



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 65 OF 2013

EUNICE MWASAHA.....CLAIMANT

v

CORRUGATED SHEETS LTD.....RESPONDENT

JUDGMENT

1. Eunice Mwasaha (Claimant) was employed by Corrugated Sheets Ltd (Respondent) as a Secretary with effect from 1 July 2003. On 20 April 2010 the Respondent wrote to the Claimant giving her one month notice of the termination of her services. The Claimant was aggrieved and on 6 March 2014 she filed a Memorandum of Claim through the firm of J.K. Mwarandu & Co. Advocates stating the issue in dispute as *unlawful termination from duties of Eunice Mwasaha by the Director J.T Shah of Corrugated Sheets Limited*.

2. The complaint being one challenging termination of employment, sections 41, 43, 45 and 47 of the Employment Act, 2007 become implicated and the Court has a duty to evaluate both the process adopted by the Respondent before terminating the services of the Claimant and the reasons.

Process before termination

3. The Claimant pleaded that she was dismissed without notice. In testimony, she stated that she was given a termination letter in April 2010 and instructed to go home and wait for a call. When she enquired from the Respondent's Personnel Manager, she was informed to await a call on when to collect her terminal benefits.

4. The Respondent called its Personnel Officer. He stated that the Claimant had previously been issued with verbal warnings and written warnings (2006). But the Personnel Officer did not disclose the process followed before dismissing the Claimant except that the Claimant had been given a warning letter in 2006 and verbal warnings at unspecified times by the Respondent's Personnel Manager and Director. These two were not called to testify.

5. Section 41 of the Employment Act, 2007 has outlined what an employer who is contemplating terminating the services of an employee on the grounds of *misconduct, poor performance* and or *physical incapacity* should do. The section provides for procedural fairness before termination.

6. The letter dated 20 April 2010 giving the Claimant notice of termination gave the reason as

performance. The Respondent was therefore enjoined to comply with section 41 of the Employment Act, 2007 before terminating the services of the Claimant.

7. The Court was not informed of who informed the Claimant that her termination was under consideration and whether she was given an opportunity to respond in writing or attend an oral hearing to state her case. In short, the Claimant was not given what is ordinarily called a show cause letter.

8. It was upon the Respondent to demonstrate to Court that it complied with the requirements of section 41 of the Employment Act, 2007. The Respondent failed to discharge the statutory burden placed upon it and the only conclusion the Court can reach is that the termination was procedurally unfair.

Reasons for termination

9. The termination letter already referred to gave the reason(s) for termination as performance.

10. In pleadings and in Court, however, the Respondent changed tune. In the Response reference was made to the Claimant taking money for purposes of having staff uniforms prepared for the Respondent's employees and failing to account for the same. This latter reason has nothing to do with performance but rather is a question of misconduct (behaviour).

11. Evidence proffered was that the Claimant paid the monies to a tailor but the tailor's shop was broken into before delivery of the uniforms.

12. The receipts issued by the tailor, New Mombasa-Fashion confirming payment of the charges for stitching of the uniforms were exhibited by the Respondent. It cannot be said that the Claimant misappropriated the monies for the uniforms.

13. The evidence also suggested that the tailor had previously made staff uniforms for the Respondent's employees.

14. Considering that the reasons given by the Respondent in the termination notice and in Court are different, the Court is of the view that the Respondent has failed to prove the reasons for termination and that the reasons were valid and fair. The termination was substantively unfair.

Relief

Two months' salary in lieu of Notice

15. The Claimant sought two months pay in lieu of notice. The letter of appointment did not provide for notice period. However, the Claimant was being paid by the month. She was given one month notice of intention to terminate her services. The notice gave the last date of service as 30 April 2010.

16. But the Claimant did not work the whole notice period. She was instructed to go home. Pursuant to sections 35 and 36 of the Employment Act, 2007 the Respondent was under a duty to pay out the one month period.

17. The Claimant's pay slip for April 2010 shows that there was Kshs 10,515/- as pay in lieu of notice. Evidence in Court was that the Claimant has not gone to collect her final dues. The Claimant has made out a case for payment of one month pay in lieu of notice.

One year accrued leave

18. Under this head, the Claimant sought Kshs 12,200/-. The Claimant was entitled to 26 days paid annual leave. The Claimant's pay slip for April 2010 had an element of Kshs 10,515/- as leave pay. The Claimant is entitled to this head of relief.

Service pay

19. The Claimant admitted that she was a member/contributor to the National Social Security Fund. By virtue of section 35(5) & (6) of the Employment Act, 2007, she is not entitled to service pay.

Exemplary damages for unlawful summary dismissal

20. No evidential, contractual or statutory foundation for this relief was provided. It is dismissed. If the Claimant meant compensation pursuant to section 49(1) (c) of the Employment Act, 2007, which is one of the primary remedies for unfair termination, she never sought for the same despite legal representation.

21. But to do justice to the parties the Court will exercise its discretion and award the Claimant the equivalent of two months gross wages as compensation pursuant to section 49(1)(c) of the Act which is assessed at Kshs 24,000/-.

22. Before concluding, the Court wishes to observe that the Memorandum of Claim was casually drafted and this has become obvious at the discussion of relief. Further submissions were not filed on or before 20 June 2014 as directed but were only filed on 27 August 2014, two days before judgment and therefore the Claimant is denied costs.

Conclusion and Orders

23. The Court finds and holds that the termination of the Claimant was unfair both procedurally and substantively and awards her and orders the Respondent to pay her

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|------------------------------------|---------------|
| a. One month pay in lieu of Notice | Kshs 12,200/- |
| b. One year accrued leave | Kshs 12,200/- |
| c. Two months compensation | Kshs 24,000/- |

TOTAL	Kshs 44,400/-
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24. Each party to bear own costs.

Delivered, dated and signed in open Court in Mombasa on this 29th day of August 2014.

Radido Stephen

Judge

Appearances

Mr. Wandera instructed by J.K. Mwarandu & Co. Advocates for Claimant

Ms. Muyaa instructed by Kinyua Muyaa & Co. Advocates for Respondent