



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 17 OF 2013

DORIS NAKUMICHA BARASA.....CLAIMANT

VERSUS

VAJA’S MANUFACTURERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Doris Nakumicha Barasa against her former employer, Vaja’s Manufacturers Limited. The claim is documented by a Memorandum of Claim dated 2nd November 2012 and filed in court on 9th January 2013. The Respondent filed a Memorandum of Reply on 15th April 2014.

2. When the matter came up for hearing the Claimant testified on her own behalf and the Respondent called Jimmy Mutuku and Christopher Ndambuki. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that she was employed in the Respondent’s Finishing Department from June 2002 until 1st December 2011, when her employment was terminated, for answering a telephone call while on duty.

4. The Claimant avers that there was no rule against the use of mobile phones while at work and contends that her dismissal was unjustifiable and unprocedural. She alleges that the real reason for the termination of her employment was her advanced pregnancy.

5. The Claimant now claims the following:

- a) Compensation for loss of future earningsKshs. 140,892
- b) Service pay.....70,446
- c) Pay in lieu of notice.....11,741
- d) Costs plus interest

The Respondent’s Case

6. In its Memorandum of Reply dated 15th April 2014 and filed in court on even date, the Respondent

states that the Respondent was employed as a helper in the Embroidery Department in June 2002. On 1st September 2004, she was issued with a formal contract by which she was engaged as an Assistant Machinist.

7. The Respondent further states that the Claimant's employment was governed by a Collective Bargaining Agreement (CBA) between the Respondent and Tailors and Textile Workers Union registered on 16th November 2010.

8. The Respondent avers that the Claimant was dismissed on 21st October 2011 on account of persistent acts of misconduct. The Respondent specifies that the Claimant had habitually contravened strict instructions not to use mobile phones while at work at the production line. On 21st October 2011, the Claimant engaged in a telephone conversation, without her Supervisor's permission, thus leaving her station unattended.

9. The Respondent adds that on 13th October 2011, the Claimant was issued with a 3rd and final warning for reporting to work late and on 15th February 2011, she was issued with a warning letter for poor performance. The Respondent cites other warning letters issued on 3rd September 2009, 14th May 2010 and 23rd June 2010.

10. Regarding the incident of 21st October 2011, the Respondent states that the Claimant was called to a disciplinary hearing on the same day. Her dismissal was effected in accordance with Clause 15 of the CBA. The Claimant's allegation that she was terminated on account of pregnancy is denied.

Findings and Determination

11. There are two issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

12. In a claim for unlawful dismissal such as the one now before me, the first question to ask is whether the employer has demonstrated a valid reason for the dismissal as anticipated under Section 43 of the Employment Act, 2007.

13. The Claimant was dismissed by letter dated 21st October 2011 stating as follows:

"Dear Madam,

It has come to the notice of management, today you stopped your work and started doing your own personal things with the mobile(sic). This is while the production line was going on. By doing this, you defied the precautions which you are well aware of.

Refer to memorandum of agreement on terms and conditions of service and wages between the management and the tailors and textile workers union clause 20(c) which reads in part "If an employee willfully neglects to perform any work which it was his duty to have performed"

Be informed that, you have been issued with more than three written and verbal warnings.

As per above, this is GROSS MISCONDUCT on your part and you are summarily dismissed from employment with the company.

You will be paid.

1) Days worked.

2) Any overtime worked.

3) Accrued leave if any.

4) Be given a letter of service.

This letter is sent to you in duplicate and you are required to sign one copy and returning (sic) to the management signifying you have received the

same and collect your dues from the office as will be communicated to you when ready.

Yours faithfully,

(Signed)

C.K. NDAMBUKI.

HUMAN RESOURCE MANAGER”

14. This letter accuses the Claimant of using her mobile phone during working hours, contrary to standing instructions. In her testimony before the Court, the Claimant admitted that on 21st October 2011 at around 11.00 am the Respondent’s Human Resource Manager, Christopher Ndambuki found her talking on her mobile phone.

15. The Claimant pushed the argument that she had no notice that it was irregular for her to use her phone during working hours. The Respondent’s 1st witness, Jimmy Mutuku who was a shop steward, however testified that the Respondent had posted notices barring the use of mobile phones during working hours. The Respondent produced screen shots of the notices and the Claimant did not contest their existence.

16. In *Rashid Jeneby v Prime Bank Limited [2015] eKLR* this Court held that the burden placed on an employer under Section 43 of the Employment Act, 2007 is to demonstrate, on a balance of probability, the existence of a valid reason that would move a reasonable employer to terminate employment. In all such cases it is not for the Court to supplant the employer’s decision with its own.

17. If in the circumstances of the case the Court finds that the employer acted reasonably and lawfully, then the employer has discharged its burden under Section 43 of the Act. In the instant case, it seems to me that the Claimant went against clear instructions issued by her employer and thus exposed herself to disciplinary action.

18. The next question is whether, in effecting the Claimant’s dismissal, the Respondent followed due procedure as set out in Section 41 of the Employment Act. From the evidence on record, the Claimant was dismissed on 21st October 2011, the same day she was found talking on phone.

19. The Respondent’s witnesses told the Court that they had some discussions on the very same day when she was issued with the dismissal letter. Whatever the subject of these discussions which were not documented, they do not in my view, qualify for a disciplinary process under Section 41 of the Act. I say so because the Claimant had no prior notice of the meeting and she therefore had no time to prepare her defence. For this reason, the Court finds that the Claimant’s dismissal was procedurally flawed.

Remedies

20. Flowing from this finding, I award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's' length of service as well as her employment record. I have also considered the conduct of the parties prior to the dismissal. I further award the Claimant one (1) month's salary in lieu of notice.

21. The Claimant admitted having been a contributing member of the National Social Security Fund (NSSF) and she is therefore not entitled to service pay.

22. Ultimately I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation..... Kshs. 70,446

b) 1 month's salary in lieu of notice.....11,741

Total.....82,187

23. This amount will attract interest at court rates from the date of judgment until payment in full.

24. The Claimant will have the costs of the case.

25. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF DECEMBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mrs. Gakoi for the Claimant

Mr. Kilonzo for the Respondent