



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 196A OF 2014

MERCY AKINYI MAJIWA.....CLAIMANT

VERSUS

SUPERGRIP MARKETING LIMITED...RESPONDENT

JUDGEMENT

1. The claimant averred that she entered into a contract of employment with the respondent in February, 2006 to serve as a waitress. According to the claimant, she worked for eight years until 5th January, 2014 when the respondent unilaterally terminated her services without proper notice, legitimate reasons and a fair hearing. The claimant stated that she never went on leave or received pay in lieu, for the period she worked for the respondent. Further that her salary at the time of dismissal was Kshs 10,447/=.
2. The respondent in its defence admitted employing the claimant but averred that her services were terminated after various warnings on absence from duty which were served on her. The respondent further averred that the claimant cleared with the respondent upon termination and her dues paid on 24th January, 2014 and she signed for the same.
3. In her oral testimony in court, the claimant further stated that she used to stay with her sister who was expectant. The sister gave birth and unfortunately, the baby died. She was called from work and sought permission to go and attend to her sister but Emily initially refused but later allowed her to go. According to her evidence, she travelled with the body to Kisumu for burial around 18th December, 2013 which was a Sunday but when she reported to work on Monday Emily demanded to know who had permitted her to be away from work.
4. She further stated that Emily complained about her hairstyle and told her to change it. The claimant also stated that when she returned to work she was not feeling well and asked for permission from Emily and she refused. That evening she went home and got more sick and collapsed. She was rushed to hospital by neighbours. The next day Emily called her and asked why she was not at work. According to her, she stayed away from work for a week. When she reported back to work she was escorted out of the premises and was asked to collect a letter from the head office. When she went to the head office she was issued with a termination letter. Upon dismissal she was paid her dues.
5. It was her evidence that when she was being dismissed she was only with the manager. None of her colleagues or union representatives were present. In cross-examination she stated that as a waitress, she was required to dress in a particular way. She further stated that she was unwell for about a week but did not have a sick off. It was her testimony that she could not manage to get one from the office. About her terminal dues, she said, she was not paid all of it but signed the clearance form because she needed money.
5. The respondent's witness Ms Arycla Imita stated that the claimant had been working for the respondent since November, 2008 and that the contracts were annual and renewable. It was her evidence that the claimant was terminated on account of absenteeism. She further stated that the claimant apologized in writing for coming to work late. Concerning terminal dues, she stated that the claimant was paid Kshs 24,534/= in full and final settlement. She further stated that the claimant took all her leave days except leave due upon termination.
7. In cross-examination, she stated that when the claimant was bereaved, she filled bereavement forms. She further stated that the claimant never informed Emily about her absence and further that Emily referred the claimant to her on account of her absence to explain. She denied knowledge of the claimant's illness. She also denied ever receiving any letter from Ebenezer Medical Clinic.
8. Concerning the apology letter, she said it was in 2010 and that there was no apology letter after 2010. She further stated that she called the claimant to her office where she was with her boss and further that no claimant's colleague was ever called to the meeting.
9. Termination of employment must be for reasonable cause. The test usually is whether a reasonable employer would dismiss an employee if confronted with the reasons for which the claimant was dismissed. If the answer is in the affirmative the court would not interfere. The claimant herein was dismissed on account of absenteeism. However, it would appear the claimant asked for leave to attend the funeral of her

sister's child which she had transport upcountry under very distressful circumstances. The claimant further fell sick upon her return. The respondent however did not seem to believe her story.

10. The claimant annexed to her statement of claim a medical note from Ebenezer Medical Clinic and chemist which showed the claimant was given 5 days off duty. The respondent did not dispute this document nor made any attempts to verify if indeed the document was genuine. The claimant in her evidence averred that there was bad relationship between her and her immediate supervisor Emily. She told the court how Emily initially refused her off to go and bury her sister's child but later allowed her to go. The respondent never called Emily to give evidence and refute the claimant's allegations.

11. The court is of the opinion that the reasons and circumstances of the claimant's absence from work were capable of being dealt with in a less drastic manner than a dismissal. The court therefore reaches the conclusion that it was unreasonable hence unfair to dismiss the claimant under the circumstances.

12. The court therefore awards the claimant as follows:

a. One month's pay in lieu of notice	10,447	
b. Service pay at the rate of 15 days		
pay for each complete year of service	41,787	
c. Eight months salary as compensation for		
unfair termination of service	<u>83,576</u>	
		135,810
d. Less already paid	<u>24,534</u>	
		<u>111,276</u>
e. Costs of the suit		

13. The respondent to issue the claimant with a certificate of service.

14. It is ordered.

Dated at Nairobi this 29th day of June, 2018

Abuodha J. N.

Judge

Delivered this 29th day of June, 2018

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

..... for the Respondent