



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 70 OF 2018

RAEL NAMASA LIKHAYO.....CLAIMANT

v

LAKE FILL STATION.....RESPONDENT

JUDGMENT

1. Rael Namasa Likhayo (the Claimant) sued Lake Fill Station (the Respondent) on 23 March 2018, alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Response on 28 April 2018, and this prompted the Claimant to file a Reply to Defence to Counterclaim (the Court has not seen any Counterclaim in the file).
3. On 25 April 2019, Mr Ouma for the Claimant proposed without any objection from the Respondent that the evidence of Fred Namwami Mola in Kisumu Cause No. 69 of 2018, *Fred Namwami Mola v Lake Fill Station* be applied in this Cause and other related Causes (Kisumu Cause No. 71 of 2018, *Omar Cheruiyot Kipkemboi v Lake Fill Station* and Kisumu Cause no. 72 of 2018, *Grace Achieng Okeyo v Lake Fill Station*). Counsel further sought that the Claimants' witness statements be admitted into evidence.
4. The Claimant filed her submissions on 15 January 2021 (the Court will disregard the submissions filed on 26 July 2021) while the Respondent filed its submissions on 26 July 2021.
5. The Court has considered the record and the submissions.

Employment relationship

6. The Respondent denied that the Claimant was its employee as a cashier. According to the Respondent, the Claimant was an employee of Lakefeeds.
7. The Claimant, on the other hand contended that she was employed by the Respondent on 5 February 2002 as a cashier and she relied on a secondary document, a Provisional member statement of Account from the National Social Security Fund to demonstrate the contractual relationship.
8. Where there is no primary document to show an employment relationship, the Court can rely on secondary records.
9. A copy of the Provisional Member Statement of Account produced by the Claimant shows that she was employed by the Respondent on 1 January 1991.
10. The Statement further indicates that the Respondent made monthly contributions on behalf of the Claimant from April 2004.
11. In consideration of the Statement of Account, the Claimant's oral testimony and section 10(7) of the Employment Act, 2007, the Court finds that the Claimant was employed by the Respondent from 5 February 2002.

Unfair termination of employment

12. In the Response, the Respondent contended that the Claimant had a pending criminal case before the Magistrates Court in Maseno and because the case had not been finalised, she could not be cleared.

13. The same assertions were repeated in the witness statement.
14. The Claimant's case was that on 28 November 2017, she was informed by the Respondent that her services were no longer required and that no prior notice was issued. She also alleged that she was not afforded an opportunity to be heard.
15. There is material on record showing that the Claimant and others were arrested by the Police and charged with the offence of stealing from the Respondent between 1 November 2017 and 28 November 2017.
16. The charge sheet, in the view of the Court corroborates the Claimant's testimony that she was dismissed on 28 November 2017. The Respondent action must have been prompted by the discovery or allegations of the theft.
17. Section 35(1) of the Employment Act, 2007 requires written notice of termination of employment. Section 41 of the Act contemplates affording the employee an opportunity to be heard.
18. The Court finds it more probable that the Respondent terminated the Claimant's employment without written notice and before affording her a chance to make representations.
19. The decision was unfair.

Compensation

20. The Claimant served the Respondent for about 15 years. By the time of hearing, she was facing a criminal charge on the same facts which led to the separation, and in consideration of these factors, the Court is of the view that the equivalent of 5-months gross wages as compensation would be appropriate (gross wage was Kshs 9,900/-).

Pay in lieu of notice

21. Since the Respondent did not issue written notice, the Court will award the Claimant the equivalent of 1-month pay in lieu of notice.

Breach of contract

22. The Claimant sought Kshs 148,500/-on account of leave accrued over 15 years of employment.

23. The Claimant did not disclose whether she applied for leave and was denied or whether the leave was accrued with the approval of the Respondent.

24. Without a proper evidential foundation and in consideration of section 28(4) of the Employment Act, 2007, the Court declines to allow this head of the claim.

Conclusion and Orders

25. From the foregoing, the Court finds and declares that the Respondent unfairly terminated the Claimant's employment and awards her:

(a) Compensation	Kshs 49,500/-
(b) Pay in lieu of notice	Kshs. 9,900/-
TOTAL	Kshs 59,400/-

26. Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9TH DAY OF MARCH 2022.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant	Odhiambo Ouma & Co Advocates
For Respondent	Odhiambo B.F.O. & Co Advocates
Court Assistant	Chrispo