



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 910 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

IRENE MWIKALI NGULI

CLAIMANT

VERSUS

PREMIER BAG AND CORDAGE LIMITED

RESPONDENT

JUDGMENT

The Claimant instituted this suit vide the Memorandum of Claim dated 18th May 2015. The claim was amended vide the Amended Memorandum of Claim dated 19th June 2015 which was later further amended by the Further Amended Memorandum of Claim amended on 15th March 2016.

The Claimant was employed by the Respondent as a cleaner on 9th October 2007 and was promoted to the position of machine operator in 2011, a position she held until her summary dismissal on 5th January 2015. At the time of her termination, the Claimant was earning a monthly salary of Kshs.8,362.00.

The Claimant's Case

The Claimant's case is that the termination of her employment was devoid of the procedures set out in sections 41 and 43 of the Employment Act. She views her summary dismissal as a breach of the rules of natural justice as set out in section 45 of the Employment Act as she was not given the opportunity to present her case nor did the Respondent have valid reasons for the same.

In her witness statement filed on 5th August 2019, the Claimant states that upon injuring her finger on 8th March 2014, she was given sick leave for almost a month and reported back in April. In August, she was given 8 days leave and when she reported back to work, she was given unpaid leave of almost two months. She was then told to wait until January 2015 when she reported back to work after her unpaid leave. However, in January 2015, she was evicted from her house and told that her services had been terminated. She avers that she was never given an explanation as to why she was sent on those extra leaves.

She states that the Respondent terminated her employment without paying her one month's salary in lieu of notice, her accrued dues and service pay that had accrued to her by dint of the provisions of the Employment Act. She therefore sought the following reliefs –

- a. A declaration that the termination was unlawful, untimely and an order that the Claimant be paid her dues and benefits of Kshs.172,110.83 as tabulated below–
 - i. Days worked of Kshs.1,608.07.
 - ii. Service gratuity pay of Kshs.33,769.00.
 - iii. Compensation for unfair loss of work of Kshs.100,344.00.
 - iv. Leave on pro-rata of Kshs.24,027.15.
 - v. One month's salary in lieu of notice of Kshs.8,362.00.
 - vi. Medical expenses of Kshs.4,000.00.

b. Costs of the claim plus interest therein.

The Respondent's Case

In its Statement of Defence filed on 30th November 2015, the Respondent denies summarily dismissing and avers that the Claimant requested for leave on 5th December 2014 and was to report back on 2nd January 2015 but failed to do so.

The Respondent contends that the Claimant is not entitled to the service gratuity claimed as she was a member of NSSF. The Respondent further contends that the Claimant is not entitled to compensation for unfair termination or one month's salary in lieu of notice as she absconded duty without any reasonable cause.

It is the Respondent's case that the Claimant is not entitled to an award for days worked as she did not report back to work. It is also the Respondent's case that the Claimant is not entitled to the claim for pro rata leave as she had exhausted her leave days leaving her with 0.25 days. Lastly, the Respondent contends that it settled the Claimant's medical expenses hence she is not entitled to the same.

The Respondent avers that it has always treated its staff fairly, as required by the Employment Act. The Respondent urged this Court to dismiss the claim with costs.

The Respondent also filed the witness statement of Ibrahim Abdallah dated 25th November 2015, which was a reiteration of the averments made in the statement of defence.

The parties agreed to dispose of the matter by way of written submissions, with both parties filing the same and which this Court has taken into consideration.

Analysis and Determination

I have carefully considered the pleadings and the witness statements filed, the evidence adduced together with the submissions and find that the issues for determination before this Court are: –

- a. Whether there were valid reasons to summarily dismiss the Claimant.
- b. Whether due process was followed before the Claimant was summarily dismissed.
- c. Whether the Claimant is entitled to the reliefs sought.

Reasons for Termination

In its Statement of Defence, the Respondent averred that the Claimant absconded duty without leave therefore her employment stood summarily dismissed by dint of the Employment Act. However, the Claimant stated that she had been sent on leave until January 2015 which evidence is backed by the leave form annexed by the Respondent.

The Respondent did not adduce any evidence to show that it had informed the Claimant that her employment stood terminated if she failed to report back to work. In the case of **Geoffrey Anjere v Unique Suppliers Limited [2015] eKLR** the Court held that before an employer terminates the services of an employee on grounds of absconding duty, the employer was required to show what steps it took to inform the employee that his or her absence would result in summary dismissal if they did not report back to work; to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time. This position was also reiterated in the case of **David Nyanjui Mburu v Sunmatt Limited [2017] eKLR**.

In light of the foregoing, it is my finding that the Respondent has failed to prove the validity of its reasons for termination as required by Section 43(1) of the Employment Act hence the Claimant's summary dismissal is deemed unfair within the meaning of Section 45 of the Act, on that reason alone.

Due process

Section 41 of the Employment Act requires an employer who wishes to terminate the services of an employee on the grounds of misconduct, poor performance or physical incapacity, to explain to them in a language they understand and in the presence of a colleague or a shop floor union representative, the reason(s) they are considering such termination; and hear any representations that they may have. Under Section 44(4) of the Act, absconding duty without leave or other lawful cause amounts to gross misconduct that justifies summary dismissal.

The Respondent did not adduce any evidence to controvert the Claimant's evidence that she was never afforded a hearing before she was summarily dismissed. As such, the summary dismissal was unfair within the meaning of Section 45. It is therefore my finding that the termination of the Claimant's employment was unfair both procedurally and substantively.

Remedies

The Claimant is entitled to an award of the medical expenses of Kshs.4,000.00 as it was specifically pleaded and has been proved by the

production of the receipt. Further, the same related to an injury sustained in the course of her duties. The Respondent did not adduce any evidence to show that it had catered for the Claimant's medical expenses or had refunded the same.

The Claimant is not entitled service gratuity pay as NSSF deductions were made on her behalf. In addition, she did not provide a contractual basis for the same.

The claim for pro rata leave fails as the Respondent adduced evidence to show that the Claimant had taken all her leave days save for 0.25 days. The Claimant did not provide any controverting evidence. The claim for days worked equally suffers the same fate as the Claimant did not prove that. She did not state which days these were that she had worked.

The claim for one months' salary in lieu of notice succeeds as the Claimant was not issued with a notice before she was summarily dismissed, nor was she paid salary in lieu of notice.

Having found that the Claimant's employment was unfairly terminated, she is entitled to compensation for unfair termination which I award her at 12 months' salary considering that the reason for her dismissal related to injury sustained during employment. She was thus discriminated on health grounds. In making this award, I have further considered the circumstances outlined in Section 49(4) of the Employment Act. In particular, the number of years the Claimant served the Respondent and the fact that the Claimant did not contribute to the reasons that led to the summary dismissal.

In conclusion, I award the claimant the following –

1. One month's salary in lieu of notice Kshs.8,362.00
2. 12 months' salary as compensation Kshs.100,344.00
3. Medical expenses Kshs.4,000.00

Total Award Kshs.112,706.00

4. The Respondent shall bear the costs of this suit.
5. Interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

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 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, the 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 Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the 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.

MAUREEN ONYANGO

JUDGE