



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1822 OF 2013

EVERLYNE MALESI LUSASI CLAIMANT

VERSUS

METAL CROWNS LIMITED RESPONDENT

M/S. Guserwa for claimant

Mrs Bukachi for respondent

JUDGMENT

1. The suit was commenced by a statement of claim filed on 14th November 2013.
2. The claimant seeks compensation for unlawful and unfair termination of employment. The claimant had initially sought reinstatement with payment of all arrear salary but this prayer was withdrawn during trial.
3. The claimant also seeks payment of terminal benefit set out under paragraph 18 of the statement of claim to wit;
 - a. Payment in lieu of notice Kshs.42,743;
 - b. Payment in lieu of 18.44 untaken leave days Kshs.11,266.84;
 - c. Six days salary for July 2013 Kshs.3,666;
 - d. Service gratuity for twelve (12) years at 25 days salary for each completed year of service per the CBA – Kshs.128,230.

Facts of the case

4. The brief facts of the case is that the claimant was employed as a casual labourer by the respondent in the year 2001. On 25th September 2009, the claimant was given a letter of appointment as a kitchen attendant/tea lady which contains the terms and conditions of service. In terms thereof the claimant was covered by Collective Bargaining Agreement between the respondent and the union.
5. The claimant worked continuously from the year 2001 until 8th July 2013 when her employment was

terminated on grounds that she was found with kitchen items by the security officer at the gate on her way home. At the time the claimant earned a gross salary of Kshs.12,823. She also received special allowance from time to time depending on the number of hours worked.

6. The claimant denies that she was involved in any theft at all, stating that on the material day she was searched and was not found with anything. The claimant states that she was not given a fair hearing hence employment was wrongly terminated.

7. The claimant prays for the reliefs set out herein before.

Defence

8. The respondent filed a response to the statement of claim on 16th January 2014 in which it denies that the employment of the claimant was unlawfully terminated. The respondent admits the salary paid to the claimant and the duties the claimant performed from the year 2003 which included making tea, washing utensils, floors and sometimes cooking.

9. The respondent avers that on 6th July 2013 upon suspicion of having carried stolen food items from the respondent's kitchen, the claimant was searched and she was found in possession of the said items. The respondent denies that the claimant was thereafter unlawfully detained as alleged by the claimant or at all.

10. The respondent admits that the claimant declined to pick her final cheque.

11. The respondent prays that the suit be dismissed with costs.

12. The respondent called RW1 Stephen Mureithi Njeru, who works for the respondent as a Human Resource Manager.

13. RW1 told the court in his evidence in chief that he knew the claimant well and that the claimant was caught with kitchen food stuffs and was served with a notice to show cause dated 8th July 2013. That the notice was copied to management and the union. The claimant did not respond to the notice to show cause and on 8th July 2013, the claimant was issued with a letter of termination.

14. RW1 said that the claimant's gross pay was Kshs.17,950 and during the pendency of the case, the respondent paid the claimant terminal benefits in the sum of Kshs.135,632.

15. RW1 under intense cross examination by Guserwa, Advocate for the claimant admitted that the claimant was not found in possession of any food stuffs on the material day. That the food stuff was found with one Mr. Jackson who worked with the claimant. That the food stuff was recovered from Mr. Jackson by a security personnel by the name of Nicholas at 4.30 p.m. on 6th July 2013. RW1 admitted this was the entry on the occurrence book for the day. RW1 also admitted that the claimant was not mentioned at all in the occurrence book. RW1 added that the respondent suspected that Jackson was in cahoots with the claimant because the two worked together.

16. RW1 denied that he wrote the notice to show cause and the letter of termination together. The two letters are dated the same day.

17. Respondent prays the suit be dismissed with costs.

Determination

18. The respondent duly paid the terminal benefits due to the claimant in the sum of Kshs.135,632 net, while the suit was on-going. The only issue for determination is whether the termination of employment of the claimant was for a valid reason and if the termination was in terms of a fair procedure.

19. From the testimony of RW1 under cross examination it is apparent that the employment of the claimant was terminated on the basis of mere suspicion. RW1 admitted that the claimant was not found in possession of any stolen food stuff. The allegation in the letter of termination that “*on 6th July 2013 you were found at the main gate with kitchen items believed to have been taken from the company kitchen where you work*”, is simply not true.

20. The employment of the claimant was therefore terminated for no valid reason.

21. Furthermore, the notice to show cause dated 8th July 2013, asked the claimant to cease carrying out any duties until she made an explanation to the allegation that she was found in possession of food stuffs on 6th July 2013, yet, the claimant received a letter of termination on the same day. It is apparent that the respondent did not adhere to Section 41 of the Employment Act, 2007 by not allowing the claimant opportunity to explain why her employment ought not to be terminated in a duly constituted disciplinary hearing in the presence of a colleague or union official selected by the claimant.

22. The termination was unfair in terms of Section 45 (1) as read with Section 45 (2) (a) (b) and (c) of the Employment Act, 2007. It was not for a valid reason and was not effected in terms of a fair procedure.

23. The claimant is therefore entitled to compensation in terms of Section 49 (1) (c) as read with Section 49 (4) of the Act.

24. The claimant had served the respondent for over twelve (12) years. The claimant was falsely accused of theft, which fact injured her feelings and reputation. She lost her means of livelihood without notice and without a hearing and she suffered loss and damage. The claimant did not contribute to the termination. The termination was aggravated by the failure by the respondent to pay her terminal benefits by depositing her cheque with the labour office or paying the money in her account.

25. The claimant initially wished to be reinstated to her job but due to passage of time had changed her mind and wished to be compensated.

26. This is a proper case for the court to award maximum compensation to the claimant being equivalence of twelve (12) months’ salary in the sum of Kshs.153,900.

27. Judgment is entered in favour of the claimant for;

- a. Kshs.153,900 compensation;
- b. Interest at court rates from date of judgment till payment in full;
- c. Costs of the suit.

Dated and delivered at Nairobi this 20th day of December, 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE