



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 420 OF 2015

BETWEEN

HANNAH ILAVUHA ELIJA CLAIMANT

VERSUS

ASHTON APPAREL [EPZ] LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Mwangangi Advocate instructed by Otieno Asewe & Company Advocates for the Claimant

Ms. Opolo Advocate instructed by the Federation of Kenya Employers [FKE] for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 29th June 2015. She states she was employed by the Respondent as a Machinist, through short term renewable contracts, starting July 2015. Her last contract was renewed on 2nd January 2015, and was to run up to 25th June 2015. It was terminated by the Respondent summarily on the 6th May 2015. The Claimant was alleged to have slapped her Supervisor. She feels the dismissal decision was unfair and unlawful, and seeks the following orders against the Respondent: -

- a) 1 month salary in lieu of notice at Kshs. 12,749.
- b) 6 years leave pay at Kshs. 61,783.
- c) 2 months' salary for the balance of the un-expired contractual period.
- d) 12 months' salary in compensation for unfair termination at Kshs. 152,988.

Statements on the day's happenings. She testified on cross-examination that she had worked for 6 years. Peter the Supervisor was to show Gladness how the new stitching style worked. The Claimant was not to show Gladness anything. She stood up, and slapped the Supervisor. She was still on her seat when she slapped the Supervisor. The Supervisor is a tall gentleman. He pulled the seat from the Claimant. The Claimant was angry and slapped the Supervisor. It is not true that the Claimant was about to fall when the Supervisor pulled her seat.

9. Amina had worked for the Respondent for 4 years. She worked as a Machine Operator. The Claimant was expectant at the material time. She was assisting Gladness in production. Amina sat at the Machine behind that from which Gladness worked. Peter was the Supervisor. Gladness was not conversant with the making of a particular garment. She asked for assistance from the Supervisor Peter. Peter asked the Claimant to give him way to access the Machine. The Claimant refused. Peter pulled the Chair the Claimant was sitting on. She stood up and slapped him. There was commotion. Witnesses were called by the Human Resource Officer. The Claimant denied slapping the Supervisor. Amina and others were able to confirm the Claimant slapped Peter. Amina confirmed on cross-examination that she sat behind Gladness at the Production Machines. She witnessed the whole episode. Peter could have made a mistake by pulling the Claimant's seat. He was otherwise polite and respectful to her. He was surprised by her slap, and had raised his arm in retaliation, but restrained himself. There was a commotion. Amina told the Court that the Company normally treats pregnant Employees well. Amina was not called to the disciplinary hearing.

10. Lusweti told the Court he has worked as the Human Resource Officer of the Respondent for 4 years. He was informed by the Production Executive George, and the Supervisor Peter, about the latter being slapped by the Claimant. The information reaching Lusweti was that Peter asked the Claimant to give way for Peter to show Gladness a certain operation. The Claimant resisted, stood up and slapped Peter. Lusweti called the Claimant the same day and issued her letter to show cause. She replied the same day and denied slapping Peter. Lusweti called Gladness and Amina who recorded statements stating what they witnessed. He went on to call a disciplinary meeting on the 5th May 2015. She was heard and the proceedings recorded, as shown in the minutes contained in the Respondent's appendix 5. She was dismissed on the 6th May 2015. Reasons for the decision were given in the dismissal letter. She was offered final dues at Kshs. 4,541. She was not paid notice pay, as she was summarily dismissed. Pay slips indicate she sold her annual leave days. Compensation is not merited.

11. Cross-examined, Lusweti testified the incident took place on 30th April 2015, around midday. He was in his office. The Claimant was brought to him. He listened to her for about 1 hour. The Machine had been assigned to Gladness. The letter to show cause indicates the Machine was assigned to the Claimant. The Claimant could not stitch because she was pregnant. Letter to show cause is dated 4th April 2015. Hearing was on the 5th May 2015. The Claimant was invited verbally. She was not operating the Machine at the time. She did not attend the hearing in the company of a person of her choice. 2 days were sufficient for her to be heard and dismissed. Lusweti enquired from Peter what happened. He did not think it necessary to record his statement. Lusweti concluded his evidence with the clarification that where the Claimant used to sit, there was a Machine, which she was not using at the time. Peter attended the disciplinary hearing, and narrated the incident.

12. The Court has not been able to trace any Submissions filed by the Respondent.

13. The issues as understood by the Court are: was the Claimant's contract of employment terminated by the Respondent for valid reason or reasons, as required under Section 43 and 45 of the Employment Act 2007?; was she treated fairly in the process leading to the decision; and does she merit the prayers sought?

The Court Finds: -

14. The Claimant was employed by the Respondent apparel Company as a Machine Operator in July 2009. Her employment was terminated by the Respondent on 6th May 2015 by way of summary

dismissal, after she allegedly slapped her Supervisor Peter. She earned a monthly salary of Kshs. 12,749 as at the time of termination. It is accepted by the Parties that at the time of termination, the Claimant was 8 months pregnant.

15. Evidence from both sides left the Court with the impression that the Claimant lost her employment after an unfortunate altercation with her Supervisor Peter. She was sitting next to Gladness, assisting in arranging the garments as they were stitched by Gladness. She was not at the time working on her own Machine, seemingly having been assigned the lighter duties on account of her advanced pregnancy.

16. Peter the Supervisor wished to instruct Gladness on a new stitching application. As the Claimant was seated next to Gladness, he asked her to give way, so that he could access Gladness.

17. Although Amina and Gladness testified Peter was polite in making his request, they also stated Peter pulled the Claimant from the seat she was occupying, after she had refused to make way. This in the view of the Court was provocative, and not the proper way, for a Gentleman to treat a pregnant Lady.

18. Employees and their Supervisors are supposed to exhibit mutual respect for each other. Communication should be civil. In a case where the Employee is 8 months pregnant, the Supervisor would be expected to exercise a higher degree of understanding than was exhibited by Peter, in dealing with the Claimant. He pulled her from her seat in anger. He overlooked she was 8 months pregnant, and susceptible to anger and injury. There were fellow Ladies around, whose assistance in approaching the volatile Claimant, Peter should have sought. He opted to play hardball with her, and ended up with a slap.

19. The Court does not condone violent behaviour by Employees towards their Superiors. Section 44 [4] of the Employment Act 2007, commands Employees to submit to the instructions of their Employers, and shun disrespectful conduct. The Claimant had the obligation to obey the command of her Supervisor, and not to show disrespect to Peter. She not only disregarded his request to give way when asked to do so; she slapped Peter in front of other Women at the workplace. She created a commotion.

20. The law also requires the instructions of the Superior to be reasonable. The conduct of the Employer, like that of the Employee should be respectful. Peter's own act of pulling the pregnant Claimant from her seat, casts doubt in the mind of the Court, as to whether his instructions and conduct were reasonable.

21. When called upon to resolve the altercation, the Human Resource Officer Lusweti, does not seem to have taken into account the Supervisor's role in the incident. He did not record any statement from Peter. He did not consider the Claimant's maternal condition. He does not seem to have been appalled at the Supervisor's violent conduct.

22. The Court is of the view that consequently, it was not safe to conclude that the Claimant engaged in insubordination by declining the instructions given by Peter; and by slapping Peter. In her response to the letter to show cause, the Claimant stated it was the second time Peter pulled her out the chair. At the disciplinary hearing, she alleged Peter slapped her. She denied slapping him. There was need to investigate the Supervisor's conduct, before condemning the Claimant. The reasons given in the letter of summary dismissal did not therefore, amount to valid reasons, under Section 43 and 45 of the Employment Act 2007.

23. The Respondent states procedure was fair. The Claimant was issued the letter to show cause why she should not be disciplined, on the 4th May 2015. This was the same day she slapped Peter. She replied the same day stating Peter had pulled her from her seat on two occasions. She stated she pushed him back. A disciplinary panel convened on the 5th May 2015.

24. The disciplinary proceedings are captured in a single page. It is not apparent on the face of this page whether the Claimant was accompanied by a workmate of her choice, or a shop floor Trade Union representative. The proceedings do not reveal if there were any formal charges read to the Claimant. The objectivity of the Panel is doubtful. The Chair, Human Resource Assistant Bosire, opens up the hearing by asking, "*Hannah, tell us why you slapped your Supervisor?*" The Panel proceeded from a point of

prejudgment. The act of Peter in pulling the Claimant from her seat did not appear to concern the Panel. While an attempt was made by the Respondent to give semblance of fairness in conducting the disciplinary hearing, the Court finds Section 41 and 45 of the Employment Act were not observed in full. The Panel members approached the task before them, with preconceived mindsets.

25. Termination did not meet the standards of fairness under Sections 41, 43 and 45 of the Employment Act. It was unfair.

Remedies

26. ***The Claimant is granted 1 month salary in lieu of notice at Kshs. 12,749 as prayed.***

27. Compensation for unfair termination is merited under Section 12 of the Employment and Labour Relations Court Act, and Section 49 of the Employment Act. Considering the Claimant contributed to the circumstances leading to her summary dismissal; and considering the period left in her contract and the aggregate period worked; ***the Court grants her compensation at 5 months' salary, amounting to Kshs. 63, 745.***

28. She does not merit salaries for the unexpired contractual period, having been compensated above for premature termination of contract.

29. The Claimant prays for annual leave pay for the 6 years worked, computed at Kshs. 61,783. Clause 8 of the contract dated 2nd January 2015 offered the Claimant 2 days leave for every month worked. Based on the calendar 12 months in a year, the Court understood this to afford the Claimant 24 days of annual leave each year. She was not clear in her evidence on annual leave. Her pay slips show she sold her annual leave days to the Respondent on certain occasions. She ought to have been forthright. She should have shown the Court on which years she was paid in lieu of leave, or contradicted these pay slips, rather than make a blanket prayer for annual leave pay for the entire period.

30. In all the Court is satisfied termination was unfair and grants orders, summarized as follows:-

a) Termination was unfair.

b) Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 12,749 and 5 months' salary in compensation for unfair termination at Kshs. 63,745- total Kshs. 76,494.

c) Parties shall meet their costs of the Claim.

Dated and delivered at Mombasa this 27th day of July 2016.

James Rika

Judge