



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO.319 OF 2013

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL

INSTITUTIONS HOSPITALS & ALLIED WORKERSCLAIMANT

VERSUS

PATRICK M. KABUNDU THE PROPRIETOR OF

IVORY SPORTRESPONDENT

J U D G M E N T

Introduction

1 The claimant is a trade union and brought this suit on behalf of her member one Dorine Wughanga Wanyika (hereinafter called the grievant). The suit is for payment of accrued employment dues and compensation for unfair termination of the grievant's employment on 17.4.2012. The claim was amended on 24.7.2014 the leave of the court. The grievant was employed as a waiter at the respondent's hotel in Mombasa earning Ksh 8,000 per month. According to the claimant, the termination was unfair because it was not preceded by a notice in writing. In addition, the claimant avers that the grievant was terminated and replaced by another waiter for alleged overcharging of juice to a customer. That the said reason for termination was not true and that grievant was not given a chance to defend herself within the meaning of Section 4 of the Employment Act (EA). The claimant first lodged a dispute with the labour office but conciliation failed after the respondent failed to appear.

2 The respondent never filed defence nor did he participate in the proceedings herein despite being served with summons and hearing notice. The suit was disposed by written submissions based on the pleadings.

Analysis and Determination.

3 There is no dispute that the grievant was employed by the respondent as waiter from 13.3.2010 and worked until 17.4.2012 when she was summarily dismissed by the respondent for over charging juice to a client. The issues for determination are whether the dismissal of the grievant was unfair and whether that reliefs sought should be granted.

Unfair Termination.

4 Under Section 45 (2) of the E.A termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after

following a fair procedure. In this case, the claimant alleged that the grievant's dismissal was unfair because she never over charged the juice for a customer as alleged by the respondent and that she was not given a chance to defend herself as provided for under section 41 of the E.A. The foregoing provision requires that before dismissing an employee, the employer shall explain to the employee the reason for the intended dismissal and thereafter invite him to air his defence. The said proceedings must be conducted in a language of the employees understanding and the employee must be accompanied by fellow employee or shop floor union representative of his choice.

5 In this case, the grievants was not given the said right to a fair hearing. She did not have any accuser and her pleas to the respondent to call the customer who alleged that he or she was over charged was not granted. In any event the grievant had already been terminated and replaced with another waiter even before being called to the staff meeting on 17.4.2012. Consequently the court finds on a balance of probability that the respondent has not discharged his burden of proving that there existed a valid and fair reason for dismissing the grievant and that a fair procedure was followed before the dismissal. In deed the respondent filed any defence and never attended the proceedings of this court after service. The court therefore finds and hold that the dismissal of the grievant from employment was both unfair and unjustified.

Reliefs.

6 In view of the foregoing the court the claimant on behalf of the grievant one month salary in lieu of notice being Ksh 9,421, as prayed. She is also awarded Ksh 15,321.90 being payment in respect of 42 leave days earned between 2010 and 2012. The claim for public holidays worked is dismissed for lack of particulars and evidence. She will however get Ksh 9,421 being service pay at the rate of 15 days, pay per year of service for the two years served. She is awarded Ksh 6,204 being salary for the 17days worked in April 2012 as prayed. She is also awarded Ksh 20,131 being the under-paid wages between May 2011 and March 2012.

7 Lastly, the claimant has prayed for 12 months compensation for unfair termination. Under Section 49 (4) of the E A the court is bound to take into account several issues before awarding compensation. One of the issues to consider include the wish of the employee, conduct of the employee which contributed to dismissal, length of service chances of getting another job and also entitlement to gratuity. In this case there is no iota of evidence that the dismissal was as a result of the grievant's misconduct. She does not wish to be reinstated and she is not entitled to any gratuity. She served for only 2 years and she could with due diligence secure an alternative employment as a waiter within a short period. In view of the forgoing consideration, the court awards to the grievant 3 months' salary as compensation for unfair termination.

Disposition.

8 For the reasons stated above judgment is entered for the claimant for Ksh 88,761.90 plus costs and interest.

Dated and Delivered at Mombasa this 9th day of October 2015.

ONESMUS MAKAU

JUDGE

9.10.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE