



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 528 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 26th January, 2017)

LILIAN KAGOTA.....CLAIMANT

VERSUS

WHITE ROSE DRYCLEANERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed suit on 16th April, 2013, through the firm of Mengich & Company Advocates seeking damages for unlawful dismissal. She states that she was engaged by the Respondent on 1st January, 2001, where she worked diligently until 4th January, 2013, when she was unlawfully terminated.
2. She states that prior to dismissal she had no disciplinary case taken against her or prior warning and that she served the Respondent strictly in accordance with the terms of service. She states that she got to know about her dismissal via a letter dated 4th January, 2013, before which she had never been summoned by the disciplinary committee.
3. She further states that her dismissal was unjust, unfair and unlawful and contrary to the Employment Act and the Labour Laws, common law and other regulations. That at the time of dismissal she was earning a salary of Shs. 36,570/=.
4. The Respondent filed a Statement of Defence wherein they admit the employment relationship and state that by December 2012, the Claimant was working at Flush Akiba as a Receptionist and on 11th December, 2012, while discharging her duties, she closed the shop before official closing time and handed the key to the supervisor forcing management to make arrangements to deploy one of the employees from another unit to attend to customers at Flush Akiba.
5. They state that on 14.12.2012, they wrote to the Claimant through her last known address requesting her to come back to work by 18th December, 2012, which she failed to do. The Respondent states that they notified the Shop Steward as the representative of the workers of the Claimant's actions.
6. It is the Respondent's contention that the Claimant reported back to work on 29th December, 2012, to her supervisor who in turn sent her to see the then Human Resource Manager at the head office. It turned

out that the Claimant had requested for ten days which had not been approved but she still proceeded on leave and reported back after twelve (12) days.

7. They further state that the Human Resource Manager asked the Claimant to explain why she had remained absent without permission which she failed to do. She was then asked to appear before the disciplinary committee on 3rd January, 2013, to answer to the charge of deserting duty which she did accompanied by Mr. Moses Mwololo the Chief Shop Steward. She admitted having closed shop on 11th December, 2012, at 10.00 a.m. without permission from the supervisor.

8. The Respondent states that the management found her with a case to answer and she was given time to make representation as did the Shop Steward who called for leniency. On 4th January, 2013, the Claimant was summarily dismissed from employment and was advised to collect her terminal benefits.

9. In evidence, the Claimant admitted that she was absent from work from 12th December to 29th December, 2012. She also admitted that she was called for a disciplinary hearing in the presence of their Shop Steward where she was charged with desertion of duty which she denied.

10. She claimed that she had never gone on leave for the duration of the employment. She prayed for the Claim to be allowed as drawn.

11. The Respondent's witness reiterated the contents of the statement of defence and prayed for the Claim to be dismissed with costs.

12. Having considered evidence of both parties, issues to determine are as follows:

1. Whether there were valid reasons to dismiss the Claimant from duty.

2. Whether Claimant was accorded due process before being dismissed.

3. What remedies to give in the circumstance?

13. From the evidence of the Claimant and the Respondent in equal measure, the Claimant was dismissed for deserting duty without permission. The Claimant admitted she was absent from duty on 12th December to 29th December 2012 without her leave being approved. This according to Section 44(4) (a) of Employment Act was a valid reason to warrant summary dismissal.

14. Section 44(4)(a) of Employment Act provides as follows:

“(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work”

15. Under Section 43 of Employment Act:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

16. A reason for termination must be a reason which existed at the time of the termination which an employer must prove. This in my view has been proved as per the evidence of the parties.

17. On issue of due process, the Claimant also admitted that she was summoned for a disciplinary hearing

which she attended in the presence of her Shop Steward. She was then charged with desertion of duty which she denied.

18. The due process envisaged is as provided for under Section Section 41 of Employment Act 2007 which states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

19. In the case of Claimant, she was accorded a hearing as envisaged under the law.

20. It is my finding that the Respondent had valid reason to dismiss the Claimant and also followed the right hearing procedure and therefore the claim by the Claimant fails on that account.

21. The Claimant’s case is therefore dismissed accordingly with no order to costs.

Read in open Court this 26th day of January, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Musungu for Claimant – Present

No appearance for Respondent