



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1478 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 17th July, 2015)

ESTHER MWENGECLAIMANT

VERSUS

ARFA ARFA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Esther Mwenge filed this Claim on 11/9/2013 in person. Claimant claims that she was unlawfully dismissed from duty by Respondents and seeks damages for unlawful dismissal, payment in lieu of notice, holding pay and gratuity.

2. It is the Claimant's case that she was employed by the Respondent on 1/4/2012 as a cashier earning a monthly salary of 16,299/=. She served the Respondent diligently and was confirmed in employment on 1/10/2012 her salary rising to 19,361/=. She continued with the dedication and commitment to work and was even nominated and rewarded by the Respondent's director for being the most productive and hardworking employee in December 2012.

3. On 1/7/2013, however, it is the Claimant's case that she was dismissed by the Respondent on grounds and reasons that are unfounded, malicious and baseless. It is her position that before the dismissal, she had not received any warning letter concerning her conduct at work and neither had she been given any fair hearing to consider the merits or demerits of her defence.

4. The Claimant also avers that she always worked for longer hours than the prescribed 8 hours but was never paid overtime. She also contends that she never went for leave during the said period of employment.

5. The Claimant therefore prays for judgment against the Respondent as per paragraph 4.0 of her claim all totaling 771,295.90/=. She also prays for damages and costs of this suit.

The Claimant exhibited her appointment letter, pay slip for April 2013, February 2013 and January 2013 and attendance list as exhibits.

6. The Respondent filed his defence on 27/9/2011 through the firm of Wambugu & Muriuki Advocates. The Respondent denies unfairly terminating the Claimant and it is their averment that they dismissed the Claimant as a result of her failure to adhere to the Respondents Company clearly communicated policy by failing to enter her sales plus acts of dishonesty and failing to obey lawful orders or directions given to her.

7. The Respondents also contend that they had given the Claimant several verbal warnings as a result of her failure to adhere to the set out company policy. On overtime, the Respondent avers that the Claimant was paid accordingly wherever it arose.

8. Upon considering the evidence of the parties plus their submissions thereof, the issues for consideration are as follows:

1. ***Whether there were valid reasons to warrant dismissal of the Claimant.***
2. ***Whether due process was followed before Claimant's dismissal.***
3. ***Whether the Claimant is entitled to remedies sought.***

9. According to the termination letter given to the Claimant – Appendix AA L 4 (a), the reason given for termination was the Claimant's deliberate behavior inconsistent with Respondents policy by not punching all sales in the system at the point of sale and also not giving customers' receipts as it should be as per the company policy.

Other than stating this concern in their defence the Respondents called one witness who reiterated the contents of the defence. The witness also stated that the system the Respondent uses records all transactions of sale and the time. It also shows any items deleted and the system detected it as fraud.

The witness also confirmed that the Claimant worked well and in June 2013, she was the employee of the year.

10. The Claimant denied disobeying Respondents policy. The Respondents had alleged theft of their money by the Claimant but at the same time allege failure to account for some stocks and errors. It is not clear whether the reason for dismissal was theft or failure to enter sales in the register or incurring losses.

In all the allegations, proof off the same is mandatory as envisaged under Section 43 of Employment Act 2007:

1. ***In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

11. These reasons must be proved and must not remain mere allegations. The best way to prove the allegations would have been to give the Claimant a hearing as envisaged under Section 41 of Employment Act which states as follows:

(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

This was never done.

12. Other than the Employment Act, the Respondents own Terms and Conditions of Service stated as follows:

“2.3 Procedure in the event of misconduct

At all states, the Employee will be notified of the complaints against them and called to a disciplinary meeting by the General Manager where the Employee will have an opportunity to give an explanation for the matter complained of. The employee may if they so wish be accompanied and represented by a fellow employee.

Stage I

If the complaint is justified, the employee will be given an oral warning.

State 2

If a further complaint, whether for the same or a different matter, is justified, the employee will be given a written warning.

Stage 3

If further complaint, whether for the same or a different matter, the employee will be given a final written warning.

Stage 4

If a further complaint, whether for the same or a different matter, is justified, the employee’s employment will be terminated.

All warnings will remain in effect for a period of 9 (nine) months from the date of issue”.

13. It is not evident that any of these procedures were followed by the Respondent and it is evident that the Respondent flouted their own procedures.

14. The Respondent had stated that they gave the Claimant a hearing but no evidence of the minutes of the said meeting were produced as evidence before this court.

15. It is therefore this court’s finding that the Respondent unfairly terminated the Claimant’s employment in terms of Section 45 (1) & (2) of Employment Act 2007 and I declare the termination unfair and wrongful.

16. Having found as stated, the last issue is to determine if the Claimant is entitled to remedies sought. The Claimant prayed for several prayers amongst them prayer for overtime. She exhibited her work attendance sheet over time showing that she worked beyond the 8 hours period and at times worked from 7 am to 3.40 am on 15/7/2012.

However from the Claimant’s pay slip produced in court, there is an indication that overtime of 1,500/= was paid. There was no proper computation of the payments due or overtime payable made by the Claimant’s which will enable the court to make a finding on this head and so I decline to award anything as overtime pay.

As to other prayers, I do find that the Claimant is entitled to the following:

1. ***1 month pay in lieu of notice = 25,651/=***

2. *Leave pay for year 2012/2013 = 25,651*

3. *12 months pay as damages for unlawful termination =25,651 x 12 = 307,812/=*

TOTAL = 359,114/=

4. *The Respondent shall issue her with a Certificate of Service.*

5. *Respondent will pay costs of this suit.*

Read in open Court this 17th day of July, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person

Nyabena holding brief for Miss Ouko for Respondent