



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 17 OF 2014

JACKLINE BOSIBORI OMACHE.....CLAIMANT

VERSUS

LONDON DISTILLERS (K) LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th December, 2018)

JUDGMENT

The claimants filed the memorandum of claim on 14.01.2014 through Ong'uti & Company Advocates. The claimant prayed for:

- a) Kshs. 270, 199.80 being Kshs. 11, 547.00 pay in lieu of one month notice; Kshs. 73, 901.00 gratuity for 8 years' service; bonus for year 2012 Kshs. 92, 376.00; and Kshs. 92, 376.00 leave for 21 days for 8 years of service.
- b) Interest on (a) at court rates.
- c) Compensation for unlawful termination of employment.
- d) Cost of the suit.
- e) Any other relief the Honourable Court will deem fit to grant.

The respondent filed the statement of response on 19.04.2017 through Chadianya Matotse & Company Advocates. The respondent prayed that the respondent's suit be dismissed with costs and the Court to award other relief the Court deems fit.

The parties were in employment contract at all material times. On 06.05.2012 the claimant was involved in an incident during working hours. The issue in dispute is whether the incident was due to voluntary intoxication namely taking alcohol as per the respondent's account or was due to ill health characterised in a serious depressive disorder as per the claimant's account.

On 06.05.2012 the claimant reported on duty at 8.00am being an overtime service on a Sunday. She recalls that she worked up to 11.00am and thereafter, as per her testimony, she suffered dizziness and unconsciousness. Her testimony was that on 07.05.2012 she regained consciousness and she found herself at Shalom Hospital in Athi River. She testified that it was her work mates who had assisted her to get admitted at the hospital the previous day when she had been struck unconscious. The discharge summary by the hospital shows that the claimant was admitted at the hospital on 06.05.2012 and discharged on 09.05.2012 and she had been taken to the hospital by colleagues with reported bizarre behaviours, talking a lot, no understandable speech, screaming and with multiple bruises. The discharge summary stated the diagnosis as "**Depressive Disorder**". Upon the discharge the doctor granted her 2 days off duty from 10.05.2012 to 11.05.2012.

The respondent's account of the claimant's behaviour on 06.05.2012 at 11.30am is documented in the memo dated 09.05.2012 signed by the bottling hall supervisors. It is documented as follows:

"Subject: Jackline Omache (Contractor, Bottling Hall)

On Sunday the 5th May 2012, at around 1130hrs, the above named person, during overtime working session, refused to take instructions from her supervisor while being allocated her duties.

When asked for an explanation for her refusal, she was rude and used abusive language on the supervisor. She also picked

bitter quarrel with her fellow workmates who wanted to know the cause of her outbursts. She beat up one worker, and pushed the other into a crate of broken bottles that caused her to sustain injuries of bottle cuts.

In the process of the workers trying to cool her down, she started misbehaving by vigorously turning her body, lifting up her clothing and exposing her nakedness to everyone, causing work to stop for some time.

When her behaviour became uncontrollable, Security was called in and they took her outside where she went behind the administration block and started rolling herself on the ground, on sharp objects like stones, sustaining injuries to herself.

We believe her unbecoming behaviour usually occurs under the influence of alcohol, which she is aware it is illegal to take while on duty.

She has been verbally warned several times for her rude response to supervisors and shouting and quarrelling with fellow workers. Her behaviour is also well known by the shop stewards who have also tried to talk to her before in vain.

This is for your information and necessary action.

Regards

Bottling Hall Supervisors

Josephine Mbevi – signed

Redemptor Mulwa – signed

Ronald Kazengwa – signed

Titus Otieno – signed

Phillis Musis – signed

Victoria Maingi – signed

Florence Mwea – signed

Juliet Kamusa – signed”

The memo was addressed to the administration manager who endorsed there, “**I don’t want such people inside of battling hall.**” The claimant was then summarily dismissed from employment by the letter dated 12.05.2012. The letter stated as follows,

“RE: SUMMARY DISMISSAL

On Sunday the 9th May 2012 at around 11:30am you misbehaved in the Bottling Hall in a manner that could have caused a breach of peace.

According to the contract terms a “misconduct” is a reason for summary dismissal. The “Bottling in Charge” does not want you working there anymore.

For these reasons, your contract is hereby forthwith summarily terminated. Return whatever belongs to the company before collecting your dues.

Regards,

Signed

Col. Peter G. Atambo (rtd.)”

The claimant was paid Kshs. 4, 500.00 for her terminal dues being pay for work done up to 06.05.2012.

The respondent’s witness (RW) testified that on the material date (06.05.2012) there were no medical or other tests to show that the claimant had taken alcohol. The Court finds that the claimant had previously suffered similar episodes because in the memo quoted above it is reported, “**We believe her unbecoming behaviour usually occurs under the influence of alcohol, which she is aware it is illegal to take while on duty.**” The Court further finds that the respondent appears to have failed to decisively get involved and was not responsive to the claimant’s reported previous episodes. The Court further finds that the basis of the belief that her unbecoming behaviour usually occurred under the influence of alcohol was baseless.

The evidence is clear. There was no evidence that on the date of the episode the claimant had taken alcohol, voluntarily or involuntarily so. The evidence before the Court is the medical evidence that the claimant was under serious depression. It is the evidence that the claimant's colleagues who took her to hospital did not report that she had taken alcohol and the doctor did not diagnose as much. The claimant clearly suffered a severe depression as reported by the hospital and unfortunately the respondent had been completely insensitive and not responsive to her very special circumstances.

Black's Law Dictionary, 10th Edition, defines depression as a medical condition that makes one deeply unhappy and anxious and can prevent one from living a normal life. The dictionary quotes **PDM Task Force, Psychodynamic Diagnostic Manual 109-10(2006)** thus,

“The medical definition of depression is a sustained abnormality in a person's mood, or feelings of despair, hopelessness, and self-hatred. A depressive episode is defined as a period lasting at least two weeks in which a person feels depressed or becomes unable to experience any pleasure, accompanied by some of the following: changes in sleep patterns, changes in appetite, changes in sexual desire, loss of interest in things that were previously interesting, loss of pleasure in life (anhedonia), loss of energy, inability to concentrate, slowing of reflexes and bodily movements (psychomotor retardation), feelings of guilt, and thoughts of suicide. The quality, intensity, and disruptive nature of the symptoms appear to be most relevant clinically. Depression is an affect state that can vary in intensity from relatively mild to profound, from subtle experience to a severely disabling clinical disorder. Depression can be a relatively appropriate, if somewhat excessive, response to an accurate appraisal of reality, or it can be based on severe reality distortions.”

The Court finds that in absence of any other material before the Court, the claimant suffered severe depressive disorder as was diagnosed at the hospital and in terms of the reported episode of 06.05.2012 when the claimant was on overtime duty on that Sunday.

It is clear that even if the respondent desired to terminate the claimant's employment on account of the alleged misconduct on the date of the episode or on account of the depressive disorder as a ground on ill-health, it was necessary that the claimant is accorded a notice and a hearing as per section 41 of the Employment Act, 2007. The Court further finds that as at the time of the termination of the contract of service, the respondent cannot be said to have established a valid or genuine reason for terminating the claimant's employment as envisaged in section 43 of the Act. The Court returns that the termination was unfair for want of due merits or substance as well as for want of due process in terms of sections 41, 43, 45 and 47(5) of the Act.

The respondent's witness (RW) testified that the claimant had been employed in 2004 and was subsequently serving on renewable contracts as there had been no break in service. The Court finds that the claimant wished to continue in employment, she did not contribute to her termination, and she desired to continue in employment. The aggravating factor was that the respondent acted with insensitivity to the claimant's health and medical requirements. The claimant as an employee legitimately expected the respondent as an employer to ensure the provision sufficient and of proper medicine for its employees during illness and if possible, medical attendance during serious illness (like it was in the claimant's case) and as provided for in section 34 of the Act. The Court finds that the respondent's insensitivity in that regard exposed the claimant adversely on the date of the episode and culminated in the unfair termination. Accordingly the claimant is awarded maximum compensation under section 49 of the Act making 12 months' salaries at Kshs. 11, 547.00 x12 making **Kshs.138, 564.00**. The termination was abrupt and unfair and the claimant is awarded **Kshs. 11, 547.00** under section 35(1) (c) of the Act and as submitted for the claimant. The pay slip on record shows that the claimant was a member of NSSF and she is not entitled to service pay for 8 years as prayed for and as per exemption in section 35(6) of the Act. The claim for bonus was not justified by terms of service and evidence and it is declined. The claimant testified that for the 8 years of service she was not given or paid in lieu of annual leave. In absence of any other material on record and RW having confirmed that the claimant worked for the respondent from 2004 to date of termination without a break, the claimant is awarded **Kshs. 92, 376.00** in lieu of annual leave throughout the period of 8 years of service. Further while wring to the labour officer on 29.05.2012 the respondent alleged that leave was normally paid at 2.3 days every month but the pay slip filed for the claimant for November 2011 does not show as much – so that on a balance of probability, the claimant has shown by her testimony that she was not given annual leave or paid in lieu of such leave. The respondent will pay the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) Payment of **Kshs.242, 487.00** by 31.01.2019 failing interest to be paid at Court rates from the date of filing the suit till full payment.
- b) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 14th December, 2018.

BYRAM ONGAYA

JUDGE