



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO.1329 OF 2017**  
**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**  
**BELTA MUTANU MWANGANGI.....CLAIMANT**  
**VERSUS**  
**STYLE INDUSTRIES LIMITED....RESPONDENT**  
**JUDGEMENT**

**INTRODUCTION**

1. The Claimant filed his memorandum of claim dated 13<sup>th</sup> July, 2017.

The Respondent filed his response on 3<sup>rd</sup> August, 2018 (same is undated).

**CLAIMANT'S CASE**

**PLEADINGS/EVIDENCE IN COURT**

2. The Claimant states that in November, 2009 she was employed as a general worker by the Respondent who was then referred as strategic Industries Limited. She says her salary then was Kshs.6,850/=. The employment contract she says was oral. She says on 27<sup>th</sup> September 2012 she was issued with a discharge form and payment of Kshs.28,313/21 being redundancy payments.

She continued working for the Respondent until 9<sup>th</sup> November, 2012 when the Respondent changed his name to **STYLE INDUSTRIES LIMITED** and issued her a new contract at an adjusted salary of Kshs.9,867/= per month.

3. She says she continued working for the Respondent diligently until 12<sup>th</sup> August, 2014 when an accident occurred at the Respondent's premises and she was injured.

4. She attaches records from Coptic Hospital where she was getting treatment.

5. She says on 31<sup>st</sup> August, 2016 her employment was terminated without any colour of right. She says the termination was oral.

She says she was not paid salary for May, June, July and August, 2016.

She says she was not given any notice to terminate her employment or notice to show cause and further her terminal dues have not been paid.

6. She now claims compensation and payment of her terminal dues as set out on paragraph 10 of her memorandum of claim and it amounts to Kshs.262,240/=.

7. She also prays for costs of the suit and interest at court rates.

Finally she wants to be issued with her certificate of service.

8. In her evidence in court on 3<sup>rd</sup> November, 2011 the Claimant said she would rely on her witness statement filed in court and the list of exhibits filed in court already.

9. She says she was originally employed by Strategic Industries and by September, 2012 she was paid her severance pay. The company changed name to **STYLE INDUSTRIES LIMITED**.

10. She says on 31<sup>st</sup> August, 2016 her services were orally terminated.

She says in 2014 she fell at the place of work and got injured and she used to give all receipts from the hospital to the Respondent. She says the company would meet her medical costs.

### **RESPONDENT'S PLEADINGS/EVIDENCE**

11. The Respondent says the Claimant was employed in an open ended contract from 1<sup>st</sup> November, 2012 at a consolidated salary of Kshs.9,867/= per month. He says Claimant failed to report on duty and was issued with a notice to show cause and refused to show up from duty on even to defend herself. She was then summarily dismissed by their letter of 17<sup>th</sup> August, 2016.

They annexed two copies of letters warning her and asking her to show cause dated 12<sup>th</sup> July, 2016 and 3<sup>rd</sup> August, 2016 respectively.

12. He says Claimant did not show up to explain her absence from work.

13. He says the Claimant having not provided services to the Respondent, the days she was absent from work without leave is not entitled to the reliefs prayed. According to the Respondent the Claimant is the one who breached the fundamental terms of her contract and is only entitled to the difference in wages arising out of the revised general order.

The Respondent prays that the claim by the Claimant be dismissed with costs.

14. The Respondent in his evidence in court produced his witness statement and list of documents already filed in court. He admitted he was not working for the respondent when the Claimant was dismissed but he got his evidence from the office records. He says Claimant was served with the letters of notice to show cause but never reported to the office.

He also says she has been called to collect her dues but had not done so.

### **THE SUBMISSIONS**

15. The Claimant filed his submissions dated 1<sup>st</sup> December, 2021. The respective parties were given until 14<sup>th</sup> December, 2021 to file their submissions.

The Respondent by that dated had not filed its submissions.

16. Claimant in his submissions set to demonstrate that the Claimant was terminated unfairly as she was not given an opportunity to explain herself.

If she deserted work as claimed by the Respondent the Claimant says she should have been given an opportunity to explain if she intended to go back to employment. She is relying on the **CASE OF SABC VS CCMA AND OTHER (2002) 8.BLLR 693** where it was held that;

“it is not desertion when an employee who is absent from work intends to return to work. Desertion necessarily entails the employee’s intention to no longer to return to work. The employer would have to establish this intention in a fair process.”

17. In her submissions therefore the Claimant avers failure for her to be accorded a fair hearing prior to her termination amounted to unfair and unlawful termination. She therefore avers she is entitled to the prayers in her claim.

18. The issues for determination;

a. The issue for determination is whether the Respondent observed legal procedure to terminate claimant’s employment and further whether the Claimant absconded from duty or was terminated.

b. Is Claimant entitled to the prayers in her memorandum of claim.

### **DECISION**

19. Claimant says she worked for Respondent from November, 2009. However the letter of appointment on record is dated 27<sup>th</sup> September, 2012. However Claimant claims she was employed in November, 2009 but Respondent says she was employed on 1<sup>st</sup> November, 2012.

Anyway the Claimant has produced a payslip showing she was working for style Limited in 2011. She was also given a redundancy letter

dated September, 2012 meaning she was working with that company or related company before September, 2012. Whichever way the Claimant seems to have been working for the Respondent even before 2012 and that is her averment.

20. As to the question of how the Claimant left employment the issue is whether she deserted employment or she was terminated.

There are records apart from the evidence adduced by the Claimant to show that the Claimant was injured at the place of work. She was referred to Coptic Hospital by the Respondent on 2<sup>nd</sup> September, 2019 and she continued to attend the said hospital as per records and medical reports produced in court.

She was under treatment a good part of the year 2014.

21. She says she was involved in that accident in August, 2014 and her services were terminated on 31<sup>st</sup> August, 2016.

She says in her evidence in court that the reason given for her termination was that she was becoming very expensive to the Respondent.

22. Now the Respondent on the other hand claims the Claimant deserted employment and he issued her with warning letters dated 3<sup>rd</sup> July, 2016 and another dated 26<sup>th</sup> July, 2016. Finally on 3<sup>rd</sup> August they issued her a letter to attend disciplinary meeting which the Respondent says she refused to attend. She was then issued a dismissal letter dated 17<sup>th</sup> August, 2016.

23. One curious thing the court noted is that all these letters did not have a postal address but are written c/o of Style Industries. Yet the Respondent says the Claimant deserted employment but the Respondent's witness Duncan Rumati did not tell the court when the Claimant deserted work. In fact in the statement of defence it is reported that the Respondents could not reach the Claimant upto 26<sup>th</sup> August, 2016 even on her cellphone. This evidence raises serious doubts whether these warning letters were really served on the Claimant. The claimant says she never got those letters.

24. The Claimant says she would attend hospital and kept the Respondent updated of her progress. That is not a behavior consistent to a person who intends to abscond from employment. Rather these warning letters do not seem to have reached the Claimant to enable her to respond.

25. The authorities cited on desertion the employer must show the steps he took to reach out to the employee before he can claim that the employee deserted employment.

The earlier referred **CASE OF SABC VS CCMA & OTHERS (SUPRA)** it was held that it is not desertion when an employee who is absent from work intends to work. Desertion necessarily entails the employee's intention to no longer to return to work.

There is no evidence that the Claimant left employment with no intention to return to work.

Indeed she says she was at her place of work on 31<sup>st</sup> August, 2014 when she was told by Margaret Ng'eno that her employment was terminated and that she was an expense to the Respondent.

26. Yet Section 41 of the Employment Act 2007 provide that an employer shall before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

27. It is settled jurisdiction that the employer must give a reason which is fair and valid before terminating his employment. The fair procedure must also be adhered to in the process of terminating the employment in the often cited case of **WALTER OGAL VS TEACHERS SERVICE COMMISSION CAUSE NO. 955 OF 2011**. In that case the court held that substantive justification and procedural fairness are necessary for termination of employment to pass the fairness test.

28. Furthermore in case of physical incapacity the employer was obligated where employee got injured or ill at the place of work to reasonably accommodate the employee. Further the court held that injured or sick employees did not lose their right to equality of opportunity under Section 5 of Employment Act and Article 27 of the Kenya Constitution 2010.

29. The Respondent failed the fairness test and he terminated the Claimant unfairly and unlawfully due to her physical incapacity. In the premise judgement is entered in favour of the Claimant.

30. Having entered judgement in favour of the Claimant, I proceed to award the following:-

i. One month salary in lieu of notice Kshs.14,278.40

ii. Salary for May, June, July and August, 2014 not clear as is not prayed but in fact what is alluded in the claim is salary for May, June, July and August, 2016 not 2014. Same is declined.

iii. Salary underpayment for the year 2015 to 2016. Again not specifically proven and so is declined.

iv. Prorate leave balance for 16 days – 2016. I am inclined to grant this prayer as the Respondent did not prove he gave her leave –

this is not controverted so is granted Kshs.6,072/=.

v. As for compensation for unlawful termination, I will fairly award her 5 months in view of the period she had worked for the Respondent Kshs.14,278.40 x 5

= Kshs.71,392/=.

31. The total award comes to Kshs.91,742.40

32. I also award costs to the Claimant. Interest is also to be provided for at court rates from the date of judgement till full payment.

33. Finally the Claimant to be issued her certificate of service within 14 days hereof.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH, 2022**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**