



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 19 OF 2017**

*(Before D. K. N. Marete)*

GRACE KERUBO OTWORI.....CLAIMANT

VERSUS

JIANGHXI ZHONMEI ENG. CO. LTD.....RESPONDENT

**JUDGEMENT**

This matter was originated by way of a Statement of Claim dated 17th March, 2017. It does not disclose any issue in dispute on its face.

The respondent in a Response to Statement of Claim dated 24th April, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that she has been in continuous employment as a Store Keeper of the respondent since 15th August, 2015.

The claimant's further case is that on or about 4th February, 2017 in disregard of due process and also without any right whatsoever the respondent unlawfully terminated the claimant from employment thereby subjecting her to server loss and damage.

The claimant avers that she was not taken through any disciplinary hearing or warning which was a procedural lapse in termination and a violation of section 41 of the Employment Act, 2007.

It is her further averment that it was the duty of the respondent to provide reasonable housing and accommodation to her employees near their place of

employment or pay housing allowance as required by law. This was not the case and she prays for Kshs.1,725.00 as such monthly house allowance.

She also claims leave allowances, unpaid salary and other allowances as per the Labour Institutions (Building and Construction Industry wages order 2012). She recites the following as particulars of breach of statutory body;

- a) *Failing to give the pre-requisite three months notice to the claimant.*
- b) *Failing to pay 3 months salary in lieu of notice.*
- c) *Failing to give any notice of termination at all to the claimant.*
- d) *Failing to pay gratuity due to the claimant.*
- e) *Breach the terms of employment.*
- f) *Breaching the law governing labour relations*
- g) *Failing to pay the claimant house allowance for the period she worked for the respondent.*

She also relies on the following provisions of the law and statute

- a) The Employment Act Section 31 and Section 3(1)
- b) Employment Act Section 35 (C)
- c) Sub rule 4 (7) of labour institutions building and construction industry section 28 of the Employment Act, 2007.
- d) Section 41 of the Employment Act, 2007.
- e) Labour institutions (Building and Constructions) (wages) Order, 201w

She prays as follows;

- a) *3 months salary in lieu*
- b) *Unpaid House allowance*
- c) *Unpaid Leave allowance*
- d) *Unpaid transport allowance*
- e) *Gratuity*
- f) *Under payment*
- g) *Cost of this suit*
- h) *Any further relief that this Honourable Court may deem fit and just to grant.*
- i) *An Order to compel the Respondent to pay costs.*

The respondent's case is that she did not terminate the employment of the claimant's employment. It is her case that without any substantiated reason absented herself from employment between the months of March, 2016, April, 2016 and February, 2017 without notice.

It is her further case that the claimant was found to have stolen from the respondent in January, 2017 and on realizing that she had reported the matter to the police the claimant absconded duty. She also denies not having the claimant through disciplinary process as this opportunity was denied by the claimant absconding duty.

She *in toto* denies any liability to the claimant or at all. It is her case that the claimant has not rendered any service worthy of consideration for a payment and therefore her case fails completely.

The matter came to court variously until 23rd November, 2017 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful"
2. Is the claimant entitled to the relief sought"
3. Who bears the costs of this claim"

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful" The claimant in her written submission dated 5th December, 2017 discounts the respondents defence and deems the same as outright lies. It is her case that nothing would have been easier for the respondent than to reply to the demand letter dated 20th February, 2017 and sent to herself by registered posts.

Further, the respondent has not tendered any evidence by way of a witness or witness statements in support of her case of absconding duty or theft by servant. Moreover, there is no evidence of an Occurrence Book Report from the police confirming any such report of theft.

She submits a case for relief as follows;

- 3 months salary in lieu of Notice  $Kshs. 14,500 \times 3 = Kshs. 43,500/=$
- Unpaid House allowance since August 2015  $Kshs. 1725 \times 30 = Kshs. 51750/=$
- Unpaid Leave allowance for 3 years  $Kshs. 14,500 \times 3 = Kshs. 43,500/=$
- Unpaid transport allowance  $Kshs. 30,000/=$
- Gratuity  $21/30 \times 1500 \times 3 = Kshs. 30,450/=$

The respondent in a rebuttal to the claim relies on the authority of **Ebrahim John Amwayi v Mabati Rolling Mills Limited [2014] eKLR** where in circumstances similar to this case O.N. Makau, J. observed thus;

*"As earlier observed, none of the two parties herein served a written notice to terminate the contract or any dismissal letter to the other. The court is therefore left to consider the oral testimonies given by the witnesses during the trial. The court has been persuaded by the defence evidence that CW1 absconded from work when he failed to return to work from a 7 days off duty given to him in September 2007. Indeed CW1 admitted on oath that he never returned to work after his 7 days off. He also never returned to work after or during the period of his criminal trial and even after his acquittal. Instead between September 2007 and June 2008, he remained away from work after he got information that he was being sought to face criminal charges connected to theft of his employer's money. After his acquittal he remained away from work waiting to be called back by the Respondent but he was never called back.*

*From the foregoing summary of facts, the court finds on a balance of probability that CW1 absconded from work. He did so by failing to return to work without any good cause or permission from the Respondent.*

*14. It not good cause for the CW1 to say that he was prevented from resuming work due to his arrest and arraignment to court. It is also neither here nor there for CW1 to state that he was never called back to work after his acquittal. The arrest came after 8 months after CW1 had absconded from work. Likewise it was not the obligation of the employer to look for the CW1 to resume duty either during the pendency of the criminal charges or after acquittal. In any case, the Respondent has so far not commenced any disciplinary action against the Claimant. The answer to the first question herein is therefore that CW1 was never dismissed by the Respondent but he is the one who terminated the contract of employment wrongfully when he absconded from work after the 7-days off duty given to him in September 2007.”*

A distinction of the defence and authority relied upon by the respondent in this matter is that she does not in any way procure evidence in support of desertion of duty. The respondent has not in any way adduced evidence of absconding duty, or at all. She merely alleges and states her case as such. It is trite law and process that he who alleges must proof. This is the clarion call of section 47 (5) of the Employment Act, 2007 which provides as follows;

*47 (5) “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”*

Here, the claimant has laid down a case of unfair termination of employment. It is the onus of the respondent to justify the termination of employment. This must be tangible and empherical.

Many a times employers fondly use the defence of abscondment or desertion of duty. More often than not, this is not serious. It is based on craft and mischief. It is premised on chance and mere gambling. This is callous and must be discouraged in situations of fair labour practices . Section 47 (5) above clearly spells out the distinct roles of the parties in delineating their respective cases. This must be done outrightly and without any shadow of doubt. Parties must be able to pursue and fulfill their respective burden of proof.

I agree with the claimant. The defence is perforated. The respondent has not tendered any evidence of desertion or theft. The authorities relied on to support the defence therefore become irrelevant and inapplicable. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allows the claim and order relief as follows;

i. One (1) months salary in lieu of notice .....Kshs.14,500.00

ii. Four (4) months salary as compensation for unlawful

Termination of employment .....Kshs.58,000.00

iii. The costs of this claim shall be borne by the respondent.

iv. The costs of this claim be and are hereby assessed at Kshs.60,000.00

Delivered, dated and signed this 15th day of December, 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Meroka instructed by Meroka & Company Advocates for the claimant.
2. Miss. Mitei instructed by Sila Munyao & Company Advocates for the respondent.



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