



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 50 OF 2018

(Before D. K. N. Marete)

NANCY C. MARITIM.....CLAIMANT

VERSUS

SOT TEA GROWERS SACCO LTD.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 7th June, 2018. It does not disclose an issue in dispute on its face.

The respondent in a Memorandum of Defence dated 28th June, 2018 denies the claim and prays that the same be dismissed with costs.

This matter is consolidated with Cause Nos 49, 51, 52, 53, 54 and 55/2018 with this as the lead case.

The claimant's case is that on or about the month of April, 1999, she was employed by the respondent as a secretary. As at November, 2017, she earned Kshs. 28,101.26.

The claimant's further case is that she served the respondent with loyalty and diligence until November, 2017 when she was wrongfully and unlawfully dismissed with a refusal to pay her terminal dues. In this process, she was purportedly transferred to a factory that had never begun operation and without her consent or participation.

Her terminal dues include;

- a. One month salary in lieu of termination notice Kshs. 28,101.26
- b. Unpaid leave for the years between 1999 – 2017 (18yrs*Kshs. 28,101.26) Kshs.505,822.68/=
- c. Gratuity/service pay (Kshs 28,101.26*18yrs) Kshs.505,822.68/=
- d. 12 months wages compensation as per section 15 of the Labour Institutions Act(12months*28,101.26)Kshs.337,215.12/=

TOTAL Kshs. 1,376,961.74/=

The claimant's other case is that her dismissal was bereft of the right procedure and in contravention of sections 41(1), 44(4) and 45(2)(a) and 4(b) of the Employment Act, 2007.

She further adduces the following as grounds of unfairness and illegality of a termination of employment or re-deployment;

9. The Claimant avers that the termination and or redeployment was unlawful, unfair and/or illegal on the following grounds;

a. The Respondent terminated and or redeployed the Claimant's employment without following the procedure laid down in the Employment Act;

b. The Respondent terminated and or redeployed the Claimant's employment without proving that the reason for the termination and or redeployment was valid;

c. The Respondent did not give the Claimant termination notice as provided in the Employment Act;

d. The Respondent did not give the Claimant his lawful leave days contrary to the Employment Act;

e. The Respondent did not give the Claimant his lawful rest days contrary to the Employment Act;

f. The Respondent rejected, neglected and/or refused to pay the claimant's his gratuity for the period he worked for the company;

g. The Respondent failed or neglected to give the Claimant a Certificate of Service as required by the Employment Act.

h. The Respondent failed to recognize that the claimant herein was on permanent and pensionable terms.

She prays for an award against the respondent as follows;

a. Kshs. 1,37,961.74/=

b. Interest at court rates.

c. Certificate of Service

d. Reinstatement to her former Job at the Respondent's Sacco

e. Costs of this suit.

The respondent's case is a denial of the claim. It is her other case that the claimant absconded duty or deserted employment and that she was under no obligation to pay any terminal benefits to her.

It is the respondent's further case that she was entitled to the right to transfer her employees inclusive of the claimant and further that she did not require the claimant's consent to transfer her to any of her branches. She further puts her case thus;

11. The Respondent denies all the allegations contained in Paragraph of the Memorandum of Claim and shall at the hearing hereof put the Claimant to strict proof thereof. In particular:-

a. The Respondent did not terminate the Claimant's employment. The Claimant absconded from duty and/or deserted employment.

With regard to deployment, the Respondent avers that the same was lawful and procedural.

b. The Respondent reiterates that it did not terminate the Claimant's employment and that the re-deployment was lawful and procedural and invited no protest from the Claimant.

c. The Respondent reiterates that the Claimant who absconded from duty and/or deserted employment and the issue of notice of termination by the Respondent does not arise as the Claimant is yet to be granted an opportunity of being heard.

d. The Respondent gave to the Claimant all her leave days and there is no pending payment in respect hereof.

e. The Respondent gave to the Claimant all her rest days and there is no pending payment in respect hereof.

f. The Claimant had absconded duty and/or deserted employment and the Claimant went underground. No demand for gratuity was made by the Claimant. In any event the Respondent contends that the same is not payable as the same was forfeited by the Claimant's own conduct.

g. Having absconded duty and/or deserted employment, it was not possible to issue or grant her a Certificate of Service as she was to officially hand over all assets to, and be cleared by the Respondent.

h. The Claimant's employment was contractual and governed by the *terms and Conditions of Service and not by the law of torts*.

This matter came for hearing on 23rd July, 2018 when the parties agreed on a disposal and determination by way of written submissions.

The issues for determination therefore are;

1. Whether there was indeed a termination of the employment of the claimant by the respondent"
2. Was the termination of the employment of the claimant wrongful, unfair and unlawful"
3. Is the claimant entitled to the relief sought"
4. Who bears the costs of this claim"

The 1st issue for determination is whether there was indeed a termination of the employment of the claimant by the respondent. The claimant in her written submissions dated 26th September, 2018 submits and reiterates a case of unlawful termination of employment. It is her penultimate case and submission that her transfer to Stegro Epz tea factory, a facility which did not exist on the ground, was unfair and unfounded. This led to her subsequent dismissal which she deemed as unfair and unlawful.

In such submission, the claimant seeks to rely on the authority of **Peter Wambugu Kariuki & 16 Others vs. Kenya Agricultural Research Institute [2013] eKLR** where the court held thus;

"First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in Article 41(2), (3), (4) and (5) of the labour practices" is elaborated in Article 41(2), (3) (4) and (5) of the Constitution. Under Article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under Article 41 (3) every employer has the right to form and join an employers' organization; and to participate in the activities and programmes of an employers' organization. Under Article 41(4), every trade union and every employers' organization and employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices. Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair

treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work.”

The claimant further relies on the authority of authority of **Mary Chemweno Kiptui vs Kenya Pipeline Company Limited, (2014) eKLR** to forment and reinforce a case for reinstatement in the circumstances of her case.

The respondent in her written submissions dated 6th September, 2018 submits and reiterate her case of lawful termination of employment. It is her submission that an employee is obliged to follow all lawful instructions by the employer and also display loyalty to the said employer and at all times is duty bound to act solely for the benefit of the employer.

The respondent in furtherance of her case seeks to rely on the authority of **Ann Njoroge vs Topez Petroleum Ltd, (2013) eKLR** where the court observed as follows;

“When an employee claim is based on unfair termination that is countered with a defence of absconding, this court is thus invited to look at the circumstances of such a case more carefully as where an employee is proved to have absconded duty this is tantamount to gross misconduct and the sanction is summary dismissal without notice. This is as outlined under section 44 of the Employment Act and more particularly as under paragraphs 44(4) (a) as read together with (c);

- a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
- b. ...
- c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

It is her submission that the claimant absconded duty. She deserted employment for no good reason. This is as follows;

The claimants absconded from duty and/or deserted employment. The Respondent did not terminate the Claimant’s employment. Therefore the allegation that the termination was unlawful, unfair and/or illegal is false in itself. There was no termination in the first instance, the Claimants absconded from duty and section 54 (2) (a) and 4(b) of the Employment Act does not apply. The Respondent redeployed the claimants to Stegro EPZ factory and the redeployment was lawful and procedural since they were notified of the same vide letters dated 30/10/2017.

The respondent’s list of documents tells this story in totality. It is a display of an employer employee relationship that was not utterly tumultuous but had it fair share of mishaps. This, however, was until the claimant was transferred to Stegro Epz tea factory whose existence the claimant denies. This denial is not documented, or at all. However, by a letter dated 30th October, 2017, the claimant was instructed to return (go back) to her work place. This was a general letter addressed to all employees who were in March, 2016 deployed to work at Stegro Epz tea factory. This letter applied and was addressed to the claimant.

Thereon, a case of desertion of duty ensued.

The respondent’s case takes sway on a balance of probability and preponderance of evidence. She overwhelmingly brings out a case of no termination of employment. I therefore find a case of no termination of the employment of the claimant by the respondent and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. In a situation of no termination of employment, this issue is relegated to the periphery. It becomes a non issue.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, the claimant becomes disentitled to the relief sought.

I am inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Koech holding brief for Mugumya instructed by P. Sang & Company Advocate for the claimant.
2. Mr. Orina instructed by Orina Riechi & Company for the respondent.



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