



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 521 OF 2014

PAMELA AUMA ODHIAMBO.....CLAIMANT

VS

ANJELA CHELAGAT t/a TELECH GENERAL SERVICES.....RESPONDENT

JUDGMENT

Introduction

1. The grievant brings this suit claiming terminal benefits plus compensation for unfair and wrongful dismissal by the respondent on 23.6.2014. She avers that the reason for the dismissal was invalid and unjustifiable and that she was dismissed without being given a chance to defend herself.
2. The respondent has dismissed liability for unfair or wrongful dismissal of the claimant. She denies ever dismissing the claimant and avers that it is the claimant who deserted work after learning that the offence of theft and malicious damage to property she had committed was reported to the police.
3. The suit was heard on 29.6.2015 and 5.10.2015 when the claimant testified as Cw1 but the respondent did not give any evidence and instead she send her supervisor Miss Oprah Jerotick who testified as Rw1.

Analysis and Determination

4. There is no dispute that Cw1 was employed by the respondent as a cleaner stationed at Kensalt offices. There is also no dispute that on 23.6.2014 she reported to work as usual but was stopped at the gate by the security guards with instructions from the respondent. There is also no dispute that Cw1 went to see the respondent at her home at Jomvu but she was told to go home and return the following day. There is further no dispute that after several visits to the respondent she was not allowed back to work but she was told to return on 1.7.2014 which day she never found the respondent at home and she has since never seen her again making her to form the opinion that she had been dismissed from employment. The issues for determination are:

- a. Whether the claimant deserted work or was unfairly dismissed.
- b. Whether the relieves sought should be granted.

Desertion vs unfair dismissal

5. Cw1 contends that she was dismissed by the respondent without any valid and justifiable reason and without being accorded any hearing on 23.6.2014. The reason for her opinion is the conduct of the respondent between 23.6.2014 and 1.7.2014. That when Cw1 attended work on 23.6.2014, she was stopped at the gate by security guards acting on the respondent's instructions. That when Cw1 went to see the respondent at her home the same day as notified by the guards, the respondent just told her to go home and return the following day. That when Cw1 returned to see the respondent she was told to return the following day and the trend continued for a while before the respondent told her to return on 1.7.2014. That when she returned on 1.7.2014 she never found the respondent and has never seen her again. She denied the allegation in the defence by the respondent that she stole and destroyed property belonging to the respondent and disappeared after a report was made to the police.

6. Rw1 admitted on oath that no report was made to the police against the claimant as alleged in the defence. She further admitted that per month, the respondent provided 4 kilogrammes of soap and 5 litres of detergent. That she suspected Cw1 of theft and reported to the respondent. That the respondent summoned Cw1 to her home and after 2 days the respondent told her to call Cw1 back to work on condition that she paid for the lost items including detergent and towels. That Cw1 never paid for the lost items and never returned to work.

7. After carefully considering evidence and the submissions, the court accepts the evidence by the claimant that she was dismissed by the respondent through her conduct. That although the respondent never told her that she had dismissed her, Cw1 considered the conduct of the respondent and formed the opinion that she had been constructively dismissed. It is trite law that's, when the employer makes it difficult or totally impossible for the employee to perform her obligations under the contract, the employer is deemed to have constructively terminated the contract.

8. In this case Cw1 attended work but she was stopped by the security guards action on instructions of the respondent. That there after Cw1 visited the respondent's home persuading her to let her continue with work but the respondent kept on postponing the day when Cw1 was to resume work.

9. The respondent never testified in this case and as such the claimant's evidence is not contested on the issue of constructive dismissal. The court therefore finds on a balance of probability, that the claimant never deserted work but she was constructively dismissed. As correctly submitted by the claimant, the defence is not supported by evidence and it contains deliberate falsehood. That although the defence pleads that the claimant deserted work after a report of her misconduct was made to the police, Rw1 confirmed that no such report was made to the police.

10. The question that follows is whether the dismissal of the claimant was unfair and wrongful. Cw1 contended that the alleged theft of towels and destruction of soap was not true and that she was never given a chance by the respondent to defend herself. Under section 45 of the Employment Act (EA) termination of employment contract is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason for the dismissal was not proved as no eye witness testified against the claimant.

Rw1 said that Cw1 had the key to the store but that allegation was not proved. Rw1 also admitted that per month, only 4kg of soap and 5 litre of detergent were provided of which Cw1 stated that by 22.6.2014 the soap was almost over. That although Rw1 alleged that the respondent had procured soap for 2 months that allegation was not proved.

11. The foregoing evidence in addition to the earlier finding that the respondent's defence contains deliberate lies, the court finds that the dismissal of the claimant was not based on a valid and fair reason. That the procedure followed to dismiss her was also unfair. Under section 41 of the Employment Act, an employer is barred from dismissing his employee for misconduct under section 44(3) and (4) of the EA before according her a fair hearing which includes explaining the reason for the intended dismissal and giving him a chance to defend himself. Consequently, the failure by the respondent to prove a valid and fair reason and that a fair procedure was followed before dismissing the claimant, the termination of her

employment was never rendered unfair and unjustified.

Relief

12. In view of the foregoing findings, the court makes declaration that the dismissal of the claimant was unfair and unjustified. Under section 49(1), of the EA, he is awarded ksh. 7500 being one month salary in lieu of notice, ksh. 7500 being salary for June 2014, ksh. 7500/= being service pay for 2 years, and ksh. 45,000 being 6 months salary compensation for the unfair and unjustified dismissal. The reason for awarding the 6 months salary compensation is because the claimant had not contributed to the dismissal through misconduct. The second reason is that she had expectation to continue working for a long time.

Disposition

13. For the reasons stated above judgment is entered for the claimant for **ksh. 67,500/=** plus costs and interest.

Sign, Dated and Delivered this 4th day of December 2015.

ONESMUS MAKAU

JUDGE