



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. 731 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 11th July, 2019)

LILIAN AKOTH OTUOMA.....CLAIMANT

VERSUS

MOHAN OYSTERBAY DRINKS KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed a Memorandum of Claim on 30th April 2015 in which she avers that she was employed by the Respondent as a Merchandiser/Salesperson until 15th March 2015 when she was unfairly terminated. She therefore seeks the following reliefs:

1. *Underpayments* **Kshs. 167,082.60**
2. *Damages* **Kshs. 285,940.80**
3. *Salary or the 11 days worked* **Kshs. 8,737.08**
4. *Two months notice pay* **Kshs. 47,656.80**
5. *Gratuity* **Kshs. 23,828.40**
6. *Costs of the suit*
7. *Interest on the above till payment in full.*
8. *Any other relief this Honourable Court may deem fit to award under the circumstances.*

2. The Respondent filed its Memorandum of Reply on 14th June 2015 in which it avers that the Claimant was employed as a Cleaner and that Claimant's performance was not satisfactory as she failed to give daily reports and attend to her duties including sharing her work reports to the Respondent's WhatsApp Group. It further avers that it was willing to pay the Claimant all her dues but she absconded duty.

Claimant's case

3. The Claimant testified that she was employed as a sales lady and was tasked with ensuring the visibility of products in supermarkets. She testified that though her contract indicates that she was a cleaner she was never a cleaner and had been asked to sign the contract, which was to be amended after a short time. She testified that she earned a monthly salary of Kshs. 14,000 and Kshs. 300 daily for her transport.

4. She testified that she was terminated on 11th March 2015 when she was informed that her services were no longer needed. She further testified that she was only issued with 2 days notice. It was her case that the termination letter stated that she was not performing and that she was never given an opportunity to explain herself. She testified that she carried out her duties and that even the stores she visited had signed her documents.

5. It was her testimony that she was underpaid as she ought to have earned Kshs. 18,329.25 and that gratuity was payable pursuant to her contract. It was her testimony that she never absconded duty and that the Respondent had never paid her dues.

6. In cross-examination, she testified that her employment did not commence on 1st January 2014 as she had been working for 5 months

before 17th October 2013. She testified that in March 2015 she never sent a wrong photo on her Respondent's WhatsApp Group as the sheet for that day was not presented in Court since it was Saturday. She testified that she got many gifts for good performance.

Respondent's Case

7. Patrick Nzioka, RW1, testified on behalf of the Respondent and stated he was previously employed by the Respondent as a Supervisor. He adopted his Witness Statement filed on 14th June 2015 as his examination in chief.

8. He avers that the Claimant was assigned duties in several outlets but she did not handle any sales on behalf of the Respondent. He avers that the Claimant would send photographs of her station to the Respondent's WhatsApp Group which were false and that despite verbal warnings she did not improve.

9. In cross-examination, he testified that the Claimant was in merchandising department and that there was no indication she was a cleaner. He testified that her appointment letter indicated that she was a management person and that he had not seen any document stating that the Claimant started to work on probation. He testified that the photos referred to by the Respondent were not in Court but were in the system.

10. He testified that the Claimant was terminated on 15th March 2015 and that the termination notice dated 15th April 2015 was issued after her termination. It was RW1's testimony that the Claimant was called to defend herself but she did not appear and that there was no letter written to the Claimant summoning her for a Disciplinary hearing.

Claimant's submissions

11. The Claimant submitted that the reasons for the Claimant's termination were ambiguous as read together with the Respondent's averments in the Memorandum of Reply and Witness Statement. She submitted that the Respondent did not observe the procedure of termination laid out in **Anthony Mkala chitavi v Malindi Water & Sewerage Company Limited [2013] eKLR.**

12. She submitted that no notice to show cause or invitation for a disciplinary hearing was issued to the Claimant before termination.

13. Further, that the Claimant was dismissed without first being given an opportunity to defend herself in the company of a witness of her choice as required under Section 41 of the Employment Act.

14. She submitted that there was no valid reason for termination as the Respondent never produced the alleged photos in Court and that her supervisor was not also called to Court as a witness. She submitted that it was the onus of the Respondent to prove the validity of reason for dismissal but the burden was not discharged.

15. She submitted that in accordance with the Minimum Wage Order, she ought to have earned not less than Kshs. 18, 329.25 as a salesperson in addition to a house allowance of Kshs, 2,749.40. She argued that she had proved her unfair termination and was therefore entitled to 12 months compensation. In respect of 2 months' salary in lieu of notice she submitted that her letter of appointment provided for the payment of 2 months' notice.

16. She submitted that she had worked for 15 days prior to termination and was therefore entitled to Kshs. 11, 911.70. She submitted that she was further entitled to gratuity pursuant to her contract having worked from January 2014 to March 2015. In addition, having proved unfair termination the Respondent should bear costs of the suit.

Respondent's submissions

17. The Respondent submitted that the Claimant was appointed as a cleaner vide a letter of appointment dated 1st January 2014 therefore the assertion that she was a merchandiser was unfounded. It therefore averred that the Court cannot rewrite a contract as held in **Wrigley Company (East Africa) Limited v Attorney General & 2 Others & another [2013] eKLR.**

18. It submitted that the Regulation of Wages (General) (Amendment) Order 2013 which came into operation on 1st May 2013 was applicable at the time of the Claimant's employment and that she earned Kshs. 14,000 as opposed to the prescribed Kshs. 9780.95 in the Order.

19. It argued that the Claimant's employment was terminated in accordance with the Employment Act as she was issued with a termination notice dated 11th March 2015 in compliance with Section 35 of the Employment Act. It urged the Court to dismiss the claim with costs.

20. I have examined all the evidence and submissions of both parties. The issues for this Court's determination are as follows:-

1. Whether there were valid reasons to dismiss the Claimant.

2. Whether due process was followed.

3. What remedies to grant in the circumstances.

21. On the 1st issue, the Respondent averred that the Claimant was dismissed for absconding work. The Claimant denied ever absconding work and indicated that she was on duty all along.

22. The Respondent's witness had indicated that the Claimant absconded duty and posted old photos in Whatsapp to indicate that she was on duty. This evidence was not presented to Court and the Respondent never called any independent witness to testify that the Claimant was not at the place she indicated she was.

23. The Respondent actually realised on their suspicion to find that the Claimant was not on duty. In this regard, it is my finding that there were no valid reasons to warrant dismissal of the Claimant.

24. On the 2nd issue, there is also no indication that the Claimant was taken through any disciplinary process.

25. Section 41 of Employment Act 2007 envisages that before an employee is terminated he should be accorded an opportunity to answer to charges levelled against him. This never happened in the case of the Claimant and she was never informed that the employment with the Respondent was no longer required.

26. It is therefore my finding that the Claimant was dismissed unfairly and unjustly.

27. In terms of remedies, I find for the Claimant and I award her as follows:

1. 1 month salary in lieu of notice = 14,000/=

2. Gratuity of 15 days salary for years worked = $\frac{1}{2} \times 14,000 \times 2 = 14,000/=$

3. Salary for 11 days worked in March 2015 = 8,737.08

4. 10 months salary as compensation for unlawful and unfair termination = $14,000 \times 10 = 140,000/=$

Total – 255,371/=

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 11th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omulia holding brief Mucheru for Respondent – Present

Maondo holding brief Nyasimi for Claimant – Present