



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 259 OF 2013

TAILORS & TEXTILES WORKERS UNION

CLAIMANT

v

MILLBROOK GARMENTS LTD

RESPONDENT

JUDGMENT

1. Beatrice Awino (Grievant) was terminated by Millbrook Garments Ltd on 19 May 2012 after a service of 8 years and 5 months having been employed as a general worker on 1 August 2003. On 16 August 2013, the Tailors & Textiles Workers Union (the Union) of which she was a member lodged a Memorandum of Claim in Court, after conciliation by the Ministry of Labour failed to bear any fruit.
2. The issue in dispute was stated as *unfair and unlawful dismissal of Mrs. Beatrice Awino and Fransiscar A. Ogol under section 44 and 45 of the Employment Act, 2007* (claim by Fransiscar A Ogol was not pursued and in any case there was a misjoinder of parties and causes of action, because she was allegedly dismissed on 6 June 2012 under different circumstances).
3. According to the pleadings, the Grievant was summoned by the Respondent's Managing Director on 19 May 2012 together with a Shop steward Patrick Juma, wherein she was informed she was being dismissed for being lazy but because of the intervention of the shop steward she was served with a warning letter instead. Immediately thereafter the Managing Director ordered the Grievant out of the Respondent's premises. The Union intervened and even reported a trade dispute.
4. In oral testimony, the Grievant stated that on the material day she was stopped at the gate and was informed by the Managing Director Mr. Vasant Makwana he was tired of her perennial late coming. She also stated that she was not given an opportunity to state her case and was not given a dismissal letter.
5. In cross examination, the Grievant admitted that she used to come to work late and that persistent lateness warranted warnings and that she had got several warnings previously for sleeping in the workplace.
6. She further stated the Director refused to give audience to the Union's representatives or give reasons for the dismissal.
7. The Grievant seeks reinstatement or in the alternative a sum of Kshs 267,416/58 made up of days worked in May 2012, two months pay in lieu of notice, eight years gratuity, compensation for unfair dismissal, accrued annual leave, leave travelling allowance and costs.
8. The Respondent in its Reply pleaded that the Grievant was terminated for gross misconduct by failing to do work assigned to her, sleeping in the work place during working hours, insulting the shop steward and Respondent's Director, Vasant Makwana and declining to obey lawful orders by signing a warning letter.
9. Regarding the procedure adopted, the Respondent pleaded that the Grievant was required to attend

a disciplinary hearing, attended but refused to sign a warning letter thus frustrating the disciplinary process.

10. The Respondent called one witness, Patrick Juma Wandalwa, a shop steward. The witness stated that the Grievant was dismissed for coming to work late and after a meeting in the Director's office to discuss the Grievant. He further stated that the Grievant had been warned previously over sleeping in the work place. He also stated that employees reporting late would work extra hours as a practice and that no other employee who had reported late had been dismissed.

Issues for determination

11. Having looked at the pleadings, listened to the testimonies of witnesses and the respective parties written submissions, two broad issues arise for determination. These are whether the dismissal of the Grievant was fair, and if not fair, appropriate remedies.
12. Before discussing the issues, I need to note that the relevant/applicable law to resolving the fairness of the dismissal are sections 41,43,45,47(5) of the Employment Act and the Collective Bargaining Agreement in place between the parties at the material time.

Whether the dismissal was fair

Procedural fairness

13. Section 41 of the Employment Act obligates an employer to notify and hear any representations by an employee whose dismissal is in contemplation.
14. In the Memorandum of Claim, it was pleaded that the Grievant was denied access to the Respondent's premises on 19 May 2012 until the arrival of the Managing Director. A meeting at which the Grievant and the shop steward were present was held. The Grievant was served with a warning letter after the meeting. The Grievant admitted in her testimony that a meeting took place and that the Director told her he was tired of her perennial late coming.
15. She further stated that she was given an opportunity to state her case but she decided to keep quiet. The Grievant knew the subject of the meeting was her late reporting to work.
16. The Court is satisfied that the Grievant was notified and knew the charges against her and was given an opportunity to defend herself in the presence of a shop floor representative.
17. The process adopted by the Respondent was substantially in compliance with the procedural fairness requirements of section 41 of the Employment Act.

Substantive fairness

18. Although the reason for the dismissal of the Grievant was not set out in writing, she was aware of the charges confronting her. In examination-in-chief, the Grievant testified that, *On 19/5/2012 I reported late for work.* There was also evidence of persistent late reporting to work and previous warning letters.
19. The Court is satisfied that the Respondent has proved the reason for dismissing the Grievant and that the reason was fair and valid.

Appropriate remedies

Reinstatement

20. This relief would not be appropriate in light of the finding that the reason for dismissal was proved and was a valid and fair reason.

Wages for days worked in May 2012

21. The Grievant was dismissed on 19 May 2012. However she is legally entitled to wages earned for the days worked. She claimed and the Respondent admitted a sum of Kshs 4,843/73. The Court would award her this sum.

Two Months Pay in lieu of notice

22.This head of relief must fail in light of the finding in respect to the fairness of the dismissal.

Gratuity

23.By virtue of clause 20(d) of the Collective Bargaining Agreement this head of relief must fail.

Accrued leave

24.The Grievant sought accrued leave of Kshs 9,793/-. The Respondent admitted the Grievant was entitled to accrued leave for 2012, but equivalent to basic wages and not gross wages. The position taken by the Respondent is the correct one in employment practice. The Grievant is entitled to Kshs 7,693/-.

Leave travelling allowance

25.This is a benefit to employees travelling on annual leave. The Grievant has been awarded accrued leave not taken by time of dismissal, and I would decline to make an award under this head.

Costs of conciliation

26.No proper statutory or contractual foundation for this relief was laid. It appears that the parties were required by the Conciliator to submit written proposals but no meetings were held. Section 61 of the Labour Institutions Act is of no aid to the Union.

Twelve months compensation for unfair termination

27.Because of the finding that the dismissal was fair, this remedy is inapplicable.

Conclusion and Orders

28.In conclusion, the Court finds and holds that the dismissal of the Grievant by the Respondent was procedurally and substantively fair but that the Grievant is entitled to and is awarded

(a) Wages for May 2012	Kshs 4,843/73
(b) Accrued leave	Kshs 7,693/-
TOTAL	Kshs 12,536/73

29.The prayers for reinstatement, two months pay in lieu of notice, gratuity, leave travelling allowance and costs of conciliation are dismissed.

30.Because of the social partnership and ongoing relation between the Union and the Respondent, each party is ordered to bear its own costs.

Delivered, dated and signed in open court in Mombasa on this 28th day of March 2014.

Radido Stephen

Judge

Appearances

Mr. Bonyonte, Branch Secretary

Tailors & Textiles Workers Union for Grievant

Mr. Molenje, Senior Legal Officer

Federation of Kenya Employers for Respondent