



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 235 OF 2016**

**BETWEEN**

**ELIZABETH MUENI KIMWENA.....CLAIMANT**

**VERSUS**

**MEGA GARMENTS INDUSTRIES KENYA [EPZ] LIMITED.....RESPONDENT**

***Rika J***

***Court Assistant: Benjamin Kombe***

***IRB Mbuya & Company Advocates for the Claimant***

***Onyango Oballa & Partners, Advocates for the Respondent***

**JUDGMENT**

1. The Claimant filed her Statement of Claim, on 29<sup>th</sup> March 2016. She states she was employed by the Respondent as a Mass Machinist, from 1<sup>st</sup> November 2012 to 14<sup>th</sup> August 2015. She earned a salary of Kshs. 12,475 per month. She was not paid house allowance. Her contract was terminated by the Respondent on 14<sup>th</sup> August 2015. She states this was done because she had filed a Civil Claim in the Magistrate's Court, for recovery of damages against the Respondent, for work injury. She was not paid terminal dues. She asks the Court to find termination was unfair and grant her Judgment against the Respondent as follows:-

- a) 1 month salary in lieu of notice at Kshs. 14,660.
- b) Annual leave at Kshs. 6,867.
- c) 12 months' salary in compensation for unfair termination at Kshs. 175,920.
- d) Certificate of Service to issue.
- e) Any other suitable relief.
- f) Costs.
- g) Interest.

2. The Respondent filed its Statement of Response on 4<sup>th</sup> October 2016. Its position is that it employed the Claimant on seasonal contracts. The last contract was for the period between 6<sup>th</sup> July 2015 and 23<sup>rd</sup> December 2015. Her last basic salary was Kshs. 12,416, and house allowance of Kshs. 1,862, as shown in her pay slip. She absconded, between 14<sup>th</sup> August 2015 and 30<sup>th</sup> August 2015, as shown in attendance register for the month of August. She was dismissed pursuant to Section 44 [4] [a] of the Employment Act 2007. The Respondent prays for dismissal of the Claim, with costs.

3. The Claimant gave evidence on 18<sup>th</sup> September 2017, and 20<sup>th</sup> November 2017 when she rested her case. Respondent's Human Resource Manager, Duncan Kavita, gave evidence on 6<sup>th</sup> March 2018, when hearing closed.

4. The Claimant confirmed details of her employment with the Respondent, the date of employment and date of termination, as pleaded in the Statement of Claim. She clarified and corrected the year of recruitment as 2013, not 2012. She worked under contracts of 6 months' each, renewed at the end of each period. She signed a contract for the period June 2015 to end December 2015. She was dismissed on 14<sup>th</sup> August 2015, before completion of the period. The Respondent told the Claimant dismissal was on the ground that she had filed a Civil Claim against the Respondent at the Magistracy. She seeks notice pay. She never went on annual leave. She was not issued the letter of termination on 28<sup>th</sup> August 2015. She was not absent for several days as shown in the biometric register.

5. Cross-examined, the Claimant told the Court it was the Parties' agreement that she would not be absent without leave of her Employer. If she absented herself, the Respondent would be justified to terminate her contract of employment. The attendance register had Claimant's personal details. Her clocking number was 0716. The register would show if and when she was absent. It was indicated she did not sign in on 18<sup>th</sup> August 2015 and 19<sup>th</sup> August 2015. Her contract had a dismissal clause. Redirected, the Claimant told the Court she was shown to have last signed in on 13<sup>th</sup> August 2015. She did not have a gate pass from 14<sup>th</sup> August 2015. The gate pass had been taken away by the Respondent. Dismissal was unjustified. She did not receive termination letter.

6. Kavita told the Court he oversaw staff issues at the Respondent. The Claimant absented herself without leave of the Respondent on certain occasions. Employees punched in at 8.00 o'clock. The Claimant did not report on 10<sup>th</sup> August 2015. She was given benefit of doubt because she could have been ill. She was dismissed on 28<sup>th</sup> August 2015. The letter of termination was delivered to her through another Employee who lived with the Claimant. Dismissal without notice was provided for under the Parties' contract, if the Claimant absented herself for 3 of more days. She absconded and is not entitled to notice. The Respondent paid Employees annual leave entitlement after every 3 months, to avoid accumulation. Claimant's last annual leave dues were paid with her August 2015 salary. She was not denied entry by the Respondent. She retained Respondent's gate pass. She did not clear with the Respondent in order to have her Certificate of Service.

7. Cross-examined, Kavita told the Court Claimant's last pay slip was for July 2015. She did not work the whole of August 2015. There was no pay slip for this month. Purity, a Colleague of the Claimant delivered the letter of termination to the Claimant. The Claimant was paid 5 days' annual leave in August 2015. She had utilized 1 day of annual leave. The letter of termination stated that the Respondent was forced to close Claimant's file. It indicates Claimant's position had been filled. The Civil Claim filed by the Claimant against the Respondent for work injury compensation, was pending at the time of Claimant's dismissal. The clause in the contract, providing for dismissal without notice, was consistent with the Employment Act 2007. The Respondent normally holds disciplinary hearings in cases where Employees are charged with employment offences, but did not have such a hearing for the Claimant. This is because the Claimant was unavailable. The Respondent sent for the Claimant. She did not turn up. Termination was not on account of the Civil Claim initiated by the Claimant. Redirected, Kavita confirmed it was not possible to hear the Claimant, as she was absent. It was unnecessary to ask her to show cause why, she should not be disciplined, as she had left employment of her own volition.

#### **The Court Finds:-**

8. The Claimant worked for the Respondent as a Machinist from 1<sup>st</sup> November 2012 up till 14<sup>th</sup> August 2015, when she claims she was unfairly dismissed, after she had filed a Claim for damages for work injury against the Respondent, at the Magistrate's Court. The Respondent denied to have dismissed the Claimant on account of her filing the Civil Claim. According to the Respondent, the Claimant abandoned her work, effective 14<sup>th</sup> August 2015.

9. Attendance Log List exhibited by the Respondent indicates the Claimant did not sign in, beginning 14<sup>th</sup> August 2015. The question is whether, she failed to sign in because she was told by Kavita her services were no longer required after she filed the Civil Claim, or whether she failed to sign in, because she abandoned her post voluntarily.

10. Evidence by the Respondent, on abandonment of work by the Claimant, is hardly convincing. The Claimant had been working in continuity, from the year 2013. Kavita was hard-pressed to show that the Claimant was a persistent absentee, before 14<sup>th</sup> August 2015. In his evidence, he referred to Claimant's absence on 10<sup>th</sup> August 2015, during which he stated the Claimant was allowed the benefit of doubt because she may have been sick. The Log List indicates the Claimant was present on this date. No other dates were given when the Claimant is alleged to have been absent, prior to 14<sup>th</sup> August 2015. Kavita did not convince the Court that the Claimant opted not to come to work beginning 14<sup>th</sup> August 2015. He alleged that the Respondent made attempts to reach the Claimant after 14<sup>th</sup> August 2015. There is no record of any letter sent out to the Claimant, asking her to return to work, or face disciplinary action for abandoning her duty. Termination letter is said to have been delivered to the Claimant on 28<sup>th</sup> August 2015, through Claimant's Co-Employee, named Purity. Purity did not give evidence. There is no evidence showing that the Respondent communicated in any way to the Claimant, after she left employment effective 14<sup>th</sup> August 2015. The Respondent did not bring her to account in a disciplinary hearing, for abandonment of duty. While the Court agrees that the Respondent could summarily dismiss the Claimant for the offence of being absent without leave, or without lawful cause, summary dismissal does not mean the Employee is sacked without being heard; it means, under Section 44 [1] of the Employment Act, that the Employee's contract is terminated without notice, or with less notice than that to which the Employee is entitled to by any statutory provision, or contractual term. There is no correlation between notice, and the right to be heard under Section 41 and 45 of the Employment. Section 44[4] itself, allows the Employee space to dispute whether facts show justifiable or lawful grounds for dismissal. Such dispute cannot be possible without a degree of hearing.

11. The most probable cause for termination of the Claimant's contract, is that she filed a Claim for recovery of damages against the Respondent, after she suffered work injury. Kavita confiscated Claimant's gate pass in the morning of 14<sup>th</sup> August 2015. He informed her, the Respondent was aware the Claimant had lodged a Civil Claim against the Respondent. The Respondent would no longer continue to employ the Claimant as a result. She was asked to leave, effective 14<sup>th</sup> August 2015. This evidence appears to the Court the most probable account, of circumstances surrounding Claimant's dismissal. The letter of summary dismissal, dated 28<sup>th</sup> August 2015, was never delivered to the Claimant. It was not intended to be a genuine communication to the Claimant, that her contract had been terminated. Termination was communicated through word of mouth by Kavita, on 14<sup>th</sup> August 2015. The Claimant did not sign the Log List from 14<sup>th</sup> August 2015 because she was dismissed from this date. She did not abandon her post; she was pushed out of it.

12. Her last pay slip indicates she was paid annual leave pay of Kshs. 2,041. Her contract provided for annual leave of 2 days for every month worked. The pay slip for July 2015 captures annual leave, although none was due on this month. The Claimant has not shown she was owed annual leave of Kshs. 6,867 at the time of termination. This prayer is rejected.

13. Her pay slips show she last earned basic pay of Kshs. 12,416 and house allowance of Kshs. 1,862- total Kshs. 14,278. It is not true that she did not receive house allowance. It is also not clear where the Claimant gets the monthly salary of Kshs 14,660.20 from, which is the monthly salary pleaded in her Claim. ***She merits 1 month salary in lieu of notice, which is allowed at Kshs. 14,278.***

14. Termination as concluded above was unfair. It was not based on valid reason, and in fact, was based on ill-motive. The Claimant exercised her statutory and constitutional right, in seeking compensation for work injury. Her Civil Claim was pending at the time of termination. The Respondent was aware of this, and was not happy that the Claimant should sue the Respondent, and continue to work for the Respondent. It is wrong for an Employer to terminate an Employee's contract, on the ground that an Employee seeks to enforce contractual or statutory rights, arising in the course of employment. The Claimant was not heard, on the allegation of absencing herself from work, or any other. She was deprived of substantive and procedural justice. Termination did not meet the minimum statutory standards under Section 41, 43 and 45 of the Employment Act. ***The Claimant is granted the equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 171,336.***

15. ***Certificate of Service to issue.***

16. ***Costs to the Claimant.***

17. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a) The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 14,278 and equivalent of 12 months' salary at Kshs. 171,336- total Kshs. 185,614.***

***b) Certificate of Service to issue.***

***c) Costs to the Claimant.***

***d) Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

**Dated and delivered at Mombasa this 28<sup>th</sup> day of September, 2018.**

**James Rika**

**Judge**