



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 754 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

TAILORS AND TEXTILE WORKERS UNION.....CLAIMANT

VERSUS

GLOBAL APPAREL (EPZ).....RESPONDENT

JUDGMENT

The claimant filed the claim herein on 24th May 2011 on behalf of the grievant, Ruth Mumbua Masika, contending that the grievant had been wrongfully dismissed. The claimant seeks the following reliefs;

1. That the dismissal of the grievant was unfair, unlawful and unwarranted.
2. That the Court orders that the grievant to be reinstated back to employment without loss of service and other conditions of employment including salaries accrued till the case is concluded;

Or in the alternative:

- a) Days worked salary up to 6th July 2010..... 1,641.20
- b) Unpaid house allowance..... 1,030
- c) Notice (1 month)..... 7,112
- d) Accrued annual leave not taken..... 14,224
- e) Leave travelling allowance..... 2,000
- f) Overtime accrued but not paid..... 12,000
- g) Gratuity at 16 day per each completed year of service..... 35,013
- h) Underpayments (Government General Wages Order)..... 1,941
- i) 12 months' salary compensation due to wrongful loss of employment 85,344.00
- j) Certificate of Service
- k) Interest at 16% per annum until the case is concluded.

3. That penalties be levelled against the respondent for having failed to attend labour conciliation meetings per Section 82 of the Labour Relations Act, 2007.

4. That the above failure to attend labour conciliation meetings caused inordinate delay in concluding the case and as such cost be provided for as stipulated in Section 12 (8) of the Labour Institution Act, 2007 and be paid by the Respondent to the Claimant.

5. Any other order as the court shall deem fit be granted to the grievant and Claimant.

The respondent filed its Response to the Claim denying the wrongful dismissal of the grievant and maintaining that the grievant was dismissed for absenteeism.

Claimant's Case

The claimant avers that the grievant reported to work on 2nd July 2010 but at 1.00 pm the grievant had to take her sick child to hospital. The claimant avers that the child's condition deteriorated leading to the child's admission in hospital on 4th July 2010. The claimant further avers that on 6th July 2010 the grievant's husband delivered to her a summary dismissal letter while the grievant was still in hospital with her admitted child.

The grievant testified that she worked for the Respondent from 18th March 2002 to 2nd July 2010 as a machine operator. She testified that she reported to work on 2nd July 2010 and sought permission to take her child to hospital but was informed that she had to choose between work and her child. The grievant testified that she stayed at work until lunch time and after lunch she was informed that her child had been brought to the gate at the workplace. She stated that she called the Human Resource Manager, Godwin Shivachi and informed him that she had to take her baby to hospital.

The grievant testified that her child was admitted in hospital. That on 5th July 2010 Mr. Godwin Shivachi called her informing her that she needed to collect her terminal dues. She stated that she was at the hospital until her child was discharged on 10th July 2010.

The grievant further testified that during the conciliation meetings the respondent denied having sacked her and that the conciliation meetings were not successful leading to the matter being filed in Court.

In cross-examination, the grievant testified that she was initially paid Kshs.3,900 and thereafter her salary was reviewed to Kshs.4,900. The grievant testified that she was aware that there was a procedure for the application for leave and the employees were issued with gate passes. The grievant testified that she wrote a letter seeking permission to take her child to hospital but the permission was not granted. The grievant testified that she had to leave at lunchtime without a gate pass. The grievant further testified that she had written a letter of apology for her absence.

In re-examination the grievant testified that her husband, who also worked for the respondent, took her to the hospital but he reported back to work. The grievant further stated that she went back to work on 5th July 2010. Further, that Mr. Godwin Shivachi had called the doctor telling him that she would not be paid unless she collected the money herself.

Respondent's case

The respondent avers that the Claimant did not reach out to it to facilitate any negotiations and that it did attend the conciliation meeting on 18th October 2010 and 29th October 2010. The Respondent avers that the Claimant came up with fresh demands during the conciliation meetings giving rise to a deadlock.

The respondent avers that the grievant was properly, legally and procedurally summarily dismissed due to absenteeism.

RW1, **Godwin Shivachi** testified that he has been working with the respondent as the Human Resource Officer since 2002. He stated that the grievant was a mass production machinist with the Respondent.

RW1 testified that there was a procedure for employees seeking leave of absence for whatever reason. An employee was expected to seek permission from the line supervisor who would then instruct the clerk to produce an exit pass. That the leave intimation form was used for leave while a gate pass was used for permission.

RW1 testified that the grievant did not seek permission or give any intimation that she had a sick child. He further stated that the Respondent did not receive any information from her husband, who was also an employee of the Respondent, on the grievant's absence. He further testified that the grievant was a habitual absentee. RW1 testified that the company considered all her apologies.

In cross-examination, RW1 testified that he was not aware that the grievant was denied leave but was aware that she had a child who occasionally got sick. He further testified that emergency cases were handled immediately. It was his testimony that the grievant did not resume duty and that the grievant received her dues upon termination.

Claimant's submissions

The claimant submitted that the grievant was not issued with a show cause letter as provided under section 41 of the Employment Act. The claimant further submitted that the respondent failed to give the grievant a chance to defend herself when she went to collect her June salary and that this is contrary to the provisions of Section 44(4) of the Employment Act.

The claimant further submitted that the respondent terminated the claimant's employment without following the laid down procedure. The

claimant relied on the case of *Nicholas Muasya -V- Farmchem Limited [2012] eKLR*. The claimant further relied on the case of *Walter Ogal Anuro -V- Teachers Service Commission [2013] eKLR* where the Court held:

“...for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

Respondent’s Submissions

The respondent submitted that the Claimant did not avail any documents to show that she applied for permission and the same was declined. The respondent relied on section 47 (5) of the Employment Act which provides that an employee bears the burden of proving that an unfair termination of employment has occurred.

The respondent submitted that the relationship between the Claimant’s members and the Respondent is governed by the Memorandum of Agreement executed by the parties and cited Section 59 of the Labour Relations Act. The Respondent relied on the case of *Kenya Airline Pilots Association v Kenya Airways Ltd [2016] eKLR*.

The respondent submitted that the grievant was summarily dismissed as provided under section 44 (1) of the employment Act and as per the Memorandum of Agreement between the parties. The Respondent submitted that the grievant had been found of absconding duty without authority from the Respondent and had been issued with a warning. The respondent submitted that the grievant’s actions amounted to gross misconduct relying on the case of *Banking Insurance & Finance Union (Kenya) V Barclays Bank of Kenya Ltd [2014] eKLR* and *Francis Nyongesa Kweyu v Eldoret Water and sanitation Company Ltd [2017] eKLR*.

The respondent submitted that the grievant did not specify the period for which she is claiming house allowance and cannot leave it to the Court to determine the same. The Respondent further submitted that the Claim for unpaid leave is unsubstantiated, as the grievant did not give particulars of the unpaid leave. The respondent further submitted that the grievant is not entitled to gratuity as she was summarily dismissed for gross misconduct under Clause 16 (a) of the Memorandum of Agreement and that her NSSF contributions were deducted from her salary. The Respondent submitted that the 12 month’s salary compensation due for wrongful dismissal is to be awarded upon the consideration of the circumstances under section 49(4) of the Employment Act. It was submitted that the grievant largely contributed to her termination.

Determination

It is undisputed that the grievant was terminated for absenteeism from work on 6th July 2010. During this time the grievant’s child was ill leading to the child’s admission in hospital. The grievant testified that she sought permission from the Respondent but the same was denied. This necessitated her leaving work to take her sick child to hospital without obtaining the required gate pass. RW1 testified that there is a strict procedure that is to be followed before an employee is allowed to leave the premises. Despite this procedure it is essential to appreciate that the grievant’s sick child had been presented to the premises and it was only reasonable for her to take the ill child to hospital as any parent would in such circumstances. The grievant produced Discharge Notes and Clinical Abstract Sheet from Kitengela Medical Services which indicates that the date of admission was 4th July 2010 and discharge was on 10th July 2010.

The Respondent in its Summary Dismissal letter sent to the grievant stated:

“On 3rd July 2010 and 5th July 2010 you did not turn up on duty. No permission was sought or leave given. Efforts made by the company to get you whereabouts or any information regarding you through your husband bore no fruits. You only showed up on the salary day to collect your salary. This is “absenting yourself from the place appointed for the performance of your work without leave or other lawful cause.” A contravention of the Employment Act Clause 44 Paragraph (4) part (a) of 2007.”

The respondent in its summary dismissal letter stated that it had sought reasons from the grievant’s husband to know her whereabouts but to no avail. Surprisingly it did issue the grievant’s husband with the summary dismissal letter to deliver to the grievant while in hospital. The Respondent did not prove that it had made any efforts to reach the grievant personally. In addition, the grievant testified that she had sent her husband with a letter dated 3rd July 2010 yet RW1 stated that the Respondent did not receive any information from the grievant’s husband on her absence. RW1 also stated that he was not aware of the note dated 3rd July 2010 addressed to him by the Kitengela Medical Services requesting him to assist Ruth Masika and Winfred Koki who were expected at the ward. It is evident that the grievant had made efforts to get assistance from the Respondent.

Section 44(4)(a) of the Employment Act provides:

Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

From the reasons advanced by the grievant, there was lawful cause for her to leave her workplace to attend to her sick child. The RW1 stated he was not aware that the grievant had been denied permission to take her child to hospital and that in emergency situations the cases were handled immediately and this was not an emergency. The grievant’s child’s illness and any other illness by an infant is an emergency and the parent is ordinarily expected to attend to it with haste. Besides, RW1 testified that he was aware that the grievant had a child who fell sick

occasionally.

Besides the foregoing, the grievant was not subjected to a hearing as provided under Section 41 of the Employment Act before her employment was terminated.

It is evident that there was no justifiable reason for dismissal of the claimant as the absence of a mother to take her sick child to hospital is justifiable and a lawful reason for absence. It is also reasonable to expect a mother with a sick child to be so stressed as to fail to seek permission when informed that her child is sick at the gate.

It is further evident that the respondent did not comply with fair procedure as the claimant was dismissed without any inquiry as to the reasons for her absence and without being given an opportunity to defend herself.

For the foregoing reasons the dismissal of the grievant was unfair both procedurally and substantively and I declare accordingly.

Whether the grievant is entitled to the remedies sought

The grievant prayed for reinstatement. Section 12(3)(vii) of the Employment and Labour Relations Court Act provides that the remedy for reinstatement is only available within 3 years from the date of termination. Further Section 49(4)(d) provides for reinstatement only in very exceptional circumstances.

The grievant has been out of employment for more than 3 years and has not pleaded any exceptional circumstances to justify the remedy of reinstatement.

The claimant prayed that in the alternative the court grants the grievant terminal dues as set out in the prayers.

It is not in dispute that the grievant was issued with the letter of dismissal effective 6th July 2010. Having found that her absence was justifiable, she is entitled to salary up to that date which I award her as prayed in the sum of **Kshs.2,220.20** inclusive of house allowance for the said days.

The claimant is entitled to pay in lieu of notice in the sum of **Kshs.9,660** and to leave days for 6 months up to June 2010 being 12 days leave based on 24 days per year in the parties CBA annexed as appendix 1 of claim. I award the claimant **Kshs.3,877** in lieu of annual leave and pro rata leave travelling allowance of **Kshs.500**.

The claimant is entitled to gratuity at 16 days' salary per year worked for 8 years worked at **Kshs.47,556.90**.

The claimant's letter of appointment provides that she was a machine operator. The minimum wage for a machine operator was **Kshs.8,400** in 2010. The consolidated wage was **Shs.9,660**. The claimant was therefore underpaid by **Kshs.30,576** based on consolidated wage (basic + house allowance) for 12 months.

Having found that the grievant was unfairly terminated, she is entitled to compensation. Taking into account the length of service and the circumstances under which she was terminated, and further taking into account that she hardly had any terminal benefits, I award her 10 months' salary as compensation based on the correct statutory consolidated minimum rate of pay in the sum of **Kshs.96,600**.

The claimant is also entitled to a certificate of service.

The respondent shall pay the claimant costs which I assess at **Kshs.50,000** to cover reasonable expenses and disbursements incurred by the claimant in prosecuting the claim.

The decretal sum shall accrue interest from date of judgment.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE