



REPUBLIC OF KENYA



**Chidangaya v Hantex Garments Ltd (Cause 437 of 2015)
[2016] KEELRC 1872 (KLR) (9 September 2016) (Judgment)**

Pricilar Kobe Chidangaya v Hantex Garments Ltd [2016] eKLR

Neutral citation: [2016] KEELRC 1872 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 437 OF 2015
ON MAKAU, J
SEPTEMBER 9, 2016**

BETWEEN

PRICILAR KOBE CHIDANGAYA CLAIMANT

AND

HANTEX GARMENTS LTD RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent in March 2013. The respondent admits that she dismissed the claimant but denies that the said dismissal was unfair. She avers that the dismissal was because of the claimant's gross misconduct and as such it was lawful and justifiable under the Employment Law.
2. The suit was heard on 25.5.2016 when the claimant testified as CW 1 but the respondent did not attend Court to defend herself. After the hearing the claimant filed written submission.

Claimant's Case

3. CW 1 told the Court that she was employed by Kenya KNIT Garments (EPZ) Ltd as a Trimmer on 8.1.2006. She worked continuously receiving her wages every two weeks in arrears until 2008 when she started receiving a monthly pay. She signed several employment contracts which were retained by the employer. She however produced the contract letters dated 3.5.2010 and 23.5.2011 as exhibit 1 and 2 respectively.
4. Later the employer changed her name to Hantex Garments (EPZ) Ltd, the respondent herein and gave her the Appointment Letter dated 15.3.2012 (Exhibit 3). Her new job title was Helper but the salary remained Kshs 4,047 plus House Allowance of 15% of the basic pay.



5. On 18.3.2013 CW 1 and other workers were injured while on duty and she subsequently filed suit against the respondent to recover compensation for the injuries suffered. The employer was not pleased with the suit filed by the claimant and she dismissed her from employment. CW 1 denies that she committed any misconduct that led to her dismissal as alleged in the defence.
6. The claimant contends that the termination was unfair because the reason for termination was because she had lodged a suit against the employer to recover damages for the said occupational accident. She therefore prayed for compensation for unfair dismissal. She also prays for terminal dues that accrued to her during her 7 years' service to the respondent. She maintained that Kenya KNIT Garments (EPZ) Ltd and the respondent are one and the same person who just changed her name.

Analysis and Determination

7. There is no dispute that the claimant was employed by the respondent until March 2013 when she was dismissed by the respondent. The issues for determination are:
 - (a) Whether the claimant was employed by the respondent from March 2012 or January 2006.
 - (b) Whether the termination of the claimant's employment contract was unfair and unlawful.
 - (c) Whether the relief sought should be granted

Commencement

8. The claimant has contended that she was employed by the respondent in January 2006 while operating as Kenya KNIT Garments (EPZ) Ltd. That later the respondent changed her name to Hantex Garments (EPZ) Ltd and appointed her as a Helper on 3.1.2012. The respondent has denied that she is the same person as Kenya KNIT Garments (EPZ) Ltd. She contended that she only employed the claimant from 15.3.2012 to March 2013 when she dismissed her for gross misconduct.
9. After careful consideration of the pleadings and the evidence, it is clear that the claimant was employed by the respondent between 3.1.2012 and March 2013. The appointment letter dated 15.3.2015 and produced as exhibit 3 indicates the effective date of appointment as 3.1.2012. There is nothing in the said letter to suggest that the appointment was to operate as a continuation of the previous appointment by Kenya KNIT Garments (EPZ) Ltd.
10. There is also no evidence adduced to prove that the two employers were actually one and the same entity which changed the names. The burden of proving that Kenya KNIT Garment (EPZ) Ltd changed her name to Hantex Garments (EPZ) Ltd lies on the claimant. That burden was not discharged by documentary evidence possibly from the Companies Registry. Consequently, I find on a balance of probability that the respondent is a separate and independent legal entity from Kenya KNIT Garments (EPZ) Ltd. Flowing from the foregoing finding, I make a further finding that the claimant only worked for the respondent from 3.1.2012 when she was dismissed.

Unfair dismissal

11. The claimant pleaded and testified that she and other colleagues were injured while on duty on 18.3.2013. That on 23.3.2013 she served a demand notice to the respondent through her Lawyer Mr. Njiru and later filed a suit that is still pending before the Subordinate Court. That as a result, the respondent dismissed her from employment and only paid her wages for the 18 days worked before the accident. CW 1 contended that the reason for the dismissal was not fair and prayed for compensation.



12. The respondent did not tender any evidence to rebut the foregoing contention by the CW 1. She also did not tender any evidence to prove that the claimant had committed gross misconduct that justified termination of her services. She also never tendered any evidence to prove that before dismissing the claimant was given a fair hearing in respect of the said misconduct in the presence of a fellow employee or shop floor common representative of her choice.
13. Under Section 45 (2) of the Employment Act, termination of the employee's contract for employment is unfair unless the employer proves that the termination was founded on a valid and fair reason and that it was done after following a fair procedure. Fair procedure is provided for under section 41 of the Act which basically involves according the employee a chance to defend herself before termination. That burden of proving the reason for the dismissal and the procedure followed has not been discharged by the respondent. I therefore find on a balance of probability that the dismissal of the claimant's contract of employment was unfair and unjustified.

Reliefs

14. In view of the foregoing finding I make the determination that the termination of the claimant's employment was unfair, unlawful and unjustified.
15. In view of the appointment letter dated 15.3.2012, I decline to make declaration that the claimant was entitled to one month leave after every 12 months. The said letter entitled the claimant to only 21 days leave per year.
16. Under section 49 (1) (a) and (c) the claimant is awarded Kshs 7,000 being one month salary in lieu of notice and further Kshs 84,000 being 12 months' salary as compensation for the unfair and unjust dismissal. In awarding the 12 months' salary I have considered the fact that the claimant did not contribute to the dismissal by her misconduct. I have also considered the fact that the reason for the dismissal was unfair under section 46 (h) of the Employment Act. The said provision states that the following does not constitute a fair reason for dismissal—
 - h. "An employee's initiation or proposed initiation of a complaint or other legal proceedings against the employer, except where the complaint is shown to be irresponsible and without foundation".
17. The claim for 7 years leave is declined for the same reason the claimant did not prove that she was employed by the respondent for 7 years. I will therefore award leave for one year and 2 months worked on pro-rata basis. Based on 21 days annual leave, I have assessed the leave earned as 24.5 days. I therefore award the claimant $Kshs\ 7,000 \times 24.5 = Kshs\ 6,596.15$
18. The claim for gratuity for 7 days is declined for lack of evidence. The claim is neither supported by the contract of employment nor the law.

Disposition

19. For the reasons stated above, I enter judgment for the claimant declaring the termination of her employment unfair and unlawful and awarding her Kshs97,596.15 plus costs and interest.

JUDGMENT DATED, DELIVERED AND SIGNED THIS 9TH DAY OF SEPTEMBER 2016

O. MAKAU

JUDGE

