



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.1438 OF 2014

GRACE MEDIVA ASAMBA
CLAIMANT

VERSUS

AFRICA APPARELS EPZ LIMITED
RESPONDENT

JUDGEMENT

1. The issues in dispute are the wrongful termination of employment; non-payment of terminal dues; and the failure to pay for the unexpired term of employment.

The claim is that the Claimant was employed by the Respondent in January 2014 as a Machinist earning Kshs.18, 807.15 per month. The Claimant also states that her contract of employment was from 2006. That and another contract was to run from 2nd January 2014 to 30th June 2014.

2. The claim is that the Claimant served the Respondent until 30th May 2014 when her contract was terminated without notice and on account of non-performance and this was before the issued contract had expired. That there was no performance appraisal so as to evaluate the Claimant and the resulting dismissal was therefore unfair. The Claimant is seeking compensation for the unexpired term contract; compensation for unfair termination; and a certificate of service.

3. In evidence, the Claimant testified that she commenced work with the Respondent since 16th April 2006 but remained as a casual. She was then issued with a contract for 3 months and graduated to a 6 months contract. Her salary was kshs.18, 000.00 and upon statutory deduction she was paid Kshs.11, 000.00. The Claimant also testified that on 30th May 2014 she was terminated without notice when she was issued with a letter at 4.30m on the grounds that she was not meeting her targets. That there was no prior notice and her contract was due by one months and her dues were not paid.

Defence

4. The defence is that the Respondent admit that they had employed the Claimant on contract basis since 2010 which were renewed subsequently the last being for 2nd January 2014 to 30th June 2014. The claims set out are denied and that the Claimant was lawfully terminated based upon reasonable and justifiable cause set out in the letter of issued and dated 30th may 2014.that all terminal dues were paid and nothing is arsing and the claim should be dismissed with costs.

5. In evidence, the Respondent called Virginia Wanjira the human Resource Manager and who knew and worked with the Claimant who was in mass production as a machinist. That the Claimant was sewing a part of garment – back seam. That the Claimant was not very hard working and ignored instruction from her supervisor Mr Mulatya. The termination of the Claimant was due to her mistakes for not being diligent in her work and despite verbal warnings she failed to meet the quality standards set for her work. This affected the Respondent products as the garments made are for export and required a strict quality check and where there was a mistake, the entire consignment was delayed, removed, or wasted and resulted in huge costs for the entire production line. The Respondent goods were scheduled based on shipments to be made and where there was a delay, the consignment had to be airlifted to beat time that had otherwise been wasted along the production line and this was very costly. That the Respondent is a fair employer and did retain staff who working hard and were able to meet strict deadline. The Claimant relaxed along the production line and therefore affected the work of other employees. The termination was therefore justified and nothing is due in compensation.

6. The Respondent also called Mr William Mulatya, the supervisor of the Claimant while she was employed by the respondent. He testified that the Claimant was under his supervisor sewing back seams and in the chain of mass production the Claimant had a specific role to do the back seams and move the product to the next employee. The Claimant did not meet her target of 150 pieces per hour and ended up doing an average of 100 pieces. He verbally warned the Claimant but she did not improve. The matter was referred to the human resource officer. That the poor work of the Claimant caused wastage and high costs of shipment⁵ and airlifts. Materials were also wasted due to lost quality of goods.

7. Upon consideration of the pleadings, the sworn evidence and the submissions filed by the parties, it is apparent that the Claimant was employed by the Respondent as a Machinist, initially on casual terms and later this was reduced into a written contract. Such contracts were time-bound with the last running from 2nd January 2014 to 30th June 2014.

8. On 30th May 2014 the Claimant was issued with a termination letter on the grounds of continued failure to reach targets of production and resulting in low production for the whole line in the chain the Claimant was placed. The Claimant was further aid to have given poor quality garments resulting to a lot of repairs and total rejections during quality inspections which resulted in the Respondent incurring huge costs.

9. In the letter of termination, the Respondent offered and paid in June 2014 in lieu of notice and the leave days due. The claim is for payment for the unexpired terms contract of one month and compensation for unfair termination.

10. Section 41 of the Employment Act sets out the procedure applicable with regard to an employee who is of poor performance thus;

41. (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.

11. It is therefore not sufficient for an employer to simply state that the employee was of poor performance or failed to meet set targets. Where an employer sets such measures such as setting performance targets for an employee, such a record must be presented and where indeed the employee is shown not to have met the same, the employer must show the efforts put in place to give support to an otherwise poor performing employee. Where such support does not yield any improvement, the employer must then issue notice based on this poor record in performance. Upon prove of such measures, then an employer can claim to be justified in issuing a termination notice. Poor performance is therefore a very serious allegation for an employer to make, as with it, there is a duty to the employee to give support to enhance performance.

12. In this case, the Respondent witness Virginia Wanjira, as the human resource officer of the

Respondent did not set out the support mechanisms that were given to the Claimant before termination. Mr Mulatya testified that he gave the Claimant warnings when she failed to meet the set targets of 150 pieces production in an hour. There is no record setting out how such a target was arrived at via-a-vies other employees similarly situated as the Claimant was. To casually then treat the Claimant and say that she was not working hard and only produced 100 pieces instead of 150, the Respondent failed to meet a crucial element so as to state that the Claimant was of poor performance.

13. The termination of the Claimant therefore lacks a valid reason that the Respondent can be said was justified. The termination was therefore wrong and unfair in the circumstances.

14. On the remedies sought, the Claimant submitted her pay slip for June 2014. With it, notice pay and leave days due were paid. The other claims not addressed are the unexpired term contract period at one month and compensation for wrongful termination.

15. The Claimant had a fixed term contract. Such contract was to expire in a month save for the termination. Such a contract could be terminated by either party giving 28 days' notice. The Claimant was terminated and paid for notice of one month. To thus claim for payment for the unexpired term contract noting the notice pay acknowledged would be double payment under the fixed term contract. Such is declined.

16. Upon the court finding that the Claimant was unfairly terminated as there existed no genuine cause, compensation is due. Section 49 of the Employment Act regulate such compensation. An award of two (2) months' pay in compensation is found appropriate. The claim sets out that the monthly salary was Kshs.18, 807.15 but the fixed term contract sets out such pay as at Kshs.11, 529.00 per month. Upon close scrutiny of the pay slip, indeed the sum of Kshs.18, 807.15 was paid upon the Claimant's termination that included notice pay and leave days due. The award due is therefore computed based on the due salary all being Kshs.23, 058.00.

There was no claim for costs. Such will not be awarded.

Judgement is hereby entered for the Claimant for the sum of Kshs.23, 058.00.

Delivered in open court at Nairobi and signed this 11th day of February 2016.

M. Mbaru

JUDGE

In the presence of:

Court Assistant: Lilian Njenga