



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 144 OF 2013

MAURINE ADHIAMBO OUMACLAIMANT

VERSUS

ASHTON APPAREL [EPZ] LTDRESPONDENT

J U D G M E N T

INTRODUCTION

The claimant has sued the respondent claiming ksh.172,457.00 as compensation for wrongful summary dismissal on 5/4/2013. The respondent has denied liability on ground that it is the respondent who deserted work from 5/4/2013 and thereby effectively terminating the employment without prior notice for which the respondent has counter-claimed for one months salary in lieu of notice.

The suit was heard on 14/5/2014 when the claimant testified as CW1 while the respondent called Philip Wekesa Lusweti as RW1.

CLAIMANT'S CASE

CW1 told the court that she was employed by the respondent in 2004 as a Machine Operator. Her salary was ksh. 9725 plus house allowance of Ksh.1495. She worked on 6 months contract which were renewed automatically. According to her she served continuously without any break. Her last contract was from 3/1/2013 to 25/6/2013 but she was terminated on 5/4/2013.

Before then she had fallen sick while on duty and treated in hospital. The sickness was related to loss of blood due to the machine she was operating. The manager allocated her lighter duties but the General manager (GM) refused and demanded that she must continue operating the machine and must meet the targets. When she returned to the machine the following day to resume work, the GM followed her there and pulled away her chair causing her to fall down. The GM also insulted her using vulgar words and told her that she had been dismissed the previous day.

She was sent away without pay for the days worked upto 5/4/2013. She also was not given any opportunity of being heard and no termination letter was given to her. She contended that during her 10 years services, she never went for annual leave. She prayed for terminal dues, salary for 10 days, leave and salary for the unexpired period of the contract.

On cross examination by the defence counsel, she maintained that she served continuously. She confirmed that the last time she attended hospital was 13/2/2013 after which she resumed work. She

confirmed that her leave days were paid by the payslip in December every year. According to her, only the leave days for the last contract were outstanding.

She confirmed from the attendance Register that she was absent from work on 13/2/2013 and 14/2/2013 during her sick leave after which she resumed and continued until 4/4/2013. She denied having deserted work and maintained that she was chased away. She further maintained that she was entitled to 10 days worked plus 3 months pay for the unexpired period of the contract. She confirmed that she was a contributor to the NSSF but not between 2004 and 2006.

DEFENCE CASE

RW1 is the HR Manager for the respondent since 18/1/2013. He confirmed that CW1 was employed by the respondent on a 6 months contract running from 3/1/2013 to 25/6/2013. He contended that the CW1 deserted work from 6/4/2013 and never returned. He produced Attendance Register to show that she stopped working on 5/4/2013. He however could not tell the circumstances under which CW1 left work because he did not enquire about it.

Afterwards RW1 received court papers in respect of this suit.

He confirmed that CW1 had a salary of ksh.9725 plus house allowance of ksh.1459 and had 3 months before her contract lapsed. He maintained that no gratuities were payable to CW1 because she was contributing to NSSF.

On cross examination by the claimant's counsel, RW1 confirmed that the clause on termination applied only when the termination was by the employer. RW1 confirmed that CW1 did not commit any gross misconduct. He further confirmed that CW1 was sick in February 2013 and he transferred her to another department for light duties after which she never went back to see him. He confirmed that she was not paid for 10 days worked. He also confirmed that he never called CW1 after she deserted work.

After the hearing counsel for both parties were directed to file submissions but only respondent filed.

ANALYSIS AND DETERMINATION

After perusing the pleadings, the evidence and submissions, the following issues arose for determination:

- 1. Whether the claimant was dismissed by the respondent or she deserted work.**
- 2. If the claimant was dismissed, whether the dismissal was wrongful**
- 3. Whether the relief sought ought to issue.**

Dismissal VS desertion from workplace

The respondent believes that CW1 deserted work because the Attendance Register indicates that she stopped attending work from, 6/4/2013. RW1 did not however know the circumstances under which CW1 left work.

On the other hand CW1 has accused respondent's GM for harassing and abusing her before telling her that she had been dismissed on 4/4/2013. According to CW1, the GM was not happy that CW1 was allocated light duties following her sickness resulting from her heavier duty of operating a machine. That CW1's evidence of allocation of light duties by CW1 was corroborated by RW1 in his testimony. Without the evidence from the GM to contest the testimony by the CW1, the court has no option but to hold that the evidence of the CW1 regarding the circumstances under which she left work is uncontested. Consequently the court finds on a balance of probability that the claimant did not willfully desert work but was summarily and verbally dismissed from work by the respondent's GM on 5/4/2013.

Was the dismissal wrongful and unfair?

The reason for the dismissal was incapacity resulting from illness contracted at the place of work for which she had been assigned light duties by the RW1. The said dismissal was wrongful and unfair because as admitted by the RW1, the claimant was not guilty of any gross misconduct. RW1 further admitted that CW1 was ill but he allocated light duties. She was therefore not completely unable to perform work.

Even if CW1 was incapable of doing her work, the law does not entitle the respondent's GM to harass and abuse CW1 and finally dismiss her summarily. Section 41 and 45 of the employment Act requires that before dismissing an employee on account of incapacity, the employer must accord the employee a hearing in the company of another employee of his choice. In this case the claimant was not afforded any hearing before dismissal. The GM pulled her down from her seat and abused calling her a reject and declared to her that she had been dismissed the previous day.

In addition to the foregoing the GM breached clause 11 of the contract of employment which provided that no employee shall be sexually, psychologically or physically harassed or verbally abused at the workplace. The procedure used in dismissing the claimant was therefore outdated, uncalled for and not found anywhere in the law books. The dismissal is consequently declared to be wrongful and unfair.

Relief Sought

The claimant sought salary for 10 days worked upto 5/4/2013 and the respondent admitted that claim being ksh.3242. It is granted alongside one month salary in lieu of notice as prayed being ksh.9725. The said notice period is provided for under clause 12 of the contract.

She will also get pay in lieu of leave on prorata basis for the 3 out of 6 months contract as per Clause 8 of the contract of employment which provided for 2 days leave per month. She will therefore get pay for 6 days leave being ksh.2,244.25. The prayer for gratuities is dismissed because the dismissal was not through redundancy under Section 40 of the Employment Act.

Lastly, the claimant prayed for 12 months salary for unfair termination. The court will only award 3 months gross salary considering that the claimant was on a fixed term contract of which she had no guarantee of renewal. She will therefore get ksh.33,552 for unfair termination making the total award ksh.48,763.25.

DISPOSITION

Judgment is hereby entered for the claimant for ksh.48,763.25 plus costs and interest from the date of dismissal.

Orders accordingly.

Signed, Dated and delivered this 18th July 2014

O.N. Makau

Judge