



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT NAIROBI

SUIT NO. 2267 OF 2014

LUCY MUTETE NGUMU.....CLAIMANT

VERSUS

TECHPAK INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on the 18th December 2014 and averred that she was employed by the Respondent as a general labourer in February 2011 and after service for 3 years was unlawfully terminated on 26th February 2014. She averred that she had performed her duties diligently and rose to the rank of assistant packing supervisor. It was averred that her dismissal occurred when the factory manager of the Respondent Mr. Vijesh stated that on 24th February 2014, the disposable plates had been wrongly labelled during the Claimant's supervision and he sought her resignation. When she declined, she averred that he terminated her employment. She averred that the termination was baseless and no reasons for her dismissal were given prior to her dismissal. It was averred that she earned Kshs. 20,893/- per month. She thus sought notice pay equivalent to one month's salary; salary for the month of February 2014; service pay; damages for unlawful termination; compensation for the abrupt and traumatizing loss of employment as well as any other relief the honourable court may deem fit to grant.

2. The Respondent filed a defence and counterclaim on 15th May 2015 and in it averred that the Claimant was employed as an assistant packer for one year vide an appointment letter dated 1st April 2013 and that her duties *inter alia* were to assist, supervise in all production/packing activities, monitor packing processes to ensure that all processes are operating within defined production and quality standards. The Respondent averred that on or about 24th February 2014, whilst working in the night shift and in disregard of her duties and responsibilities caused disposable plates being made under her supervision to be mislabeled occasioning loss to the Respondent. The Respondent averred that thereafter the Claimant absconded from work and by absconding from duty breached her employment contract by failing to give one month's notice. The Respondent claimed the sum of Kshs. 12,075 being one month's notice pay and sought the dismissal of the Claimant's claim with costs. The Respondent sought costs, interest as well as any other relief the court may deem fit and just to grant.

3. The Claimant testified on 1st November 2017 and stated that she was hired in November 2008 and worked for the Respondent till February 2014. She testified that she was a packer till 2013 when she became an assistant packing supervisor. She had a one year contract renewed annually and was earning Kshs. 20,893/- per month at the time of her termination. She testified that she worked on the night shift on 24th February 2014, was off duty on 25th February and when she reported to work on 26th February 2014 Mr. Vijesh stated that there was a mistake that had occurred and she was asked to write a resignation

letter. She declined and he told her to leave without being offered an explanation. She testified that her February salary was not paid and that she did not refuse to go back to work and instead was asked to leave. She stated that she did not receive the letter the Respondent had exhibited addressed to her. She asked the court to find that she was dismissed unlawfully. She thus sought notice, pay for days worked and costs of the suit plus compensation.

4. In cross-examination, she testified that she had a contract and was entitled to notice if she was to be terminated. She stated that the contract also provided for notice from the employee when terminating the contract. She testified that she had a basic of Kshs. 15,000/- plus 15% house allowance and overtime pay at the rate of 1.5 per hour. She stated that she was an assistant supervisor packing and was working daily. She testified that her last day was 24th February and she resumed on 26th February as 25th was her off day.

5. The Respondent called Mr. Peter Wanjama Mwangi who stated that he did not know the Claimant personally but from the records. He testified that the Claimant was an assistant supervisor in charge of packing disposable food containers for clients and that she deputized Daniel Muasa Ndaka. He stated that from the records, the Claimant was on night shift on 24th February 2014 and there was mislabeling of food packaging containers and they were requested to take responsibility. He testified that she was supposed to undertake the work with diligence and care and that, that night it did not happen. He stated that the Claimant did not report back to work and could not be reached and the letter was written seeking to establish her whereabouts and another letter written to the Industrial Area labour office in relation to her absence from work requiring her to deposit one month salary. He testified that the Claimant did not issue a notice of intention to leave and that the overtime earned varied from month to month. He stated that the Respondent remitted PAYE, NSSF and NHIF monthly. He requested the Court to dismiss the claim and request the Claimant to deposit Kshs. 12,500 as she left without serving one month notice.

6. In cross-examination he testified that he was employed in March 2015 and that he did not know the Claimant personally. He confirmed that from the records she was an employee and that he was relying on the records. He testified that the Claimant was last at work on 24th February and they mislabeled items. He stated that he had not filed documents showing mislabeling. He testified that the Claimant never resumed duty from 24th February and the company wrote to her per the records and she never turned up to receive the letter. From the record, he was not sure if the monthly salary for the month of February 2014 was remitted. He stated that the Claimant was entitled to a hearing but she could be afforded such opportunity as she did not come back. He testified that her contract was expiring on 31st March, a month later.

7. In re-examination, he testified that she never came back where she could be given an opportunity to be heard. He was not sure if the remittances of salary for the month of February went through.

8. The parties filed submissions on 29th November 2017 for Claimant and 14th December 2017 for the Respondent. The Claimant submitted that the issue that was for determination was the unfair and unlawful termination of employment of the Claimant. She submitted that at the hearing she had testified on her engagement and work up to the date of termination when she was verbally dismissed from employment. She submitted that the termination was not fair as she was not shown the wrongly labeled plates and/or letters of complaint from the Respondent's clients. She submitted that she was not accorded a fair hearing or opportunity to defend herself and that the dismissal was unprocedural. The Claimant submitted that notice was due under Section 35 (1)(c) of the Employment Act before termination and that under Section 41 of the Act, there is procedure established for the handling of cases of misconduct. The Claimant submitted that desertion of duty was a ground for summary dismissal under Section 44(4) of the Employment Act but that any employer who relies on this ground must demonstrate its existence. The Claimant relied on the case of **Geoffrey Muringi Mwangi v Rwaken Investments Limited [2015] eKLR** for the above proposition. The Claimant submitted that she was entitled to the claims in her suit.

9. The Respondent submitted that the issues for determination were whether the Claimant terminated her services without notice, whether the Claimant had proved her case on a balance of probabilities and

whether the Claimant is entitled to the prayers sought. The Respondent submitted that its witness was a competent witness as it was juristic person with perpetual succession, keeps records and because of its artificial nature acts through human persons namely, directors, officers, shareholders and corporate managers etc. for the management of its day to day running. The Respondent submitted that the Claimant absconded duty after the mislabeling of disposable plates in February 2014. The Respondent submitted that the Claimant breached her employment contract as read with Section 35(5) of the Employment Act and did not give the requisite one month notice per the contract. The Respondent submitted that it was trite law that he who alleges must prove and cited Section 107(1) of the Evidence Act and that under the test in **JRS Group Limited v Kennedy Odhiambo Andwak [2016] eKLR** per Majanja J. the standard of proof in civil cases is on a balance of probabilities. The Respondent cited Section 3(1) and (2) of the Evidence Act in support of its contentions. The Respondent raised the possibility that the Claimant was embarrassed and disturbed by the mistake she made that caused her to abscond duty. The Respondent submitted that it had demonstrated on a balance of probabilities that the Claimant had deserted duty without proper notice as required under the contract and therefore should reimburse the Respondent the monthly salary as notice. The Respondent submitted that it was incumbent upon the Claimant to prove that the alleged unfair termination took place per Section 47(5) of the Employment Act. The Respondent submitted that the Claimant's claims should be dismissed and that she was not entitled to service pay as she was a contributor to NSSF. The Respondent relied on the case of **Peter Mucha Gachoka v Protocol Solutions Limited [2017] eKLR** on service pay being unavailable to contributors of NSSF and the case of **Alphonse Maghanga Mwachanya v Operations 680 Limited [2013] eKLR** for the proposition that there is no grant of damages contemplated under Section 49 of the Employment Act. The Respondent submitted that if the court were to find in favour of the Claimant then the maximum compensation she would be entitled to would be the one month which was the remainder of the contract period. Reliance was placed on the cases of **Joseph Aura v China Jiangxi International (K) Limited [2017] eKLR**, **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** and **Rift Valley textiles Limited v Edward Onyango Oganda [1994] eKLR**. The Respondent urged the court to dismiss the claim and enter an award in favour of the Respondent for the claim against the Claimant for one month's salary in lieu of notice.

10. The Claimant was an employee of the Respondent and she earned Kshs. 12,285/- basic pay with house allowance of Kshs. 1,843/- making a total of Kshs. 14,128/- plus some overtime each month. She asserts that her dismissal arose from a night shift fiasco regarding some labels for disposable food containers. The Respondent asserts that the Claimant was asked to give an explanation and she went missing instead. The Claimant was of the view that her dismissal was improper and was in contravention of statute. The Claimant's view was reinforced by the evidence of the Respondent's witness Peter Wanjama Mwangi who stated that he did not know the Claimant personally but from the records held by the Respondent. It was his testimony that the Claimant, an assistant supervisor in charge of packing disposable food containers, was on night shift on 24th February 2014 and there was mislabeling of food packaging containers. He stated that she deputized one Daniel Muasa Ndaka and that they were requested to take responsibility for the mislabeled containers. The Claimant in her testimony stated that Vijesh, the production manager, sought her resignation and when she declined, he terminated her employment. She stated that she declined to take responsibility for the mislabeling Vijesh told her to leave and she was not offered an explanation for the dismissal. In my view, the evidence of the mislabeled containers would have assisted in apportioning blame on the Claimant for the dismissal whether constructive or overt. Conversely, it would also have provided proof of the Respondent's assertion that the Claimant was so embarrassed by her mistake that she absconded from her workplace. The Respondent was bound to keep records in terms of Section 74 of the Employment Act 2007 and it was not open to the Respondent to assert the Claimant absconded work and fail to provide proof. The Employment Act places a burden on the employer in scenarios where allegations of dismissal for misconduct or poor performance arise. The Claimant asserted her pay for the month of February 2014 was not availed and the Respondent did not provide any evidence of remittance of the funds. The witness confirmed that there was nothing in the records to show that the Claimant had been paid her February 2014 salary. In the case of **JRS Group Limited v Kennedy Odhiambo Andwak (supra)** as correctly pointed out by my brother Majanja J., the standard of proof in civil cases is balance of probabilities.

11. In the case before me, the Claimant was asked to admit to an error that was said to have occurred on

the night of 24th February 2014. It was not clear from the pleadings or evidence of the Respondent whether the Claimant was the person who stuck the labels on the containers as she was an assistant supervisor. If indeed the labeling was erroneous, the Claimant as supervisor would not be the person to be dismissed but the staff who erred. She would have been warned or received other sanction but a dismissal for the mistake of another was in my view extreme. It is also not lost on the court that the manager Vijesh was not called to testify as a witness for the Respondent to dispel the averments or evidence of the Claimant. There was an allegation that the Claimant was contacted to attend and give an explanation. The letter purporting to invite her to give an explanation was addressed to the Claimant care of the Respondent. In addition the letter alleged to have been issued to the Labour Office had no acknowledgement nor did it have any response from the Labour office. It is odd the letter to her is dated 12th March 2014 while the one to the Labour Office is dated 27th March 2014 and is not copied to her. Both letters bear the exact same reference making it seem that they were not issued in the manner suggested by the Respondent. As regards the claims for service pay and damages, the Respondent was right in its assertions that service pay is not available to employees under the NSSF scheme and neither are damages available in this case per the holding of Radido J. in the case of **Alphonse Maghanga Mwachanya v Operations 680 Limited** (*supra*).

12. In the final analysis, the Claimant proved her claim against the Respondent to some extent and is entitled to the following:-

- i. One month salary in lieu of notice Kshs. 14,128/-
- ii. Salary for the month of February 2014 - Kshs. 26,888/- (basic plus house allowance and overtime per the October 2013 payslip)
- iii. One month salary compensation Kshs. 26,888/-
- iv. Costs of the suit
- v. Interest on the sums in i), ii), iii) from the date of filing suit till payment in full.
- vi. Certificate of service

The Respondent's counter claim against the Claimant is hereby dismissed with no order as to costs.

It is so ordered.

Dated at Nairobi this 27th day of December 2017

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 16th day of January 2018

Radido Stephen

JUDGE