



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 506 OF 2015**

**EDINAH NYABOKE GWACHI.....CLAIMANT**

**VS**

**KAPRIC APPARELS (EPZ) LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a case of premature termination of a fixed contract by the employer. The Claimant avers that the premature termination was wrongful and unfair because it was both substantially and procedurally unfair. Consequently she prays for damages amounting to Kshs. 274,389 made up of one month salary in lieu of notice, salary for the unexpired period of the contract term, compensation for unfair termination, and 50 leave days outstanding.

2. The Respondent admits that she had employed the Claimant and that she terminated the Claimant's employment for stealing her property from the work place. It is the defence case that the said termination was fairly and lawfully done as the Claimant was accorded a fair hearing and was paid all her rightful dues. She therefore prayed for the suit to be dismissed with costs.

3. The hearing of the suit was dispensed with and the parties agreed to dispose of the suit by written submissions on the basis of the pleadings, witness statements and the documentary evidence.

**Claimant's case**

4. The claimant stated in her statement that she was employed by the respondent on 26.2.2013 as a Helper earning a salary of Kshs. 11,970 per month. That later she was give short term contracts with the last one starting on 2.1.2015 and ending on 31.12.2015. That she worked well until 11.5.2015 when her services were terminated by the respondent without payment of terminal and contractual dues. That the termination was not fair because it was not founded on genuine or true reason and she was not accorded any opportunity to defend herself.

**Defence Case**

5. The respondent filed statements from two witness namely, Mr. Gabriel Okeda Were and Mr. Robert M. Nguga. Mr. Were is the HR Manager for the respondent. He confirmed that the claimant was employed by the respondent. That on 11.5.2015 at 5.30pm the claimant was intercepted at the main gate by the security while going home with six pieces of fabric stolen from the respondents factory. That when she

was told to stand aside for an explanation, she forced her way out and went home. That on the following day, he interrogated her and she admitted both verbally and in writing, the offence of taking away the fabric from the factory for her own use without permission. That she also admitted the offence of disobeying the security orders. That he explained to her that the offences amounted to gross misconduct and that she was liable for summary dismissal. That he also told her that she had right of appeal through the Shop stewards. That a meeting was later convened to discuss the matter further and the claimant was allowed to invite her representative so that she may be given a fair hearing. That she was then paid her salary for the 11 days worked upto 11.5.2015 plus 8 days leave outstanding less statutory deductions.

6. Mr. Nguga stated on 11.5.2015 at 5.36 pm, the claimant was searched by the security Guard, Madam Susan Nyangau and was found with several pieces of fabric sewed with overlock style and then she was handed over to him for interrogation. That she dropped the fabric down and he requested her to stay behind to solve the matter but she forced her way out. That he tried to grab her by the hand but he let go when the other ladies started making noise. That the claimant hit him with a stone and he reported the matter to Mr. Were, Mr. Hitesh and Mr. Rakesh to take a deterrent action against her.

### **Analysis and Determination**

7. After considering the pleadings, evidence and submissions, it is clear that the claimant was employed by the Respondent as Helper for a renewable one year fixed term contract. It is not in dispute that her contract was terminated on 11<sup>th</sup> May 2015 when there were still 8 months remaining before the lapse of the contract. There is further no dispute that the termination was done verbally and the reason cited was stealing pieces of fabric from the respondent's factory. The issues for determination are whether the premature termination of the Claimant's contract was unlawful, unjust and unfair, and whether the reliefs sought by the Claimant should be granted.

### **Unlawful, unjust and unfair termination**

8. Under section 45 (c) of the Employment Act, termination is unfair if the employer fails to prove that it was founded on valid and far reason and that it was done after following a fair procedure.

### **Reasons for the termination**

9. The claimant has denied that she was found in possession of pieces of fabric from the respondent's factory. The evidence by the Mr. Nguga, an eye witness confirms on a balance of probability that the claimant committed the offence of taking away the said pieces of fabric from the respondent's factory. The burden of explaining that the removal of the pieces of fabric from the factory was lawful and that she never disobeyed security orders on the claimant but she failed to discharge the same by evidence. I therefore find that the respondent has proved that the reasons for dismissing the claimant were valid and fair within the meaning of section 43, 44, 45 and 47(5) of the Employment Act. No employer is bound to continue employing a thief.

### **Procedure**

10. The claimant contended that she was not accorded any chance to defend herself. Mr. Were however, stated that he interrogated the claimant on 12.5.2015 and she admitted the offence and thereafter he explained to her that the offence amounted to gross misconduct and that she was liable for summary dismissal. That he further told her that she had a right of appeal through the Shop Stewards. That later a meeting was convened to hear the claimant on the alleged misconduct and that she was allowed to invite a representative to the meeting. After careful consideration of the evidence by both sides, I find that the respondent has not proved on a balance of probability that she followed a fair procedure before dismissing the claimant from service.

11. Under section 41 of the Employment Act, an employer is barred from dismissing his employee on ground of misconduct before first explaining to her, in a language she understands and in the presence of Shop Floor Union Representative or a fellow employee of her choice, the reason for the intended

dismissal and the accord them a chance to air their views for consideration before the dismissal is decided. In this case no hearing was done because defence has not proved that. Although Mr. Were stated in his statement that a meeting was convened to hear the claimant after the dismissal, the date of the meeting, the venue and the attendants were not stated.

12. Under section 45 (2)( c) of the employment Act, termination of an employee's contract of employment is unfair if the employer fails to prove that it was terminated after following a fair procedure. In this case the said burden of proving procedural fairness has not been discharged on a balance of probability and consequently, the court finds and holds that the termination of the Claimant's employment was unfair. The first issue is therefore answered in the affirmative.

### **Reliefs**

1. The Claimant has prayed for prays for damages amounting to Kshs. 274,389 made up of one month salary in lieu of notice, salary for the unexpired period of the contract term, compensation for unfair termination, and 50 leave days outstanding. In view of the finding that the premature termination of CW1's employment was procedurally unfair, the court declares it unlawful and unfair and proceeds to award damages to the claimant. She will get kshs.95808 being salary for the 8 months as compensation for the unfair and premature termination of her employment contract. In making the said award I have considered the claimants reasonable expectation that she was to earn that money during the remainder of her fixed term contract period. Having given her the maximum amount she expected to earn, I will not award any salary in lieu of notice.

2. The claimant also prayed for 50 days outstanding but no particulars or evidence was adduced to prove the same. The defence has produced evidence to prove that the claimant had only 8 day leave outstanding and that she was paid kshs.3192 for the same. The said evidence from the defence was not contested by the claimant as such I dismiss the claim for leave.

### **Disposition**

3. For the reasons stated above judgment is entered for the Claimant in the sum of **Kshs. 95808** plus costs and interest.

**Signed, dated and delivered at Mombasa this 18th day of November 2016.**

**O.N. MAKAU**

**JUDGE**