



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 769 of 2010

JANE KATUNGE WAMBUA CLAIMANT

-VERSUS-

AIRSIDE LIMITED T/A SWISSPORT (K).....RESPONDENT

JUDGEMENT

The Claimant **JANE KATUNGE WAMBUA** has instituted this case by a Memorandum of Claim dated 30th June 2010 and filed in Court on 7th July 2010 in which she alleges wrongful dismissal by the Respondent from her employment and refusal to pay her terminal dues.

The Claimant prays for the following orders:-

(i) The Claimant be paid by the Respondent all her terminal dues as tabulated in Paragraph 23 hereinabove and also set out as hereunder.

- a) One month salary in lieu of notice 3x81.00 - Kshs.23,740
- b) Salary for August 2009 - Kshs.23,740
- c) Leave due - Kshs.23,740
- d) 12 months' compensation for loss of employment Kshs.304,880
- e) Service pay at the rate of 16 days pay for
each of service (16÷26x23,740)x3 Kshs.43,827.70
- f) Certificate of service

TOTAL:- Kshs.419,927.70

(ii) A declaration that termination of the Claimant's employment was wrongful.

- (iii) The Respondent be ordered to give the Claimant her Certificate of Service as required by the provisions of Section of the Employment Act, 2007.
- (iv) The Honourable Court do issue such orders and gives such direction as it may deem fit and just to grant to meet the ends of justice.
- (v) The Respondent be condemned to pay costs and interest at Court rates.

The Respondent filed its Memorandum of Reply on 28th July 2010 in which it denies that the Claimant was employed by the Respondent in the manner, on the terms and on the date and salary as alleged. The Respondent alleges that the Claimant was employed on 4th September 2006 at a salary of Shs.10,527 and house allowance of Shs.2,500/=. That the Claimants salary was reviewed in 2007, 2008 and 2009 as provided in the terms and conditions of service applicable to her. The Respondent alleges that the Claimant was dismissed from service for poor performance. That on 17th August 2009 she was spotted by her supervisor carrying out her service duties incorrectly while carrying out search duties at the check-in counter of Virgin Atlantic which was considered a high risk airline in terms of aviation security. That when this was pointed out to her she initially ignored the supervisor then insisted she was carrying out the search properly. This being a security risk the Claimant was removed from the check-in counter and assigned other tasks. She was thereafter requested to write a statement on the incident. The matter was booked in the occurrence book and the Respondents Security Manager informed of the incident. The following day on 18th August 2009 there was a meeting between the Claimant, her supervisors and head of department with the aim of resolving the matter but the Claimant acted disrespectfully and repeatedly shouted at her supervisor. The matter was reported to the Human Resources Manager, who convened a disciplinary hearing on 20th August 2009.

At the hearing the Claimant was represented by the Chief Shopsteward Mr. Moses Oyatsi and the Security Shopsteward Mr. Edward O. Geko. The Claimant's Supervisor and the Claimant made representations at the meeting. The Respondent further submitted that the Claimant admitted to being disrespectful to the supervisor severally in the presence of the Head of Department. She however alleged sexual harassment by the supervisor while she was on attachment before she was employed by the Respondent.

After the disciplinary hearing a decision was made to summarily dismiss the Claimant. The Respondent maintained that the dismissal of the Claimant was lawful. The Respondent further submitted that the Claimant had not been paid her terminal benefits as she refused, failed or ignored to return the Respondent's property in her possession.

The case was first mentioned by Hon. Justice Charles P. Chemmutut on 23rd September 2009 when Mr. Nyabena was present for the Claimant and Ms. Irene Mburu held brief for Mr. George Kithi for the Respondent. The case was fixed for hearing on 27th October 2010. On 27th the case was by consent rescheduled to 15th February 2011 when the case was heard. Hon. Justice Chemmutut reserved the Award to be on notice.

The parties substantially reiterated the contents of their respective memorandum. The parties did not call any witnesses. Mr. Nyabena submitted that the Claimant was employed on 4th September 2006 as Security Agent. Her last consolidated salary was Shs.23,740. That she was dismissed from employment on 21st August 2009. The reasons for her dismissal were that she was disrespectful, carried out a search in a substandard and unsatisfactory manner.

Mr. Nyabena submitted that this did not constitute a valid reason for dismissal, that the Claimant was not given a hearing. He asked for orders as prayed in the Memorandum of Claim.

Mr. Kithi for the Respondent submitted that the Claimant's salary was Shs.10,527 and referred to Respondents Annex 2 which is the letter of appointment of the Claimant stating her salary. He submitted that the Claimant's last salary was Shs.12,419. He further submitted that the Claimant was dismissed for

being disrespectful and disobedient. That she did not comply with inspection procedures for the airline. He further submitted that she was accorded a fair hearing as provided under Section 45 of Employment Act. He further submitted that she did not clear with the Respondent. That she will be paid her August salary and issued a Certificate of Service once she clears. He further submitted that the Claimant's dismissal was lawful and that the union concurred with the dismissal.

Hon. Justice Chemmutut retired from the Court before delivering the award and the file was allocated to me to prepare the award. The parties were summoned to appear before me for directions on 5th December 2012 when only Mr. Nyabena appeared for the Claimant and there was no appearance for the Respondent. Mr. Nyabena informed the Court that he had no objection to me preparing the award and also stated that the Claimant did not wish to make any further submissions.

I have read the pleadings and the Court record. In my opinion the issues for determination are the following:-

1. Whether the dismissal of the Claimant was wrongful.
2. Whether the Claimant is entitled to terminal benefits as prayed in the Memorandum of Claim.

Section 41 of the Employment Act provides for the disciplinary procedure before an employee can be dismissed or terminated.

In the present case both the Claimant and the Respondent admit that the Respondent asked the Claimant to write a statement about what transpired on the material day, was later summoned for a meeting by her head of department in an effort to resolve the issue but due to her improper conduct of insubordination of her immediate supervisor the case was escalated to her head of department. She was accorded a hearing on 20th August 2009 at which she was represented by the Chief Shopsteward and the Security Shop steward. The minutes of the disciplinary hearing have been attached as Appendix 10 of Respondents memorandum in reply to the claim.

From the foregoing I find that the Claimant was accorded a fair hearing in compliance with Section 41 of the Employment Act.

The second limb of this issue is whether there was valid reason for the termination of the Claimant's employment by way of summary dismissal on 21st August 2009.

The charge against the Claimant was that on 17th August 2009 the Claimant was assigned duties on Flight VS672 check-in area to do baggage search and that the supervisor on duty observed she was not carrying out the search as expected. When the supervisor pointed this out to her and asked her to observe how her colleagues were carrying out the search she was uncooperative and responded that carrying out the search the right way was slow. The Claimant confirmed this in her statement which reads as follows:-

I was allocated at check-in VS672. During my baggage search I did my best by feeling clothes bit by bit as I took them out of the bag. In the due course SC Kamau came and said that I had to feel a piece by piece which can take hours to search the whole bag.

It was further submitted that when the Claimant was called for a discussion to try to resolve the matter between her and her supervisor she was disrespectful and repeatedly shouted at him in the presence of the Human Resources Manager.

For these reasons I find that there was valid reason for the Respondent to take disciplinary action against the Claimant. I however find that there having been no incidents of poor performance and insubordination against the Claimant before this incident and taking into account her length of service, dismissal was rather harsh.

I therefore reduce the summary dismissal to normal termination.

Whether Claimant is entitled to terminal dues as prayed

I now consider the Claimant's prayers.

(i) 1 months' salary in lieu of notice

Having reduced the summary dismissal to normal termination, the Claimant is entitled 1 month's gross salary in lieu of notice as provided for under Section 35,36,46 and 49 of the Employment Act.

Section 46 provides for payment of remuneration which is defined at Section 2 as "the total value of all payments in money or kind, made or owing to an employee arising from employment of that employee,"

The Claimants salary included both standing and variable pay. Salary in lieu of notice will therefore be based on basic pay, house allowance and laundry allowance amounting to Shs.16,119.

I award her pay in lieu of notice in the sum of Kshs.16,119.

(ii) Salary for August 2009

The Respondent has admitted not paying salary for August 2009 which as tabulated in Respondent's appendix 15 is Kshs.14,716.00 after deductions.

I award the Claimant the said sum of Kshs.14,716.00 being her salary for August 2009.

(iii) Leave due

The Respondent submitted that the Claimant did not have any outstanding leave days. Indeed in the tabulation of her terminal benefits it is shown that she had overdrawn her leave by 8 days which has been recovered from her last salary for the month of August 2009.

I therefore find that the Claimant is not entitled to any payment for annual leave.

(iv) Compensation

Having found that the termination of the Claimant's employment was not unfair, she is not entitled to any compensation.

(v) Service pay

The Claimant was a member of both National Social Security Fund and Staff Pension Scheme. She is therefore not entitled to service pay within the provisions of Section 37(5) and 37(6) of the Employment Act.

(vi) Certificate of Service

The Claimant is entitled to a Certificate of Service.

(vii) There shall be no order for costs.

Orders accordingly

Read in open Court and signed on this 25th day of April 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Mr. Nyabena

In the Presence of:- _____ for Claimant

Mr. Otieno

_____ for Respondent