



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 27 OF 2015

ALI SALIMINI.....CLAIMANT

VS

KAPRIC APPAREL EPZ LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 6.6.2014. The respondent denied liability to pay any damages to the claimant and avers that the termination of the contract was substantively and procedurally fair.
2. The suit was heard on 9.11.2015 when the claimant testified as CW1 while by consent of the parties the respondent adopted as her evidence, the written statement of her HR Manager Mr. Gabriel Were and Chief Shop Steward Mr. Evance Odongo dated 25.2.2015. Before the hearing the parties recorded to settle the claim for leave outstanding plus salary for May 2014 at Kshs.9,788.25 and after the hearing both parties filed written submissions.

Analysis and Determination

3. Upon careful consideration of the pleadings, evidence and submissions, it is clear that the claimant was employed by the responded on fixed term contracts of one year starting 1.3.2011; that the contracts ran consecutively and the last one was renewed on 1.1.2014 to end on 31.12.2014 but it was prematurely terminated by the respondent on 6.6.2014. The issues for determination are:

- (a) **Whether the termination of employment contract was unfair.**
- (b) **Whether the claimant is entitled to reliefs sought in his suit.**

Unfair Termination

4. Under section 49(2) of the Employment Act, termination is unfair if the employer fails to prove that it was grounded on a valid and fair reason(s) and that it was done after following a fair procedure. In this case the reason for termination cited by the summary dismissal letter "is absence from work without permission or lawful cause contrary to section 44 of the Employment Act from, 16.5.2014 till 30.5.2014".
5. The claimant has admitted that he absented himself from work from 16.5.2014-30.5.2014 to attend to

an urgent personal matter at his upcountry home at Embu where another person had grabbed his private land. He however contended that he notified his supervisor Mr. Jackson Mwashigedi by phone before leaving Mombasa and the supervisor undertook to notify the boss and seek permission on his behalf.

6. Mr. Were however stated that CW1 absented himself from work without leave or other lawful cause. That he never followed the company procedure of applying for leave by filling leave forms and delivering it to the HR/Personnel Manager through his Head of Department or his immediate supervisor.

7. After careful consideration of the evidence presented to the court, I am satisfied that the claimant absented himself from work without permission or lawful cause and that constituted a valid and fair reason for summary dismissal under section 44(a) of the Act. The reasons for the going is that the claimant never adduced any evidence to prove that he in deed called Mr. Jackson Mwashigedi to seek permission to be absent. He further did not prove that Mr. Jackson had the authority to give him leave of absence. Finally, he admitted in evidence that in his letter dated 3.6.2014 by which he explained his absence, he never stated that he had spoken to Mr. Mwashigedi by phone to seek permission to travel upcountry.

8. As regards procedural fairness, the claimant contended that after reporting back to work on 30.5.2014, CW1 was barred entry to work by the personnel manager and was send away. That his departure stirred other workers to strike and he was called back and directed to write a letter to explain his absence from work on the said dates which he did on 3.6.2014. However, he was served with a summary dismissal letter dated 6.6.2014 before being given any hearing.

9. The two defence witnesses contended that the claimant was accorded a hearing before the dismissal. Mr. Were never stated the date when the hearing was done but Mr. Odongo stated that it was on 3.6.2014. This discrepancy in the defence case is material and I resolve it in favour of the claimant by finding that no hearing was ever accorded to the claimant before dismissal. If at all it happened the minutes would have been availed or at least the dismissal letter would have mentioned that such hearing was done. Consequently the default to accord a fair hearing to the claimant before the summary dismissal rendered the termination unfair.

10. Section 41 of the Employment Act provides that before dismissing an employee for misconduct under section 44 of the At, he shall first explain the reason to the employee in a language he understands and in the presence of a fellow employee or Shop floor union representative of his choice and thereafter invite the employee and his chosen companion to air their defence. In this case the respondent has not proved that she followed the said mandatory procedure before firing the claimant on 6.6.2014.

Reliefs.

11. In view of the foregoing finding that the dismissal of the claimant was procedurally unfair; I award to him Kshs.11,772 being one month salary in lieu of notice plus Kshs.35,316 being 3 months gross salary as compensation for unfair termination under section 49(1) and (4) of the Act. In awarding the small compensation, I have considered the fact the claimant contributed to his termination through his misconduct.

12. As regards the prayer for gratuity, no evidence was adduced to prove that the claimant was entitled to the same on termination. Although he contended that the law provided for the payment of gratuity, the claimant never cited the law, evidence or submissions. Consequently the prayer for gratuity for 4 years service is dismissed.

Disposition

13. For the reasons stated above, I enter judgment for the claimant in the sum of Kshs.35,316 in addition to the Kshs.9,798.25 consented to by the parties before trial. The claimant will also have cost and interest.

Signed, dated and delivered at Mombasa this 20th day of January, 2017.

O.N. MAKAU

JUDGE