



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 773 OF 2015

JOSEPHINE NZIOKA.....CLAIMANT

VS

INSULAE AFRICANUS LTD t/a

PANGONI BEACH RESORT.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for termination dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 5.8.2015. The respondent has admitted that she terminated the claimant's services due to her gross misconduct. She avers that although the misconduct by the claimant warranted summary dismissal, she exercised her discretion by offering to pay salary in lieu of the notice upon clearance.

2. The suit was heard on 30.6.2016, when the claimant testified as Cw1 and the respondent called Mr. Kennedy Kirigia Matiki and Mr. Julius Mwaringo as Rw1 and 2 respectively. Before the hearing started, the parties produced all the documentary evidence filed by consent. The parties also filed written submissions after the hearing.

Claimant's case

3. Cw1 was employed by the respondent on 15.2.2011 as a Pastry Cook earning kshs.15,176 as basic salary, kshs.6,647 House Allowance plus service charge which was fluctuating. She worked well until December 2014 when she fell into trouble with Rw1 who was her Supervisor, when she refused to support him in dismissing their colleague Peter. Thereafter Rw1 vowed to frustrate her and ensure she was also dismissed.

4. Cw1 explained that, Rw1 executed his threat by changing her shifts and started to talk ill about her with her colleagues in order to put a wedge between her and them. In response she reported the matter to the HR Manager who later called her, the Rw1, three other cooks and three cleaners (stewards) to a meeting in June 2015 but Rw1 defied and said he can only case before the General Manager (Rw2).

5. Cw1 returned to work and continued until 12.7.2015 when she was suspended until 20.7.2015 by a Memo at the kitchen. Cw1 went to report to the HR Manager who told her to comply with the suspension order and return on 20.7.2015. Cw1 complied and returned on 20.7.2015 but the HR manager told her that

she had a case to do before the General Manager. The hearing was done on 22.7.2015 where she was charged with the offence of disrespecting the supervisor and burning pastries but she denied the offence. She was however dismissed on 5.8.2015 by letter signed by the General Manager and the HR manager. In her view, the termination was unfair because she was not represented by union official during the hearing. She prayed for one month salary in lieu of notice, compensation and service pay.

6. On cross examination she admitted that what she referred to as suspension was off days communicated by a memo at the Notice Board.

Defence case

7. Rw1, is the respondents' kitchen supervisor since 2012. He started that in June and July 2015, Cw1 started insubordinating him by refusing to take instructions in relation to her duties at the kitchen. That she deliberately and negligently performed her duties by overcooking and even leaving pastries to burn up in the oven. In addition she became rude to him and insulted through SMS and also verbally using derogatory words.

8. Rw1 reported the matter to the HR manager on 22.7.2015 who escalated the matter to the General Manager on 30.7.2015 after preliminary hearing. The General Manager heard the case again and considered the SMS by Cw1 and the evidence that the operation at the kitchen was getting worse and proceeded to terminate claimant's services. Rw1 maintained that the termination of the claimant's services was justified. He denied the allegations that he had enlisted the support of the claimant to assist him to dismiss Peter. He however admitted that Cw1 was not represented by union officials during the hearing and that he had not been served with warning letter before then.

9. Rw2 is the General Manager for the respondent. He started that on 30.7.2015 the HR Manager Mr. Chai, Rw1 and Cw1 came to his office with a dispute that had arisen between Rw1 and Cw1. That he listened to their representations and read the SMS by the Cw1 to the Rw1 which he found to be disrespectful and an indication that Cw1 was no longer taking instructions from Rw1. He then did further investigations and discovered that Cw1 was burning up food for clients in the oven or delaying orders. He then formed the opinion that the claimant's employment was no longer in line with the operational requirements of the respondent's business. As a result he summarily dismissed her on 5.8.2015 and directed her to clear by handing over all the company property in her possession in order to get her terminal dues. He denied that the claimant was entitled to compensation because she was fairly dismissed for gross misconduct.

10. On cross examination Rw2 contended that he gave the claimant the right to call union official or any other employee to accompany him during the hearing but she declined. That she was also rude to him during the hearing. That after dismissal the claimant was paid all her accrued dues and she offered 2 months' salary in lieu of notice payable after clearing and handing over company property. Rw2 maintained that the salary in lieu of notice will be paid after the clearance as stated in the letter in the letter dated 28.8.2015. He however contended that Cw1 was disqualified from claim of gratuity under the Collective Bargaining Agreement (CBA) because she served less than 5 years.

Analysis and Determination

11. There is no dispute that the claimant was employed by the respondent as a Pastry Cook from March 2011 and continued as such until 5.8.2015 when her services were terminated. The issues for determination are:-

(a) Whether the termination of the claimant's services was unfair.

(b) Whether the reliefs sought should issue.

Unfair termination

12. Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. In this case the claimant has contended that he was dismissed summarily for alleged gross misconduct of disrespecting her supervisor but she has denied that offence. She has also contended that she was denied a fair hearing because she was not allowed to be accompanied by her union official.

13. Rw1 and Rw2 have however demonstrated by evidence that in deed the claimant misconducted herself by disrespecting and using abusive words against the Rw1. That under section 44 of the Employment Act, the respondent was entitled to summarily dismissal of the claimant for the said misconduct. That Rw1 and Rw2 have also proved that the claimant was explained the offence she had committed and was also given a chance to air her defence. That she was also given a chance to call a union official or any other employee of her choice during the hearing but she rudely refused and proceeded without any representation. In consideration of the defence evidence, I find that the hearing was fair and as required by the law.

14. Under section 41 of the Employment Act, before the employer dismisses his employee for misconduct under section 44 of the Act, the employer must first explain to his employee the reason for which he contemplates to dismiss the employee. The said proceeding should be in a language of the employees understanding and must be in the presence of a shop floor union representative or a fellow employee of his choice and thereafter, the employee and his chosen companion must be allowed to air their defence for consideration before the decision to dismiss is made.

15. Having found that the respondent has proved that the summary dismissal of the claimants was founded on a valid and fair reason and that it was done after following a fair procedure, I find and hold that the respondent has discharge her burden of proving that the termination of the claimant was fair as required under section 45(2) of the Employment Act.

16. The foregoing notwithstanding, the respondent responded to the demand letter by her letter dated 28.8.2015 starting that:-

“Your letter dated 18.8.2015, relevant to the above has reference. We wish to admit as follows:-

- 1. Josphine Nzioka was terminated and not dismissed after sending disrespectful messages to her superior.**
- 2. She was given two months’ pay in lieu of notice. The one month’s claim is not appropriate.**
- 3. She is not entitled to gratuity as she has not worked for five years or more.**
- 4. She is not entitled to compensation for wrongful termination”.**

17. In addition to the foregoing undertaking, Rw2 stated in his testimony that the respondent stands by the contents of the said letter that she will pay two months’ salary in lieu of notice after the claimant completes her clearance and handing over of the company property which are in her possession. After considering the letter dated 28.8.2015 and the testimony by the Rw2, I find on a balance of probability that the respondent rescinded the decision to dismiss the claimant and/or reduced the same to a normal termination by which he offered to pay her 2 months’ salary in lieu of notice.

Reliefs

18. Having found herein above that the summary dismissal of the claimant was fair and further that the respondent later reduced it to a normal termination, I make a finding that the claimant is disqualified from the claim for compensation under section 49 of the Employment Act. She will however get kshs.43,646 being two months’ salary as undertaken by the employer despite the pleadings which she filed without the help of a lawyer. She must however first clear and hand over all the respondent’s property if she has any.

The claim for gratuity is dismissed because the claimant has not adduced any evidence to support it.

Disposition

19. For the reasons stated above, the suit is dismissed. The claimant will however be paid **kshs. 43,646** upon meeting the condition given by the respondent of clearing and handing over all the respondents' property in her possession. Each party will bear her own costs.

Signed, dated and delivered this 14th October 2016.

ONESMUS MAKAU

JUDGE