



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 386 OF 2013

CAROLINE TALIU MUTUKU..... CLAIMANT

v

ASHTON APPAREL (EPZ) LIMITED RESPONDENT

JUDGMENT

1. Caroline Taliu Mutuku (Claimant) was initially employed by Ashton Apparels (EPZ) Ltd (Respondent) on 26 July 2009 as a Mass Production Machinist. The contract was for a fixed term and was to lapse on 19 December 2009.
2. On expiry, the contract appears to have been renewed severally, though not all written notifications of renewal were produced.
3. On 26 September 2011 the Respondent offered the Claimant another contract as a Mass Production Machinist, reduced into writing and to expire on 23 December 2011.
4. On 3 January 2013, the Respondent again offered the Claimant employment as a Mass Production Machinist. The offer was reduced into writing and the contract was to expire on 25 June 2013.
5. Through a letter dated 30 April 2013, the Respondent informed the Claimant that it had decided to terminate the contract and was giving her one month notice in accordance with clause XII of the employment contract. The letter also advised the Claimant that her dues would be computed and paid to her.
6. The Claimant was not happy with the turn of events and on 13 November 2013 she lodged a Statement of Claim in Court against the Respondent alleging wrongful summary dismissal and seeking damages for the dismissal and terminal dues.

Claimant's case

7. According to the Claimant, she had been employed by the Respondent initially in 2009 on a 6 month renewal contract and the same had been continuously renewed over the years and that on 30 April 2013 she was called by the Human Resources Manager and handed a termination of service letter on the ground of reduced work.
8. She stated that she was told to report after 8 days which she did and was allowed to work for 2 days but was again instructed to go home and return later to collect her dues.
9. In cross examination, the Claimant stated that her last contract was dated 3 January 2013 and was to expire on 25 June 2013 and that she was given one month written notice on 30 April 2013.
10. Shown the attendance register for May 2013, the Claimant confirmed that she was absent from 4 May 2013 to 13 May 2013 and that she worked on 14 May 2013 and 15 May 2013 after which she was stopped, but was not paid full salary for May 2013.
11. She further confirmed 5 other employees were given notices of termination on 30 April 2013 and

- that the Human Resources Manager called Eric told them work had reduced and she was paid dues and she acknowledged the payment.
- 12.The Claimant confirmed she was a member of the National Social Security Fund.
 - 13.The Claimant stated she was seeking the reliefs set out in the Statement of Claim.

Respondent's case

- 14.The Respondent contends that it had employed the Claimant on several seasonal contracts of 6 months duration and that the last contract was from 3 January 2013 to 25 June 2013.
- 15.The Respondent's case is that it made a decision not to renew the contract and issued the Claimant with a non-renewal notice on 30 April 2013 though inadvertently it was for one rather than two months.
- 16.The Respondent denied that the Claimant was dismissed or unfairly dismissed, and that the Claimant was paid all final dues save for Kshs 10,016/- being salary in lieu of notice upto 25 June 2013, house allowance and 2 days outstanding leave.
- 17.The Respondent's Human Resources Manager who testified stated that the Claimant was informed of reduced work volume and was issued with a notice of termination, though the notice did not refer to reduced work volume. A decision had been taken not to renew contracts expiring within 2 months and other employees were affected.

Issues for determination

- 18.From the pleadings, testimony, documents produced and written submissions, the issues arising for determination are mainly two, whether the contract expired by effluxion of time or was unfairly terminated and if so, appropriate remedies. Some incidental issues raised by the parties will also be addressed briefly.

Whether contract expired by effluxion of time

- 19.It is not disputed that the contract dated 3 January 2013 was to expire on 25 June 2013. The contract in essence was a fixed term contract. It was a contract which was terminating automatically at an agreed and ascertainable date, and under the common law, notice of termination was not required. It was also not provided for.
- 20.The contract also did not provide for renewal either through request of Claimant or option of Respondent. Its expiry on 25 June 2013 was therefore *a fait accompli* or self executing.
- 21.But the contract had a provision for termination. Clause XII provided for termination by either party giving one month written notice or salary in lieu of notice. The right of the Respondent to summarily dismiss the Claimant was also reserved.
- 22.On 30 April 2013 the Respondent issued a notice of termination of service to the Claimant. The notice made reference to clause XII. The notice was clear that the Claimant was being given one month notice and that her last working day would be 30 May 2013.
- 23.On the documentation, it is apparent that the Respondent intended to bring the relationship to an end before its set date of 25 June 2013. In pleadings and testimony, the Respondent attempted to explain that the giving of the one month notice was inadvertent and that the Claimant should have been given two months notice and that it was ready to pay for the one month. And the reason given in evidence, and not the letter was reduced volume of work.
- 24.In my view, the Respondent intended to terminate its relationship with the Claimant prematurely during the subsistence of the contract, before its ascertained expiry date because of reduced volume of work.
- 25.Clause XII in my view did not affect the fixed term nature of the contract but reserved the power to any of the parties to bring it to a premature end. The Respondent exercised that option through its letter of 30 April 2013.
- 26.And because the Respondent was exercising a power reserved to it under the contract to prematurely bring it to an end, it was therefore under a statutory obligation to comply with sections 41, 43 and 45 of the Employment Act, 2007.
- 27.The termination letter was so clear and unambiguous in its language and intention, that the

explanations given by the Respondent cannot gel. The Respondent's intent could not have been to notify the Claimant that the contract would not be renewed on its expiry. It had no legal obligation to do so, though a prudent employer would have done so in clear and express language, which is not the case here.

28. The contract did not expire by effluxion of time at the agreed and ascertained date. It was prematurely terminated by the Respondent in clear and unambiguous language.

Procedural fairness

29. Both the Claimant and the Respondent agree that the Claimant was summoned to the Human Resource office and informed that due to reduced work her services would be terminated. Thereafter, the Claimant was issued with the termination notice.

30. The question therefore arises whether the procedure adopted by the Respondent was in accord with the process contemplated by section 41 of the Employment Act, 2007.

31. Section 41 of the Employment Act is applicable where the termination is on the ground of *misconduct, poor performance or physical incapacity*. None of these grounds were applicable to the instant case and on the surface of, the Respondent was not obliged to comply with section 41 of the Act.

32. But that cannot be the end of the inquiry on whether the Respondent followed due process. I say so, because of section 45(2)(c) of the Employment Act, 2007 which provides that

A termination of employment by an employer is unfair if the employer fails to prove-

(a)

(b),

(c) ***that the employment was terminated in accordance with fair procedure.***

33. My understanding of section 45(2)(c) of the Employment Act, 2007 is that termination on any other grounds apart from *misconduct, poor performance or physical incapacity* must be in accord with a fair procedure and because the section has not expressly outlined what the fair procedure is, the notorious and certain principle of *audi alteram partem* (hear the other side) would apply to fill in the void. The application of the *audi alteram partem* principle is consistent with the Constitutional norm guaranteeing a right to fair labour practices.

34. In other words, before terminating an employee on grounds other than *misconduct, poor performance or physical incapacity*, an employer should inform the employee and hear his side of the case.

35. Both parties agree that the Claimant was summoned to the Human Resources office and informed that her services would be terminated because of reduced work volume. The Court is satisfied that there was some compliance with the *audi* principle.

Substantive fairness

36. The Court now turns its attention to the reasons for the termination. The letter of termination did not give any reason(s), but both witnesses agree that the reason given at the meeting in the Human Resources office was reduced work volume.

37. The Claimant was being terminated involuntarily. It was not because of her *conduct, poor performance or physical incapacity*. It was due to the operational requirements of the Respondent. This was a case of redundancy.

38. In my view, although redundancy was not pleaded by the Claimant or Respondent, the application of the law to the obtaining circumstances and testimony/evidence leads logically to the conclusion that legally, because the Claimant was being terminated because of reduced work volume, she was being declared redundant before the expiry of her fixed term contract.

39. The Respondent did not prove or attempt to prove reduced work volumes as an operational reason to terminate the services of the Claimant.

40. There is nothing on record to suggest that the Respondent complied with the conditions set out in section 40 of the Employment Act, 2007 and the only conclusion which the Court can reach is that the termination though disguised as non-renewal of contract was actually termination through redundancy, and was unfair.
41. If I were wrong on the conclusion reached, I would still find in favour of the Claimant on the basis that the termination was before the contract expired and was subject to sections 43 and 45 of the Employment Act, 2007 and the Respondent has not discharged the statutory burden of proving the reasons for termination and that the reasons were valid and fair.

Parties bound by pleadings

42. Before discussing remedies, the Court would wish to address very briefly one issue submitted on at length in the Respondent's written submissions (the submissions were filed outside the agreed time without any explanation- 2 days to judgment to be precise. Late filing of submissions significantly impacts the Court's management of its docket).
43. The issue arose in the context of what the Respondent categorized as severance pay claim (no such head of claim was pleaded. The Claimant rather sought gratuity).
44. According to the Respondent, and relying on the decision of the Court of Appeal in *Thomas de la Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR, parties are bound by their pleadings and Courts should not address issues not raised by the parties, that cases must be decided on the issues on record and that Judges should not raise issues themselves.
45. The position urged by the Respondent is generally true but not all the time. In *Odd Jobs v Mubia* (1970) EA 476 the Court of Appeal held that a Court may base its decision on an unpleaded issue if the parties allowed it in the course of trial through evidence and on the facts it had been left/addressed for the decision of the Court. The principle has since been approved in many decisions.
46. In the instant case, the Respondent's case was that the termination of the services of the Claimant was because of reduced volume of work. The issue was taken up even in cross-examination. It is the parties who introduced the issue.
47. The Employment Act, 2007 has provided statutory remedies for certain wrongs/breaches and the Court is under an obligation to consider its conclusions on the facts/evidence placed before it in fashioning/awarding an appropriate and effective statutory remedy(ies), even where such a remedy was not pleaded.
48. In my view taking into account the primary statutory remedies provided in employment/labour disputes there is an obligation upon the Court to award a remedy which is congruent with the evidence produced in relation to what is pleaded.
49. But each case must be considered on its circumstances considering that the Industrial Court has a higher number of unrepresented litigants unlike other civil Courts. In some instances, the litigants or grievants are represented by persons without legal training or skills.
50. Without giving any definitive pronouncement on how the Court should deal with this peculiarity, I can only observe for now and reserve any detailed discussion for an appropriate case in the future, (both parties had legal representation), that the Court should generously construe pleadings prepared by laypersons in their favour and not hold them to the high standards of detail, precision and skill expected from lawyers.

Appropriate remedies

Salary for days worked in May 2013

51. The Claimant sought Kshs 3,117/-. The Respondent contended that the Claimant was paid wages upto 22 May 2013 and 8 days pay in lieu of outstanding leave and the Claimant acknowledged the payment. This relief is declined.

Two months' salary in lieu of Notice

52. The Claimant sought Kshs 18,700/-. Respondent contended that the Claimant is not entitled to this

Delivered, dated and signed in open Court in Mombasa on this 4th day of July 2014.

Radido Stephen

Judge

Appearances

For Claimant Ms. Omollo instructed by Lamanya Katee & Associates

For Respondent Mr. Molenje, Senior Legal Officer, Federation of Kenya Employers