



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1049 OF 2017

WANJIRU MUNYAO.....CLAIMANT

VERSUS

NEW WIDE GARMENTS KENYA EPZ LIMITED.....RESPONDENT

MAHALAKSHMI GARMENTS KENYA EPZ LIMITED....RESPONDENT

JUDGEMENT

1. Through a statement of claim dated 30th May, 2017, the claimant avers that she was employed by the 1st respondent as a checker and was earning a salary of Kshs 12,000.00. That thereafter, she was promoted to the position of supervisor and her services transferred to the 2nd respondent in the same capacity. That it was while in the employment of the 2nd respondent that her services were terminated on 16th June, 2016 when she alleged that the manager, a Mr. Nishadha, picked a quarrel with her and ordered her out of the premises.
2. The claim was denied by the respondents who stated that the claimant was dismissed on 17th June, 2016 after she absconded duty with effect from 13th June, 2016.
3. The matter proceeded for hearing on 10th November, 2021 with each side calling one witness.

Claimant's case

4. The claimant testified in support of her case and at the outset, sought to rely on her witness statement which she asked the court to adopt as part of her evidence in chief. She also produced the bundle of documents filed together with the claim as exhibits before court.
5. The claimant avers that throughout the duration of her employment, she did not have any issue of indiscipline and that her problems began when she sustained injuries and lost a pregnancy following an accident she was involved in, sometimes in May, 2016 when she had just left work.
6. She averred that on 16th June, 2016, while at work, the 2nd respondent's manager, Mr. Nishadha picked a quarrel with her and directed her never to set foot in the premises. It was the claimant's testimony that that the 2nd respondent did not issue her with a notice of dismissal nor grant her an opportunity to express herself on whatever allegations. She denied absconding duty and added that indeed, she would work overtime and over the weekends but was not compensated appropriately.
7. In cross examination, the claimant admitted that the relevant punch card does not indicate that she was at work between 13th -17th June, 2016 although she still maintained that she was actually at work.

Respondents' case

8. The respondents called one witness Ms. Florence Mwajuma Mwalawa, who identified herself as its Human Resource Manager and testified as RW1. She also sought to rely on her witness statement which she asked the court to adopt as part of her evidence in chief. She also produced the respondents' bundle of documents as exhibits before court.
9. RW1 averred that the respondent companies have very close ties and that prior to August, 2015, the claimant worked for the 1st respondent whereafter her services were transferred to the 2nd respondent company.
10. It was her testimony that the claimant worked as an inline quality checker and not as a supervisor as she had alleged. She further averred that the claimant was absent from work on 14th, 16th, 26th and 28th May, 2016. That the 2nd respondent was not aware that the claimant was

expectant and that she had fallen down and suffered a miscarriage. That in event the claimant sustained the injuries as alleged, she did not apply for sick off as required. RW1 further denied that the claimant was at work on 13th May, 2016 at 8:00 pm, as the records indicate that she punched out at 4:31 pm.

11. RW1 further stated that the claimant was not at work on 16th June, 2016, hence it could not be true that she had quarreled with Mr. Nishadha, hence directed to leave the premises. She further told court that the claimant had not reported any incident of mistreatment by Mr. Nishadha to her office, which she averred, was responsible for receiving such complaints.

12. It was also her testimony that since the claimant absconded duty, the 2nd respondent was right in dismissing her from employment and that on account of her absence, it was not practical to accord her a hearing.

Submissions

13. Upon close of the hearing, each party filed written submissions. The claimant submitted that her termination was unlawful, wrongful and unfair. She further stated that her termination was founded on non-existent and invalid reasons, if any. She further submitted that the respondents did not comply with peremptory procedural dictates as provided by law hence flouted the provisions of sections 41, 43 and 45 of the Employment Act. She sought reliance on several authorities including **Walter Anuro vs Teachers Service Commission [2013] eKLR**, **David Gichana Omuya vs Mombasa Maize Millers Limited [2014] eKLR**, **Samuel Muchiri Gikonyo vs Henkel Chemicals (EA) Ltd [2014] eKLR**, **Peter Apolo Ochieng vs Amedo Centre Kenya Limited [2016] eKLR**, **David Njoroge Muiru vs Elsa Limited (2014) eKLR**, **Peter Onyango Nyabongo vs Citadelle Security Limited [2015] eKLR** and **Chrispine Onguso Okinyi vs Devki Steel Mills Limited [2018] eKLR**.

14. The respondents submitted that the claimant had failed to prove to court the fact of her dismissal pursuant to section 47(5) of the Employment Act and on this issue, invited the court to consider the following cases; **Rusiah Misesi vs Egale Heights Afrika (K) (2019) eKLR** and **Nicholus Kipkemoi Korir vs Hatari Security Guards Limited (2016) eKLR**. The respondents also submitted that the claimant absconded duty and as a result, it was not possible to take her through a disciplinary process. In this regard, reliance was placed on the following authorities; **Jackson Butiya vs Easter Produce Kenya Limited IC Cause No. 335 of 2011**, **Matthew Lucy Cherusa vs Poverelle Sisters of Belgano (2013) eKLR**, **Consolata Kemunto Aming'a vs Milimani High School (2019) eKLR**.

Analysis and Determination

15. Before considering the issues of determination, it is imperative to address an issue raised by the respondents to the effect that the claimant has not proved that she was dismissed from employment. Indeed, the respondents have submitted extensively on the same. Be that as it may, the respondents have attached a letter of summary dismissal addressed to the claimant hence their submissions to that extent cannot be fully comprehended. In my view, there's no contest in that regard as the 2nd respondent has by its own admission through documentary evidence confirmed that it dismissed the claimant from employment. I therefore find the argument to that extent idle.

16. Arising from the pleadings on record, the evidence before court, the testimonies of the parties and the rival submissions, the issues falling for court's determination are:

a) Whether the claimant was unlawfully and unfairly terminated or absconded duty?

b) Is claimant entitled to the remedies sought?

Whether the claimant was unlawfully terminated or absconded duty?

17. The parties have presented different versions as to how the employment relationship was extinguished. On the one hand, the claimant avers that she was verbally terminated by Mr. Nishadha who ordered her out of 2nd respondent's premises and directed her never to set foot there again. On the other hand, the 2nd respondent contends that the claimant absconded duty hence it had reason to terminate her services.

18. From the record presented by the respondents, the claimant was summarily dismissed on grounds of absconding duty. The letter of summary dismissal is dated 17th June, 2016 and is addressed to the claimant. The reasons for the dismissal as set out in the said letter are as follows:

“ (i) you have been absent from duty as from 13/06/2016 to date, without seeking for prior permission neither following the company's leave procedure.”

19. Indeed, Section 44 (4) of the Employment Act provides for summary dismissal on several grounds. One of the grounds provided for under (a) is where an employee absents himself/herself without leave or other lawful cause from the place appointed for the performance of his work.

20. As stated herein, the respondents have alleged that the claimant absconded duty hence the reason for her dismissal from employment. I have considered the evidence presented by the respondents and note that the punch card indicates that the claimant was marked as absent on 26th -28th May, 2016 as well as 16th and 17th June, 2016.

21. Despite noting the claimant's absence, the 2nd respondent, being he employer, did not indicate whether it made any efforts to reach her or establish the reason for her absence from work. Having been in an employment relationship for a considerable amount of time, it is most

probable that the parties had established channels of communication.

22. It was therefore reasonable and prudent in the circumstances, for the 2nd respondent to contact the claimant and establish the reasons for her absence. There is no indication or evidence that this was ever done.

23. In the case of **Mary Mumbi Kariuki vs. Director, Pamoja Women Development Programme [2015] eKLR** the Court found as follows;

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”

24. Further, in the case of **Joseph Nzioka vs. Smart Coating Limited [2017] eKLR**, the court opined that; **“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”**

25. In the instant case, it is apparent that the 2nd respondent upon ascertaining that the claimant was absent from work, proceeded to terminate her services without further recourse to her.

26. The 2nd respondent has contended that on account of the claimant’s absence from duty, it was not practical to take her through a hearing as required under section 41 of the Employment Act. Section 41(2) of the Employment Act provides as follows;

“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\) or \(4\)](#) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make.”

27. Having noted the claimant’s absence from duty, the 2nd respondent as an employer had all the right to commence disciplinary action against her. Its hands were not tied at all. In this case, it ought to have notified the claimant of the reasons it was considering terminating her employment in a language, she understands. The 2nd respondent did not tender any evidence before court to prove that it indeed notified the claimant of such reasons and required her to explain or show cause why her employment should not be terminated.

28. To this end, and by dint of section 41(2), the 2nd respondent ought to have gone an extra mile and accorded the claimant an opportunity to make any representations against the allegations of abscondment of duty.

29. Such a process could have been achieved by contacting the claimant through her known and disclosed contacts. In absence of such procedure, the 2nd respondent’s disciplinary action can be faulted hence the claimant’s dismissal is deemed as unfair and unlawful and I so find.

Remedies available to the claimant

30. Having found that the claimant was unfairly terminated, I now proceed to explore the remedies available to her.

One month’s salary in lieu of notice

31. Pursuant to Section 44(2) of the Employment Act, summary dismissal without notice or with less notice is prohibited. On its part, section 35 (1) (c) of the Employment Act provides for a mandatory one month notice where an employee is on a monthly salary as the claimant herein. In this regard, I find that the claimant is entitled to one month’s salary for unlawful dismissal. I must state that the 14 days’ notice period stipulated in the claimant’s contract of employment is superseded by the statutory requirement under section 35(1) (c) of the Act.

Unpaid leave days, public holidays and rest days

32. The claimant has not adduced the necessary documentary evidence to support the grant of this relief. On its part, the 2nd respondent has produced the claimant’s pay slip for the months of May and June, 2016 which indicate that she was paid the sum of Kshs 1,337.44 being leave pay. Further, the punch cards produced by the 2nd respondent, indicate that she did not check in at work on Sundays hence this discounts her claim that she worked on Sundays with no rest.

Days worked in June, 2016

33. The claimant has prayed for the sum of Kshs 11,888.89 being days worked in the month of June, 2016. The punch cards which indicate the days the claimant reported to work, show that she worked upto 11th May, 2016 and thereafter, she was marked as absent. The 2nd respondent produced the claimant’s pay slip for the month of June, 2016 to confirm that she was paid for the days worked. This was not countered by way of evidence by the claimant, and to that end, I will decline to make an award under this head.

Compensatory damages for wrongful termination

34. The claimant has prayed for the sum of Kshs 231,833.28 being 12 months compensation for unlawful termination. An award under this head would be determined by various factors including the length of the employment relationship. It is apparent that the claimant worked for the 2nd respondent for about a year or so. Before then, she avers that she worked for the 1st respondent with effect from 17th July, 2013. From the testimony of RW1, the respondent companies have very close ties hence the claimant’s transfer of service. I would therefore presume that her service was continuous from July, 2013 till June, 2016 when her employment was terminated. On this account, I will award the claimant compensatory damages equivalent to 5 months gross salary for unlawful dismissal.

35. In view of the fact that the employment relationship has been admitted, the claimant is entitled to a certificate of service pursuant to section 51(1) of the Employment Act.

Orders

36. In the final analysis, I enter Judgement for the claimant against the 2nd respondent in the following terms;

- (a) A declaration that the claimant’s termination was unfair and unlawful.**
- (b) The claimant is awarded compensatory damages in the sum of Kshs 96,579.20 which sum is equivalent to 5 months gross salary.**
- (c) One month’s salary in lieu of notice being Kshs 19,319.44.**
- (d) The total award is Kshs 115,916.64**
- (e) The claimant shall have the costs of the suit.**
- (f) Interest on the amount in (d) at court rates from the date of Judgement till payment in full.**

37. The claim against the 1st respondent is dismissed in its entirety as there is evidence that the claimant was an employee of the 2nd respondent at the point of her dismissal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY 2022.

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STELLA RUTTO

JUDGE

APPEARANCE:

FOR CLAIMANT MR. MULI

FOR THE RESPONDENT MR. KIPRONO

COURT ASSISTANT BARILLE SORA

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE