



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1746 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th January 2016)

NAHUM MBULA MUKUNZUCLAIMANT

VERSUS

BROTHER SHIRTS FACTORY LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed her Statement of Claim on 7-10-2014 through the firm of Charles Gomba & Company Advocates. The Claimant's case is that on or about September 2004 she was employed by the Respondent on a 3 month renewable contract as a tailor with a net salary of Kshs.4,097/= per week inclusive of overtime which amount translated to Kshs.16,388/= per month. Appendix 1 is her NSSF registration Certificate dated 14.10.2004.

2. The Claimant avers that she was however never supplied with a copy of the said contract of employment and an itemized payslip. She however worked for the Respondent and she avers that she never went for annual leave.

3. The Claimant avers that on 28th August 2014, she reported to work as usual and while doing her duties, she was confronted by her supervisor who claimed that the Claimant had been backbiting her and spreading rumors in the village where the said supervisor resides. That the Claimant's supervisor further accused the Claimant together with the Final Inspector Department Supervisor of inciting other employees to go on a go slow and throw awaits the clothes they were making at the time which claims the Claimant states were untrue, misguided and malicious.

4. Following this claim, the Claimant's services were orally terminated on 28.8.2014. It is the Claimant's case that the dismissal was unjustified as he was never given any notice nor a hearing.

5. In cross examination the Claimant stated that she had signed a contract which was to end on 30/10/2014 but the same was terminated in August. She denies backbiting her supervisor. She admits that she worked from 2004 to 2014 but her NSSF was not paid for all the months e.g. in Appendix 3 in 2007 NSSF was only remitted for December. She also denies being given any house allowance. She avers that her bank statement (Appendix 2) shows how she was paid.

6. The Respondents filed their Memorandum of Defence on 19-12-2014 through the Federation of Kenya Employers. They also called one witness to give oral evidence. It is the Respondents case that indeed

they employed the Claimant intermittently on temporary basis from October 2004 as a general labourer. That at the time of leaving employment she was on a fixed term contract of employment from 1st July 2014 to 30th October 2014 at a daily rate of 470.60/= which translated to a monthly consolidated salary of Kshs.14,118/=. (Appendix 1 Respondent's documents is a copy of the said contract).

7. The Respondents deny the Claimant's allegations as to the events leading to her termination but state that on 29.8.2014 the Claimant was found talking to her co-workers disrupting their work. She was told to stop and do her work but she instead turned abusive to her supervisor. She was then called to a meeting to discuss the incident and given that she had had previous warnings on such behavior, she was informed that the Respondent intended to terminate her services. She was issued with a termination letter which she refused to accept (Appendix 2).

8. The Claimant escalated the matter and reported to the labour office who wrote a letter to the Respondent demanding payment of her terminal dues. That the Respondent responded and issued a cheque of Kshs.6,632/= for Claimant's terminal dues which the Respondent considers the Claimant's entitlements.

9. It is the Respondents case that the Claimant's conduct amounted to a gross misconduct which entitled them to terminate her services and that the termination was justified under Section 44 (4) (c) and (d) of Employment Act 2007. They also aver that they gave the Claimant a chance to exonerate herself but she became abusive during the meeting leading to the decision to terminate her services.

10. On remittance of NSSF, the Respondents aver that the same was only remitted when Claimant worked as she only served the Respondent intermittently. They deny that the claimant is entitled to payment of house allowance as her salary included house allowance. They want the Claimant's case dismissed accordingly.

11. I have considered the evidence of both parties and the issues for determination are as follows:

1. Whether there were valid reasons to terminate Claimant's services.

2. Whether due process was followed in terminating the Claimant's services.

3. If the Claimant is entitled to prayers sought.

12. On the 1st issue, the Respondents aver that the Claimant denied abusing anybody. Under Section 47 (5) of Employment Act the burden of justifying that this abuse occasioned rests on the employer. RW1 is the Supervisor allegedly who was informed of the abuse and she gave her evidence in court and only stated that what happened was that the Claimant's table was taken by another worker and when Claimant came to work, she removed the clothes and put them down. When asked about it, she apparently abused the supervisor called Aywa. RW1 was informed and went to inform the boss. The boss decided that she be terminated as she had been given warning letters before.

13. The person who is said to have been abused gave evidence in court and stated that the Claimant only told him that he was feeling very superior. That this apparently meant he was proud. This is not an abusive statement as interpreted by the Respondent.

14. The Claimant expressed herself in this manner apparently when she found RW2 had taken her table without asking her and I do not find this an abuse that would have led to the termination of the Claimant. It is therefore my finding that there was no valid reason to warrant termination of Claimant's services.

15. On issue of due process, the Respondent states that they gave the Claimant an opportunity to apologize over the "abuse" and she refused so they decided to terminate her. No hearing was accorded to the Claimant as envisaged under 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.”

16. There having been no valid reason to terminate the Claimant and due process having not been followed I find the termination of the Claimant unfair and unjustified as provided for under Section 45 (1) & (2) of Employment Act 2007 which states as follows:

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(a) that the employment was terminated in accordance with fair procedure.

17. Having found the termination unfair, I find that the Claimant is entitled to 1 month’s salary in lieu of notice, house allowance not paid as envisaged under Section 31(1) & (2) of Employment Act. The contract never provided that the amount being paid was inclusive of house rent.

18. I also find that the NSSF dues not remitted are payable but having not been itemized, I award nothing on this limb. I therefore award the Claimant as follows:

1. 1 months salary in lieu of notice = 14,118/=.

2. House allowance at 15% of monthly salary x 120 months = 15% x 14,118 x 120= 254,124/=.

3. 12 months salary as compensation for unlawful termination = 12 x 14,118 = 169,416/=

TOTAL = 437,658/=

Plus costs

4. Certificate of Service.

Read in open Court this 19th day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Respondent

Kamuya holding brief for Gomba for Claimant