



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 100 OF 2017

MARGARET WAMBUI GATONYE.....CLAIMANT

VERSUS

HOMAGE SERVICES STORE LIMITED.....1ST RESPONDENT

KENYA UNION OF COMMERCIAL, FOOD AND

ALLIED WORKERS.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 15th December, 2017)

JUDGMENT

There is no dispute that the 1st respondent employed the claimant and the claimant is a member of the 2nd respondent trade union. The evidence is that the claimant worked for the 1st respondent from 01.07.2010 to 22.07.2016. The claimant's duties included assisting the tailors in fixing buttons, ironing, finishing works, and cleaning. Thus, she was a general worker.

The claimant's testimony was that at termination on 22.07.2016, her monthly pay was Kshs.10, 300.00. It was her testimony that on 21.07.2016 a customer came and bought buttons worth Kshs.1, 000.00. The customer then returned some of the buttons as unfit for use. The manager then set out to quarrel the claimant and told her not to report on duty the following day. On 05.08.2016 the claimant testified that the manager summoned her to collect her July 2016. It was her case that she reported her case to the 2nd respondent's official who was reluctant to accept the dispute. Thus she filed the present case on 05.04.2017 through her lawyers Waweru Macharia & Company Advocates. She prayed for judgment against the respondents for:

- a) The 1st respondent to pay her Kshs.323,730.00 being Kshs.40, 176.00 unpaid leave for 3 years, compensation for unfair termination Kshs.159,442.00, one month pay in lieu of termination notice Kshs.11,553.00, Kshs.45,140.00 underpayment, house allowance Kshs.62,.00, holidays' pay Kshs.5,028.00 and a certificate of service.
- b) General damages against the 2nd respondent for breach of representation with interest.
- c) Costs of the suit with interest.
- d) Any other or further relief as the court may deem fit to grant.

The 2nd respondent filed a memorandum of response on 26.04.2012 confirming that it had a recognition agreement with the 1st respondent and the claimant was its member. It was the 2nd respondent's case that immediately after the dismissal the claimant visited the 2nd respondent's office and she was advised to follow internal settlement of the dispute and she never came back to the 2nd respondent. On 14.11.2016 the 2nd respondent discovered that the claimant had appointed her advocate to deal with the matter. The 2nd respondent's case was that the claimant was entitled to appoint an advocate and as such, the 2nd respondent's duty to represent the claimant was taken up.

The 1st respondent filed the response on 09.05.2017 through M.K. Kiminda & Company Advocate. The respondent's case was that the claimant was found with goods stolen from the respondent's shop while leaving duty at 5.00pm. The 1st respondent's case was that the claimant had covered the goods with the clothes she was wearing but then she was discovered and the 1st respondent agreed with the union not to follow up the criminal case and on humanitarian grounds not to do so. The claimant was paid her full terminal dues and the suit should be dismissed with costs.

The **1st issue** for determination is whether the 2nd respondent is liable as claimed. The court returns that it is clear that after the claimant was advised to follow some internal settlement, she did not come back to the 2nd respondent. The court returns that in such circumstances, the claimant clearly opted to pursue her claims by instructing her lawyers. As submitted for the 2nd respondent, there was no dispute to be pursued if the claimant had failed to come back. There were no submissions made towards justifying the claim and prayer against the 2nd respondent. The court returns that the same is deemed abandoned. Thus, the 2nd respondent is not liable as claimed and as prayed for.

The **2nd issue** for determination is whether the termination was unfair. RW1 was the 1st respondent's manager. His evidence was that the claimant was found with stolen 1st respondent's property and then she deserted duty fearing arrest. The 2nd respondent advised payment of July, 2016 salary and dropping of criminal case and the 1st respondent acted accordingly. He admitted that he kept no records about the claimant's employment and he gave no certificate of service. RW2 was the respondent's staff performing the security duties. He said he searched the claimant and found a pair of trouser hidden under the trouser the claimant was wearing. That was at 5.00pm on 21.07.2016. He admitted that the claimant was fired without a hearing.

The court has considered the evidence. The alleged reason for termination was theft as levelled against the claimant. The 1st respondent says it unilaterally opted to give the claimant a soft landing by dropping arrest and by opting to pay July 2016 salary. The alleged agreement between the respondents in that regard was not filed. The court finds that the actions by the 1st respondent were inconsistent in that after the alleged theft, the claimant would be liable to summary dismissal and not to be rewarded with the last full salary. In any event the 2nd respondent's position was that it was not involved at all. The court has further considered that RW2 being a man is most unlikely to have searched beneath the clothes the claimant (a woman) was wearing. It was not said that the claimant was allowed some time in privacy to unearth whatever was said or alleged to have been beneath her clothes and therefore the court returns that the alleged search and discovery of allegedly stolen trouser were largely a fiction.

Thus, the court returns that the termination was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007 and for want of due process of a notice and hearing as per section 41 of the Act.

While making that finding the court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority

to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination."

The 3rd issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The claimant is entitled to one month pay in lieu of termination notice **Kshs.11, 553.00** as prayed for.
- b) The claimant has submitted that she is entitled to underpayment as prayed for based on the Regulation of Wages (General) (Amendment) Order, 2013 and Regulation of Wages (General) (Amendment) Order, 2015. The respondent has not opposed that submission at all and the claimant is awarded **Kshs.45,140.00** as submitted. As per the Wage Orders, she is awarded **Kshs.62,391.00** in house allowance.
- c) The claimant had served for over 6 years and she was willing to continue in employment. She did not contribute to her termination in any manner. Her offer to get the matter settled amicably was not given a chance. Under section 49(1) (c) of the Employment Act, 2007, she is awarded 12 months' salaries as prayed for making Kshs.159,442.00.
- d) The court returns that she is entitled to a certificate of service as per section 51 of the Act.
- e) The claimant testified that she worked during holidays and further claimed for pay in lieu of annual leave. RW1 stated that he kept no records about the claimant's service. Under the Employment Act, 2007 the respondent had duty to keep the records. Thus, the court returns that on a balance of probability, the claimant has established her claims for leave and holiday pay as claimed and prayed for.

In conclusion, judgment is hereby entered for the claimant against the 1st respondent for:

- a) The payment of **Kshs.323,730.00** by 01.02.2018 failing interest to be payable thereon at court rates from the date of this judgment till full payment
- b) The respondent to deliver a certificate of service by 01.01.2018.
- c) The 1st respondent to pay the claimant's costs of the suit and the 2nd respondent to bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 15th December, 2017.

BYRAM ONGAYA

JUDGE