



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**

**KENYA AT NAIROBI**

**CAUSE NUMBER 781 OF 2012**

**JANE MUKUI MWINI.....CLAIMANT**

**VERSUS**

**AFRICA APPARELS EPZ LIMITED.....RESPONDENT**

**JUDGEMENT**

1. By an amended statement of claim filed on 3<sup>rd</sup> February, 2017, the claimant averred that she was employed on 9<sup>th</sup> July, 2010 by the respondent as a Helper –Fin. Her monthly salary was Kshs 7,755/=. According to her, she worked until 29<sup>th</sup> September, 2010 when the respondent terminated his services and promised to pay all her dues in form of one month's salary in lieu of notice, unpaid sick leave and salary for September, 2010.

2. The respondent on its part admitted the claimant was its employee and denied that she was unlawfully and unfairly dismissed from employment. According to the respondent, the claimant terminated her own employment when she deserted her place of work on or about 30<sup>th</sup> September, 2010 and only showed up on 4<sup>th</sup> November, 2010 to demand her final dues.

3. In her oral testimony, the claimant further stated that on 9<sup>th</sup> September, 2010 she asked for leave because she was unwell. According to her, she was hospitalized for three days and when she returned she was terminated. It was her evidence that she asked her supervisor a Mr William for permission to be absent. It was her evidence that she produced a medical report over her illness to the supervisor but he tore the same and returned it to her. She further complained that she was never given a hearing before the dismissal.

4. In cross-examination, she stated that she was paid for September, 2010 and that she had earlier asked for leave to attend a burial. She further stated that she did not go to the respondent's dispensary. She denied deserting work.

5. The respondent's witness Ms Virginia Wanyara stated that she was the respondent's HR Manager and was familiar with the claimant's case. It was her evidence that the respondent had a clinic for employees and a supervisor would give an employee a note to be attended at the clinic. It was her evidence that the claimant never brought any medical evidence to show that she was unwell.

6. According to her, the respondent did not terminate the claimant's service and that the claimant left on her own. She left on 30<sup>th</sup> September, 2010 and returned on 4<sup>th</sup> November, 2010 and further that the claimant never communicated her absence to the respondent. In cross-examination she stated that all employees receive their pay through the bank and further that every employee is aware of the staff clinic. She denied knowledge of the claimant's illness earlier. There was no record that the claimant sought leave.

7. The onus of proof that an unfair termination has taken place is on the employee while the duty to prove that there existed valid reason for termination of service rests on the employer. The claimant herein does not deny absents herself from work. She however states that her absence was due to illness. She further alleged that she attended a clinic other than the respondent's and when she presented the documents to her supervisor which she said was a Mr William, he tore the same and returned to her. She was thereafter verbally terminated.

8. The claimant neither produced the alleged torn medical sheet nor called any witness from the facility she attended to confirm she was attended to at the alleged clinic. The claimant could have better still obtained another sheet from the clinic to support her claim that she was prevented from going to work by illness.

9. The respondent on the other hand asserted that the claimant absconded work but did not produce any evidence to show any attempt to reach the claimant. Either party in this matter have not discharged the legal and evidentiary burden placed on them by the Employment Act. The court doing the best it can, will consider this as a normal termination of employment and will not make a finding concerning unfair termination of service. This has not been proved by the claimant.

10. The court therefore awards the claimant one month's salary in lieu of notice. Each party to bear their own costs.

11. It is so ordered.

**Dated at Nairobi this 29<sup>th</sup> day of June, 2018**

**ABUODHA J. N.**

**JUDGE**

**Delivered this 29<sup>th</sup> day of June, 2018**

**ABUODHA J. N.**

**JUDGE**

**In the presence of:-**

.....for Claimant

.....for Respondent