



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 365 OF 2018

AMINA ALI MASHA.....CLAIMANT

VS

HAPPY COW DAIRY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by a Memorandum of Claim dated 24th May 2018 is for compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Response on 9th August 2018.
2. When the matter came up for hearing, the Claimant testified on her own behalf and the Respondent called Samuel Wachira.

The Claimant’s Case

3. The Claimant states that she was employed by the Respondent as a Merchandiser in September 2016. She earned a monthly salary of Kshs. 23,503 as at the time of her exit from the Respondent’s employment.
4. The Claimant avers that on 5th May 2018, she received a call from the Human Resource Manager informing her that she had been dismissed with immediate effect.
5. Prior to her dismissal, the Claimant had been issued with a show cause letter to which she duly responded after which she was issued with a warning letter. She adds that there was no further misconduct from her that warranted a dismissal.
6. The Claimant’s case is that her dismissal was wrongful and unfair. Further, the Respondent had refused to pay her terminal dues.
7. The Claimant states that in response to a demand letter from her Advocates, the Respondent’s Advocates had stated that the Claimant would only be paid her salary for April 2018 and leave pay if she withdrew this claim. The Claimant terms this an unfair labour practice.
8. The Claimant particularises her claim as follows:

- a) One month’s salary in lieu of notice.....Kshs. 23,503
- b) Salary for April 2018.....23,503
- c) 6 days’ leave pay for 2017/2018.....5,424
- d) 12 months’ salary in compensation.....282,036
- e) Costs plus interest

The Respondent’s Case

9. In its Response dated 31st July 2018 and filed in court on 9th August 2018, the Respondent states that the Claimant was employed on a fixed term contract for a period of one year from 1st January 2017 to 31st December 2017.

10. The Respondent pleads that the Claimant's monthly salary as per contract stood at Kshs. 17,004.

11. The Respondent further states that renewal of the Claimant's contract was not automatic but subject to her performance. The Respondent adds that upon expiry the Claimant's contract was not renewed because the Claimant failed to perform her duties as expected.

12. A notice to show cause was sent to the Claimant to explain her poor performance. In her response, the Claimant admitted being negligent in her work. She promised to improve but did not do so.

13. The Respondent's case is that the termination and/or failure to renew the Claimant's contract was lawful and fair.

14. The Respondent avers that the Claimant refused to clear as required and to receive her dues in the sum of Kshs. 20,904 being prorata leave and salary for April 2018.

Findings and Determination

15. There are two (2) issues for determination in this case:

a) Whether the Claimant has proved a case of wrongful dismissal;

b) Whether the Claimant is entitled to the remedies sought.

Wrongful Dismissal?

16. The Respondent filed a letter dated 30th April 2018 addressed to the Claimant as follows:

"Dear Amina,

RE: TERMINATION OF EMPLOYMENT CONTRACT

The management appointed you in the company as a merchandiser in the Sales and Marketing department in Mombasa region subject to following all policies and procedures and diligently performing your duties as stipulated in your job description.

However it has come to the management's attention that in addition to laxity on your side when it comes to performing your duties your attitude towards work, team members and those in authority over you have been questionable from time to time despite verbal as well as written warning.

This has been discussed several times and a chance has always been given to you to show some improvement but on the contrary you keep getting worse. Any instructions issued to you is (sic) met by some resistance, rudeness and whining and this was clearly evident before you proceeded for your leave.

This only portrays you as someone who is not able to handle their own personal issues and taking correction positively thus letting it affect your performance and how you relate with your fellow team members and colleagues.

As a Happy Cow employee, you ought to know the importance of team work, cooperation and respect and carrying out your duties diligently and above all proper communication skills as you go about attending to your outlets.

In view of the above and in accordance with the Employment Act 2007, as this cannot be tolerated under any circumstance, the management of this company has terminated your services effective 1st May 2018.

You are therefore asked to hand over all the company properties in your possession (if any) as well as all the PPE's to the regions sales representative and have the clearance form signed for submission with immediate effect and that any dues owed to you by the company shall be paid to you via a cheque subject to a proper handing over at the end of the month.

For Happy Cow Ltd

(signed)

Effy Karugu

HUMAN RESOURCE MANAGER"

17. Prior to the letter of 30th April 2018, the Claimant had been issued with a warning letter on 8th December 2017, accusing her of laxity in

her work and insubordination towards the Sales Representative and Sales Manager.

18. On 12th February 2018, the Claimant was issued with a show cause letter on accusations of laxity in the performance of her work. The Claimant responded to the show cause letter on 13th February 2018, acknowledging that she had been negligent at work and asking for forgiveness upon her undertaking that she would improve.

19. The Claimant was subsequently issued with a warning letter on 16th February 2018. The warning letter put the Claimant on notice that a repeat failure to observe company policies and procedures would put her job on the line. Her employment was finally terminated on 30th April 2018.

20. From the correspondence availed to the Court, the Claimant's employment was terminated on account of poor performance. This is one of the grounds allowed under the Employment Act. The question to ask is whether the Respondent observed due procedure in effecting the termination.

21. It is now well established that an employee facing accusations of poor performance ought to be allowed a reasonable opportunity to improve.

(see *Kenya Sci-ence Research International Technical and Allied Workers Union (KSRTAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)*).

22. From the evidence on record, the Respondent took issue with the Claimant's apparent laxity as early as 8th December 2017. The Claimant was thereafter issued with a show cause letter on 12th February 2018, to which she responded on 13th February 2018. In her response, the Claimant acknowledged that she had been negligent in the performance of her work, asked for forgiveness and promised to improve.

23. A further warning letter issued to the Claimant on 16th February 2012 put her on notice that termination of her employment on account of poor performance was under consideration.

24. From the foregoing, it is evident that the Respondent pointed out the Claimant's shortcomings and gave her an opportunity to improve. There was no evidence of any improvement and therefore the Court finds that the Respondent had a valid reason for bringing the Claimant's employment to an end.

25. The claims for compensation and notice pay are therefore without basis and are dismissed.

26. The claims for salary for April 2018 and leave pay were settled in the course of trial. The prayers thereon are therefore spent.

27. In the end, the Claimant's claim fails and is dismissed.

28. Each party will bear their own costs.

29. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY MARCH 2020

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JUDGE

Appearance:

Miss Mbithe for the Claimant

Miss Ndinda h/b Mr. Ikua for the Respondent