



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 608 OF 2014

IRENE NDINDA MBINDACLAIMANT

VERSUS

MOMBASA FILTERS SUPPLIES LIMITED1ST RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 2.12.2014 alleging that she had been unfairly dismissed by the respondents, and seeking to recover terminal dues plus compensation for the unfair termination of her employment. It is her case that she was dismissed for unjustified reason and without following a fair procedure.
2. The respondent has denied the alleged unfair termination and averred that it is the Claimant who deserted her employment after stock taking confirmed that she had stolen from the employer. It is further defence case that the claimant started a rival business then deserted work. The respondent has therefore counter claimed against the claimant for value of the alleged stolen stock.
3. The suit was heard on 20.7.2017 and 25.9.2017 when the claimant testified as Cw1 and the respondent called her MD Miss Zippora Mukonyo Munyao as Rw1. Thereafter only the claimant filed written submissions which I have carefully considered herein.

Claimant's Case

4. Cw1 testified that she was employed by the respondent in March 2011 as storekeeper cum cashier. Her salary was Kshs.8000 gross per month but in May 2012 it was increased to Ksh.10,000 and in March 2013, it was increased to Kshs.12,000. She however contended that the said salary was way below the statutory minimum pay and prayed the arrears of her rightful salary as gazette vide the relevant wage order.
5. On 22.8.2014, Rw1 called Cw1 at night and told her not to report to work again until a debt of Kshs.60,000 was paid to the company by Mr. Wandeto, a customer who bought stock on credit and paid by a cheque that bounced. She denied the alleged desertion and maintained she was dismissed by phone because of the said debt by Mr. Wandeto. She further denied the alleged theft and maintained that the issue is still pending before the Criminal Court.
6. Cw1 contended that, her arrest and the said criminal charges were done after she refused to withdraw this suit after threats from Rw1. She also contended that she was not handling the stock solely and explained that the respondents Directors, their son Maxiwell and other employees were involved in the sales at the shop and at the store. She further contended that her termination was without a valid reason and it was done without prior notice of one month or fair hearing.
7. Cw1 stated that she never went for any annual leave during her entire service to the respondent she further accused the employer for not remitting NSSF and NHIF for her throughout her entire period of service. She therefore prayed for accrued leave and service pay. She also prayed for compensation for unfair termination of her employment she also prayed for certificate of service.
8. On cross examination, Cw1 denied that she was paid her salary for August 2014. She admitted that, stocktaking for the respondent started in April 2014 but it was not over as the time she was terminated in August 2014. She however admitted that she signed a document agreeing that some items were lost. She further admitted that her colleague Mr. Albert also signed the agreement that some items had disappeared from the stock. She finally admitted that from November to December 2013, Rw1 was absent from work.
9. On further cross examination, Cw1 denied that she left work to start spare parts business and maintained that she only registered the business in September 2014 after dismissal by the Rw1. She explained that she used loan money to start her business but in September Rw1

started to harass and threaten her and caused her arrest and arraignment in Court. She contended that it was only after the arrest that she was told the value of the lost stock. She further contended that no complete stock taking was done before her termination. She concluded by alleging that she used to request for leave but she was always denied. She however admitted that every year the respondent used to close the shop from 23rd December to 3rd January of the following year.

Defence Case

10. Rw1 testified that she is a co-director of the respondent with her husband. She confirmed that Cw1 was their employee since March 2011. She was employed as Cashier and storekeeper starting with salary of Kshs.8,000 gross per month but it was later increased. The salary was paid without deduction of NSSF and as such, it was upon the claimant to remit her contributions to the N.S.SF.

11. Rw1 explained that there were 2 other salesmen Mr. Makenzie and Kyumwa they were outside salesmen. The other employees Mr. Lonya and Albert were messenger and fitting technician assisting customers and they were not involved in the sales. Finally, she explained that their son was the Account but only came to the shop occasionally only to collect books for checks.

12. In March 2014, Rw1 went to the shop and discovered that the procedure for the business was not being followed. A customer was being supplied with goods without signing a credit form to commit himself to payment as required. The customer was trading in different names and after investigation, he discovered the customer was Mr. Wandeto. She conducted a stock taking with the claimant, Mr. Lonya and Albert beginning with sleeves for Hydraulic pipes and found that some sleeves valued at Kshs.67,600 were missing and they signed in agreement. Rw1 further explained that the claimant deserted work before the stock taking was completed.

13. Rw1 further testified that after the claimant deserted the stock taking went on Maxwell prepared the report dated 8.1.2015 indicating as missing the sleeves worth Kshs.67,600, Hydraulic pipes worth Kshs.183,989 Hydraulic fittings were Kshs.310,600 and fitters work Kshs.716,438 all totaling to Kshs.1,278,627. She explained that the said value was arrived at after considering the difference between the book stock and the actual stock after the physical count. She maintained that the book stock was recorded by the Claimant who was responsible for the stock. She contended that the claimant should be held liable for the lost stock. She however admitted that herself, her husband, Maxiwell, Makenzie and Juma were also selling stock. She further admitted Cw1 was away from work once in a while.

14. On cross examination, RW1 maintained that Cw1 was employed as Cashier and Store keeper she explained that Cw1 started with a salary of Kshs.8,000 in March 2011 which was increased to Kshs.10,000 and Kshs.12,000 from May 2012 and March 2013 respectively. She confirmed that after 22.8.2014, Cw1 never reported to work and her salary for August 2014 was never paid.

15. On further cross examination, Rw1 admitted that she knew Mr. Wandeto who was a tenant at their premises at VOK and he was introduced to their business when it was being run by her husband and son, Maxiwell. She however denied that there were any special arrangement between their business and Mr. Wandeto and maintained that every customer was required to avail an LPO or sign a credit form subject to authorization. She however contended that in this case there was no authority given to sale the goods to Wandeto on credit. On being shown delivery Note dated 12.2.2014 for Kshs.21,000 for payment on 4.3.2014, Rw1 admitted that it was signed by her husband. She admitted that as at 22.7.2014, Mr. Wandeto had a debt of Kshs.60,000 for which he issued a cheque which was dishonored by the bank. Thereafter the customer was arrested and charged for giving a cheque which bounced.

16. Rw1 denied that on 22.8.2014 she told Cw1 not to report back to work until the debt of Kshs.60,000 was paid. She maintained that the claimant ran away just like her colleagues. Rw1 however admitted that the stock taking was going on while the shop was still operating.

Analysis and determination

17. After careful determination of evidence and submissions the issue for determination are:-

- (a) Whether the claimant was dismissed or she deserted her employment.
- (b) Whether the claimant is entitled to the reliefs sought in the suit.
- (c) Whether the counter claim should be allowed.

Desertion Vs Unfair termination

18. The claimant has denied the alleged desertion and contended that on 22.8.2014, she was called by Rw1 via her phone and told not to report to work again until the debt of Kshs.60,000 was paid. The debt was owed by Mr. Wandeto whose cheque for payment had been dishonored by his bank. The said cheque had led to the arrest and arraignment to Court of the said customer. She however maintained that the claimant ran away like his colleagues before completion of the stock taking.

19. After careful consideration of the rival evidence and submissions, I find on a balance of probability that the claimant never deserted employment. There is no evidence to prove that she did so. There is no reason why she had to wait for months before running away. There was no evidence of any theft as at the time she is alleged to have run away. The only loss as at then was Kshs.67500 which she alleges was the debt owed by Mr. Wandeto whose cheque for payment had bounced. Consequently, I hold that the claimant was constructively dismissed by Rw1 vide a phone call made by Rw1 on the night of 22.8.2014 by being told not to report to work until Mr. Wandeto paid the Kshs.60,000 debt arising from credit of stock. Rw1 has not denied that she made the call to the claimant on 22.8.2014 at night. The question that follows is whether the termination was unfair.

20. Under section 45(2) of the Employment Act, termination of employees contract of employment is unfair if the employer fails to prove

that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason for the termination was the unauthorized credit sale of stock to Mr. Wandeto who gave a cheque which bounced. According to Rw1, the credit sale was done in breach of company policy and procedures which require that credit sale had to be done on the strength of an LPO or credit form signed by the claimant and authorized by the Management.

21. The claimant contended that the credit sale was authorized by the husband of Rw1 who is also a co-director of the respondent. Rw1 admitted that Mr. Wandeto was their tenant and he was introduced to the business by her husband. She also admitted that the husband had signed authority of credit sale of Kshs.21,000 to Mr. Wandeto on 12.2.2014. The husband of Rw1 has not given any evidence to deny that he authorized the credit sale to Mr. Wandeto. He seems to have left the entire matter of the following the debt from Mr. Wandeto to Rw1. It is that debt that led to the termination of the claimant's employment on ground that it was not authorized.

22. In my view the said debt has not been denied and that is why the customer gave a cheque for payment. It was authorized by director of the company who has not denied having so authorized. Consequently, I find and hold that the respondent has failed to prove a valid and fair reason for dismissing the claimant. Under section 43(1) of the reason for termination of employment are those matters which existed at the time of the termination and which led the employer to dismiss the employee. In this case, Rw1 has not proved that the credit sale to Mr. Wandeto was unauthorized. Failure to prove the reason for the termination rendered the dismissal of the claimant unfair within the meaning of section 45 of the Act.

Procedure followed

23. Under section 41 of the Act before terminating the services of an employee on ground of misconduct, poor performance or physical incapacity, must first explain to the employee, in a language he understands and in the presence of a fellow employee or shop floor union representative, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. In this case, the termination was through a phone call at night and as such it did not comply with the mandatory provisions of section 41 of the Act. I therefore find and hold that the respondent has not proved on a balance of probability that a fair procedure was followed before terminating the claimant.

Reliefs

24. Under section 49 of the Act I award the claimant Kshs.26,185 being one month salary in lieu of notice. The said salary is based on the minimum wage for a Cashier prescribed by the wage order for 2013. She is also awarded 10 months salary as compensation for unfair termination being Kshs.261,850.

25. The claimant is also awarded her salary for August 2014 being Kshs.22,156.55. She also awarded leave for 3 years and 5 months less the days given between 23rd December and 3rd January every year. That equals to 10 days less 3 public holidays and one Sunday leaving only 6 leave days per year. For 3 years, she utilized only 18 leave days out of 71.75 leave days earned during the entire period of service.

Hence $Ksh.26,185 \times 5 \frac{3}{26} = Kshs.54,132.45$.

26. The claimant is further awarded service pay at the conventional rate of 15 days per year of service. Hence $Kshs.26,185 \times \frac{3}{2} = Kshs.39,277.50$

27. The claim for salary underpayment is also allowed based on the wage orders for 2011, 2012 and 2013 from March to April 2011 the minimum wage for a cashier was Kshs.15,216 but he was earning Kshs.8,000 representing under payment of Kshs.7,216 equaling to Kshs.14,432 for the 2 months. From May 2011 to April 2012 the minimum pay was Kshs.17,118 but the claimant was receiving Kshs.8,000 representing an underpayment of Kshs.9,118 and equaling to Kshs.109,426 for the 12months. However I award Kshs.38,575.20 which he prayed for. Therefore the total underpayment awarded for April 2011 to April 2012 is Kshs.53,007.20.

28. From May 2012 to April 2013 the minimum wage for a cashier was Kshs.19,360.50. claimant received Kshs.10,000 upto February 2013 representing an underpayment of Kshs.9,360.50 and equaling Kshs.93,605 for the 10 months. However he will get what he prayed for being Ksh.84,245 from March 2013 his salary was increased to Kshs.12,000 representing Kshs.7,360 which I award as prayed. Therefore the total underpayment for May 2012 – April 2013 is Kshs.91,605.00.

29. Finally from May 2013 to April 2014 the minimum wage was Kshs.22,070.95 representing an under payment of Kshs.10,070.95 equalling to Kshs.171,206.15. She will however get what she pleaded being $Kshs.110,780.45 + 32,297.85 = 143,078.30$. The total under payment in arrears is therefore Kshs.287,690.50 but I award the sum prayed for by the claimant being Kshs.280,474.30.

30. The claimant prayed for unpaid house allowance at the rate of 15% of her lawful basic pay. I will award the same based on her minimum basic salary. I award the Kshs.109,135.38 as total unpaid House Allowance as prayed.

Disposition

31. For the reasons that the Claimant's contract of service was unfair terminated by the respondent, I enter judgment for her in the sum of Kshs.793,211.20 plus costs and interest. The claimant will also be issued with a certificate of service.

Dated and signed at Nairobi this 6th day of April, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 26th day of April, 2018

LINNET NDOLO

JUDGE