,580.00. She religiously worked for the respondent until termination of employment by the respondent on 6th January, 2010. She submits that this was unlawful and contrary to her employment contract and prays as follows;

| | | |
|--|---|------------------------------|
| i. <i>Balance of December, 2009 salary</i> | - | <i>Kshs. 8,080.00</i> |
| ii. <i>Salary in lieu of 1 month notice</i> | - | <i>Kshs.11,580.00</i> |
| iii. <i>Unpaid leave for 2 years worked</i> | - | <i>Kshs.16,212.00</i> |
| iv. <i>Severance dues for 2 years worked</i> | - | <i><u>Kshs.11,580.00</u></i> |

Total - *Ksh.47,452.00*

She categorically prays for;

- a. *The Respondent’s assessment of the Claimant’s terminal benefits be declared wrongful and unlawful and the same be re-assessed.*
- b. *The Claimant be paid his terminal benefits as set out in paragraph 7 above.*
- c. *Costs of the claim.*

d. *Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice in the circumstances.*

e. *Interest on the above at court rates.*

The respondent denies the claim. He submits that the claimant is not entitled to the amounts set out and claimed at paragraph 7 of the memorandum of claim save for salary arrears set out as item 1 and that the respondent has always been willing to pay the same. He therefore prays that the matter be dismissed with costs.

The issues for determination in the circumstances are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful.
2. Whether the claimant is entitled to the relief sought.
3. Who bears the costs of the case.

The claimant's contention is that the termination of her employment was wrongful, unfair and unlawful and a confrontation of S.45(1) of the Employment Act, 2007. The decision of summary dismissal was without any reasonable justification, or at all. No notices were issued or even proper procedure for so doing was applied in the termination.

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason-*
 - i. *related to the employees conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

a. *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) *the conduct and capability of the employee up to the date of termination;*

(c)the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

- d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
- e. *the existence of any previous warning letters issued to the employee.*

The respondent's case is that the termination was on grounds of absconding from duty. It was testified that the claimant absconded duty on 31st December, 2009 and this information was heard from Kelvin Musyimi a neighboring employee that the claimant had quit her job. On 6th January, 2010 the claimant approached the respondent for her salary without an explanation for leaving employment.

The claimant denies the allegations of absconding duty and or any wrongdoing. She contends and submits that she is the aggrieved party in the circumstances. On a balance of probabilities, this matter tilts in favour of the respondent. It is a case of dealing with a not too good employee who takes matters in her hands and messes up her employment contract. The story of misconduct and absconding duty is the more probable of the two claims. This is because ordinarily, no employer would want to tamper with the employment of a productive employee, or at all. This is the game of appropriate labour relations.

Secondly, during the testimony of the witnesses for the two parties, their demeanor pointed out to a case for the respondent. It was a sincere testimony, cool and convincing. It portrayed a real life situation as opposed to the claimant's version that had loopholes.

In the circumstances, I am inclined to dismiss the claim with costs to the respondent. The claimant is only entitled to her claim for two days worked in December, 2009 as this is not disputed.

Dated, delivered and signed the 20th day of December, 2013.

D.K. Njagi Marete

JUDGE

Appearances

1. Miss Kamande instructed by Kamande & Company Advocates for the claimant.
2. Mr. Muchoki instructed by Muchoki Kangata & Company Advocates for the Respondent.