



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 654 OF 2016

BETWEEN

CYNTHIA MTEKHO ODANGA CLAIMANT

VERSUS

ASHTON APPAREL [EPZ] LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates, for the Claimant

Ms. Opolo Advocate, instructed by the Federation of Kenya Employers, for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 7th September 2016. She avers she was employed by the Respondent as a Quality Checker, on 4th January 2010. She worked under several short term contracts. The last was renewed on 26th June 2015 to run through to 25th December 2015. She was paid a monthly salary of Kshs. 14,279. She was accused by the Respondent of poor quality production on 6th November 2015. She was issued notice to show cause, why she should not be disciplined. She replied the same day. She was summarily dismissed on 12th November 2015. She states she was not given a valid reason for the decision. She was not given a fair hearing. She asks the Court to declare termination was unfair under Section 41, 43 and 45 of the Employment Act 2007, and grant her Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 14,279.
- b) Annual leave pay of 5 years at Kshs. 57,645.
- c) Gratuity based on 18 days' salary for every complete year of service at Kshs. 49,410.
- d) Compensation equivalent of 12 months' salary at Kshs. 171,348

Total... Kshs. 292,682

e) Costs, Interest and any other suitable relief.

The Claimant also makes repetitious prayers for declaration that termination was unfair and unjust.

2. The Respondent filed its Statement of Response on 5th December 2016. It is conceded the Respondent employed the Claimant as a Quality Checker. She failed to control defects in garments on or around 7th November 2015. Consequently approximately 40 pieces were found defective. There were defects of skip at inseam operations and broken stitches at the side seam. The Claimant was asked to show cause, why disciplinary action against her should not be taken. It was not the first time she was caught up in disciplinary lapses. There were several previous warning letters against her. She was taken through a fair disciplinary hearing, and paid all terminal dues as shown in her last pay slip. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. Parties agreed in Court on 19th July 2017 to have the dispute determined on the strength of the record. They confirmed filing of Submissions on 25th September 2017.

4. The Claimant submits the defective garments were not within her area of responsibility. They were under the responsibility of Quality Assurance and Quality Auditor. There was no proof that these garments were in the Claimant's production line. The Respondent used the defective garments merely to justify termination. There was no justification under Sections 43 and 45 of the Employment Act 2007. Procedure was unfair.

5. The Respondent submits garments from Claimant's production line were found to be defective. This was confirmed through the disciplinary proceedings. Minutes of the disciplinary meeting are exhibited in Respondent's Further Documents filed on 14th December 2016. The Respondent discharged its obligation under Section 43 of the Employment Act 2007. The Claimant was issued notice to show cause, why she should not be disciplined. She was invited to a disciplinary hearing. She was heard. She pleaded for leniency asking to be transferred to another department. She had warnings in the past. She was paid outstanding annual leave days on termination. She was subscribed to N.S.S.F and not eligible for gratuity. She did not prove unfairness of termination under Section 47[5] to merit compensation.

The Court Finds:-

6. The Claimant was employed by the Respondent on various short term contracts as a Quality Checker. The last contract commenced on 26th June 2015 to run through to 25th December 2015. It was terminated by the Respondent through a letter of summary dismissal dated 12th November 2015, about 1½ months to the date of expiry. The reason for termination is stated in the letter of summary dismissal to be continuous poor performance on the part of the Claimant. Approximately 40 pieces of garment in Claimant's production line were found to have various defects.

13. There is evidence the Claimant was asked to show cause, why disciplinary action should not be taken against her. She replied. She was invited to a disciplinary hearing. She was heard on 10th November 2015. At the end of the hearing, the Claimant told the meeting:-

“ I am sorry. I will be more serious with my job and I request the management to transfer me to another department.”

14. By this statement, it seems to the Court the Claimant accepted she was at fault. She appears to have conceded that she was unable to discharge her role as Quality Checker, pleading for transfer to another department. There was no question that the defective garments came from the Claimant's production line. It was not proper for the Claimant to shift responsibility to other Employees, when she eventually came to Court. The Court notes also that the Claimant had been issued several warning letters, one which issued on 20th April 2015, and related to production of poor quality garments. There was valid ground in justifying termination.

15. Although notice to show cause, issued, and the Claimant was heard, there was a defect in the hearing procedure. The Claimant was not accompanied to the hearing by a Colleague of her choice, or Shop Floor Union Representative. She was asked by the Chair if she wished to call any Witness. She answered, “*Hapana, niko sawa,*” [Kiswahili for “No, I am fine”].

16. A Colleague or Trade Union Shop Floor Representative under Section 41 of the Employment Act does not attend disciplinary hearing necessarily, as a Witness. The Employee can call Witnesses who come to give evidence for the Employee. A Representative on the other hand comes in the form of an intercessor who assists the Employee, in presentation of his/ her case. When the Claimant stated she did not require a Witness, it was not the same thing as saying she waived her right to be accompanied to the hearing by persons indentified under Section 41 of the Employment Act. These persons are not be understood to bear the same elements of a Witness.

17. There was a defect therefore, in that the Claimant was not accompanied to the hearing by persons identified under Section 41 of the Employment Act. To this extent, procedure was unfair.

18. The Claimant was 1½ months away from end of her last contract. The Court has taken this into account, and the fact also, that she had several warnings leading to summary dismissal. She played a large role in the circumstances which led to termination of her contract.

19. *She is allowed the equivalent of 1½ months’ salary in compensation for unfair termination at Kshs. 21,418.*

20. She is denied the prayer for notice pay, the Respondent having had valid reason in justifying its decision.

21. She was actively subscribed to the N.S.S.F as shown in her pay slip. She is not eligible for service pay under Section 35[6] of the Employment Act 2007. She was entitled to 2 days of annual leave after every 2 months’ continuous service, under different contracts. She states she did not take leave for a cumulative period of 5 years. The Court is not able to find in her favour on this. The various contracts ended and were renewed, without the Claimant raising the grievance on pending leave. Her terminal dues included 19 days of pending annual leave. She did not account for these days in her prayer for annual leave pay. The declaratory prayers as suggested above are repetitious. It has however been found that termination was unfair, to the extent stated under the preceding paragraphs.

22. *In the end it is declared termination was unfair. The Claimant is granted the equivalent of 1½ months’ salary at Kshs. 21,418, in compensation for unfair termination. No order on the costs. Interest granted at 14% per annum from the date of Judgment till payment is made in full.*

Dated and delivered at Mombasa this 24th day of November 2017.

James Rika

Judge