REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1836 OF 2014

NAOMI WANGARI MURIU...CLAIMANT

VERSUS

ROYAL GARMENT INDUSTRIES EPZ LIMITED.......RESPONDENT

JUDGMENT

On 3rd January 2014, the parties herein entered into an employment contract for a period of 12 months. However, the Respondent terminated the Claimant's employment before the lapse of the contract period. As a result, the Claimant commenced this cause vide the Memorandum of Claim dated 16th October 2014, challenging the termination. She seeks the following reliefs:

a. A declaration that her dismissal from employment was wrongful and unfair.

b. Salary for the unexpired term of the contract in the sum of Kshs.140,000.00.

c. 12 months' salary compensation in the sum of Kshs.420,000.00.

d. Punitive and aggravated damages for breach of the Claimant's constitutional rights.

e. Costs and incidental to this suit.

It is the Claimant's case that she was employed as a mass production machinist on line 6 at a monthly salary of Kshs.24,000.00. The salary was later increased to Kshs.35,000.00. She avers that she was transferred to line 5-10 and later line 11, despite her protestations. Consequently, she proffered her resignation. However, the Respondent declined to accept it and requested her to reconsider her decision, which she did.

Nevertheless, she was later issued with a show cause letter and thereafter a dismissal letter. The Claimant avers that she was never issued with a termination notice or paid her terminal dues. Further, that as a result of the unlawful termination of her contract she sustained aggravated damages in the form of psychological injury and mental distress. Therefore, the Respondent should be condemned to pay punitive damages.

It is her position that the Respondent breached the contract and disregarded the provisions of the Constitution and the Employment Act.

In its Memorandum of Reply dated 24th November 2014, the Respondent avers that it had the discretion to alter the Claimant's duties and transfer her to other production lines depending on production demands. It contends that it requested the Claimant to rescind her resignation on humanitarian grounds and she was given another chance to improve on her performance.

The Respondent avers that the Claimant did not improve on her performance, which was a subject of various meetings and discussions between the parties. As such, she was issued with a show cause letter that she did not respond to. Instead, the Claimant sought redress from the Industrial Relations Officer EPZ. After careful consideration of her response, the Respondent opted to terminate her services.

The Respondent contends that the Claimant refused to collect her dues and that she is only entitled to Kshs.17,099.00 being salary for the days worked, unpaid leave, house allowance, other allowances less deductions. The respondent avers that the termination of the Claimant's employment was lawful and justified. It is the respondent's position that the Claimant has no cause of action against the Respondent. Further, that the claim for compensation for 12 months' salary has no basis since the Claimant was only left with 3 months before her contract could lapse.

The Claimant's case was heard on 29th November 2017 where the Claimant testified on her own behalf. The Respondent's case was heard on 26th July 2018 where Wellington Atanasi and Samuel Otieno Mwai testified on the Respondent's behalf. Thereafter, parties filed their submissions.

The Claimant testified that the reason for termination was not specified. Instead, she was summoned to a meeting and told to see the HR's officer who issued her with a termination letter. She contended that she was in charge of production line 6 yet the complaint that led to her dismissal is in regard to line 11.

During cross examination, the Claimant gave contradictory evidence. She stated that she had been issued with a show cause letter and a dismissal letter on the same day, yet the two letters were dated 8th September 2014 and 10th September 2014 respectively. She admitted that the show cause letter had indicated that her failure to respond would lead to summary dismissal. She further testified that she tendered a resignation letter dated 9th September 2014. She admitted that she did not respond to the notice to show cause as it was written after she had resigned.

Upon cross examination she maintained that she reached her targets and that her performance was the best in the company. She asserted that the show cause letter and the dismissal letter were issued on the same date.

RW1, an Administrative Manager of the Respondent, testified that the Claimant was a line supervisor in charge of monitoring the production process from beginning to end. He further testified that she was in charge of line 6, then line 5 and later line 11. It was his testimony that the Claimant's performance dropped in August 2014 when her line was producing 1100 or 1300 garments as opposed to the required 1800. Even after the factory manager, production manager and floor-in-charge talked to her regarding her performance, there was no improvement. Despite being given a second chance, the Claimant's performance continued to decline and she was issued with a notice to show cause on 8 th September 2014. She never responded but showed up on 10th September 2014 with no logical explanation as to why she did not respond. That he had no option but to dismiss her from employment. The Claimant sought the intervention of the Industrial Relations Officer in EPZ Authority, Mr. Ephantus Mogire. The matter was discussed and Mr. Mogire came to the Conclusion that the Claimant was indeed on the wrong. It was then agreed that the Claimant would collect her dues, but she never did.

During cross examination, he testified that the contract had an alteration clause allowing the Respondent to alter the Claimant's duties. He however conceded that there was no letter altering the Claimant's duties. It was his testimony that the targets were prepared by the Industrial Officer and the Production Manager but conceded that there was no provision for the supervisor to sign.

It was his testimony that the Claimant absconded work after she was issued with the notice to show cause letter and reported back on 10 th. When he was questioned about the conflicting dates in his witness statement, he stated that the date of 9 th September stated therein was an error. It was also his testimony that the respondent did not have to report an employee's absenteeism to the Industrial Officer. He stated that he had reports regarding the Claimant's absconding duty but conceded that the reports were not before Court.

Upon re-examination, he maintained that the Claimant had been transferred from one production line to another during the subsistence of her contract. It was his testimony that the terms of the contract remained the same even is a supervisor was moved from one line to another. He testified that he had not produced records of the target breakdown because it was not necessary.

RW2, the Respondent's Resource Manager, reiterated some of RW1's testimony hence the same will not be replicated. He testified that Naomi was first employed by the Respondent in September 2013 which contract expired on 31 st December 2013 and was thereafter renewed. He testified that before a production line is started, the line manager explains to the workers the style and the production target and what is expected of them.

During cross-examination, he conceded that the Claimant's contract was renewed due to her performance. He conceded that he was not present when the events in question took place and was only testifying based on what he was briefed. He conceded that the Human Resource Manual required the Respondent to give 3 warning letters before the Claimant could be summarily dismissed. He insisted that the Claimant was given a hearing.

Submissions by the Parties

In her submissions dated 29th August 2018, the Claimant submits that once an employee had discharged the burden of proving that a termination has occurred pursuant to section 47 (2) of the Employment Act, the burden shifts to the Respondent to justify the grounds for termination. It is her position that the Respondent did not specify the reasons for her termination. She relies on Article 4 of ILO Convention 158 which provides that:

"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

The Claimant argues that the employer must also prove that the reason for termination was fair, which fairness can be inferred by the court from the evidence present before it. This has not been proved by the Respondent, she submits. She therefore posits that the termination was unfair and unlawful because she was not given the opportunity to present her defence as the notice to show cause and her letter of dismissal were issued at the same time. She submits that the Respondent did not follow the disciplinary procedure as set out in its HR manual. She relies on the cases of ***John Rioba Maugo vs. Riley Falcon Security Services Limited*** **[2016] eKLR,** ***Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited*** **[2014] eKLR,** ***Agnes Kavata Mbiti vs. Housing Finance Company Limited*** **[2017] eKLR** and ***Anthony Mkala Chitavi vs. Malindi Water & Sewerage Company Limited*** **[2013] eKLR.** In the last case, the Court was of the opinion that:

"…if it is the case of summary dismissal there is an obligation on the employer to hear and consider any representation by the employee before making the decision to dismiss or give other sanctions."

The Claimant submits that she is entitled to the 12 months' compensation as prayed as she has proved that her employment was wrongfully terminated. She relies on the cases of ***Samsom Mwangi Gaita vs. Kensal Limited [2013] eKLR***, ***John Mwanzia Mbithuka vs. Mr. Mukesh Malde & Another [2014] eKLR*** and ***Pamela K. Butalanyi vs. University Council for the Kenya Polytechnic University College [2015] eKLR***. She urged the Court to compel the Respondent to issue her with a certificate of service.

In its Submissions dated 24th September 2018, the Respondent submits that the reason for terminating the Claimant's employment was fair and valid as she wilfully neglected to perform her duties. It is the respondent's position that the Claimant's employment contract stipulated that her performance would be monitored and failure to perform would lead to disciplinary action. It was also a provision in its HR manual that any employee who performed dismally would be summoned for an informal hearing to discuss ways to improve the performance. The Claimant was summoned for such a meeting but instead of suggesting ways for improving her performance, she stormed out but later apologized and was told to go back to work and improve on her production. However, she resigned vide her letter dated 9th August 2014. The respondent relies on the case of ***Alex Wainaina Mbugua vs. Kenya Airways Limited*** **[2017] eKLR** where the Court stated:

> *"…From my analysis of the HR policy, I find the Respondent has the remedy for poor performance. The first step is to hold a meeting (informal hearing) with the employee. Explain where the employee is falling, what standard is not being met, discuss the matter fully to see if the reason for the poor performance can be established. Time is allocated for review. Only then does the formal hearing process begin."*

To support its argument regarding the Claimant's dismal performance and her knowledge of the performance standards required of her, the Respondent relies on the case of ***Fredrick Owegi vs. CIC Life Assurance;*** **Cause 1001 of 2013.** The Respondent further relies on the following cases to support its case for the Claimant's poor performance: ***Kenya Petroleum Oil Workers Union vs. Kenya Petroleum Refineries Ltd*** **[2013] eKLR** where the Court stated:

> *"Performance is therefore gauged on the basis of sufficient job output, acceptable quality, compliance with employer operating procedures, sufficient employee effort and ability to perform the job at the expected level."*

And the case of ***Agnes Yahuma Digo Vs. PJ Petroleum Equipment Limited; Cause 2049 of 2011*** where the court stated

> *"The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve a reasonable length of time."*

The Respondent submits that the procedure to terminate the Claimant's employment was fair and met the legal requirements of fairness as outlined in section 41 of the Employment Act. It relies on the cases of ***Aphonse Machanga Mwachaya Vs. Operation 680 Limited*** **[2013] eKLR** and the case of ***Rebecca Ann Maina & 2 Others vs. Jomo Kenyatta University of Agriculture and Technology [2014] eKLR*** where the Court held that:

> *"Section 41 of the Employment Act 2007 sets the threshold for procedural fairness. The practical application of the provisions of Section 41 at the work place will however take different formats depending on the nature of the offence and the institutional sophistication of the employer…"*

The Respondent submits that the Claimant is not entitled to the reliefs sought. In its view, the claim for compensation is not grounded in this suit and the same should not be awarded since the termination was fair and lawful. The Respondent submits that it should be awarded costs and relies on the case of ***Republic vs. Rosemary Wairimu Munene ex parte Applicant vs. Ihururu Dairy Farmers Co-operative Society Limited.***

Determination

From the pleadings filed herein, the evidence adduced as proof of the claim and the submissions made, the following are the issues for determination –

1. Whether the Claimant's employment was lawfully and fairly terminated.

2. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's employment was lawfully and fairly terminated

The Claimant has submitted that her termination was unfair and unlawful because she was not given the opportunity to present her defence as the notice to show cause and her letter of dismissal were issued at the same time. The Respondent did not follow the disciplinary procedure as set out in its HR manual. However, during trial it was indeed established that the letters were not issued simultaneously. The letter to show cause was issued on 8th September 2014 and the Letter of Summary dismissal was issued on 10th September 2014. The claimant admitted in her testimony that she never responded to the letter to show cause because the two letters were served on the same day.

Section 47(5) of the Employment Act provides as follows:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The Respondent submitted that the Claimant's employment was terminated lawfully and in accordance with section 44 of the Employment Act. Section 44 reads as follows:

(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

However, section 44 should not be read in isolation. Section 41 should be taken into consideration even as an employer summarily dismisses their employee. The Court in ***Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited*** **[SUPRA]** stated that the procedure under section 41 was mandatory and should be followed by any employer who sought to terminate their employee's employment services. Although she declined to respond to the letter to show cause, the next step was to institute disciplinary proceedings to accord the Claimant an opportunity to present her case. The reasons for terminating the Claimant's services were valid, but denying the Claimant a chance to be heard as required in the respondent's HR manual and Section 41 of the Employment Act made the termination process flawed. As such, the Claimant's termination was unfair.

Whether the Claimant is entitled to the reliefs sought

The Claimant's claim for salary compensation for unlawful termination succeeds as her termination was unfair and unlawful. In view of the circumstances under which she was terminated, I award her three (3) months' salary as compensation.

The claim for salary for the unexpired term of the contract in the sum of Kshs.140,000.00 fails as it is a duplication of the prayer for compensation.

The claim for punitive and aggravated damages for breach of the Claimant's constitutional rights fails. The Claimant has not specified which constitutional rights have been infringed upon and how they were infringed.

Conclusion

In conclusion I enter judgment for the claimant against the respondent in the

sum of Kshs.36,852/=.

The respondent shall pay claimant's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE