



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 85 OF 2013

AGNETOR MUKOCLAIMANT

VERSUS

J.R. GITTAU & JEMATT INVESTMENT LTDRESPONDENT

J U D G M E N T

The claimant was employed by the respondent from 19/8/2009 and worked until 20/9/2012 when she alleged that she was dismissed without notice. She therefore brings this suit claiming for her employment terminal dues plus compensation for unfair termination of the employment.

The respondent has denied that he employed the claimant since 19.8.2009 but the 2nd defendant admits it. The two however deny that they dismissed the claimant from her employment. Instead they have blamed her for dismissing herself by deserting the employment after concluding her study leave. Consequently they pray for the suit to be dismissed.

The suit was heard on 30/5/2013 when the claimant testified as CW1 and the 1st respondent, Aisha Charo Bisaru, Margaret Kangombe and Kulthum Khalfan testified as RW1, RW2, RW3 and RW4 respectively for the defence. CW2's evidence was that she was employed by the respondent on 19/8/2009 as a waiter. Her last groaa salary was ksh.8000/ per month.

That on 20/9/2012 she was dismissed for requesting for her accumulated leave which she wanted to spent while studying a computer course. That she had first sought the leave from the RW2 on 10/9/2012 but it was refused. That when she renewed her request on 20/9/2012 it was again declined and RW2 send RW4 to tell claimant to remove her uniform and go away. That upon enquiry the reason of being send away, RW4 told her that her work was not good. That she went to see RW2 who told her to comply with the orders of her supervisor, RW4. That being dissatisfied she went to see RW1 but she found that he had already been notified of the incidence but with a false information that she had deserted work.

That RW1 told her to go home and wait for his call the following day. That she waited in vain for the call from RW1. After two weeks, she decided to call RW1 to find out why he had not called but he told her to keep on waiting.

That in December 2012 she called again but he did not pick the call but in January 2013 he picked but told her to wait until the end of General Election after which he was to call her.

That he never called after the election following her to call him on15/3/2013 but he refused to pick her calls. Consequently the claimant reparteed to the Labour Officer but her case could not not be received

due to time limitation. She was advised on various option of which she chose to file the present suit.

That on 15/3/2013, she also reported to COTU after which RW1 asked COTU to send her to his office at 2 p.m. That at the RW1's office they discussed payment of terminal dues and leave not taken. That in the meeting the RW1 told her that she was dismissed for poor performance of work.

She however, insisted that her service for the 3 years were without any complain or warning letter from the employers. That even in the said meeting the RW1 just told her to go and wait for his call. He never called and after a week she called him but he told her that she was disturbing him and that he had no debt for her. That on the same day RW2 who is the wife of the RW1 called her and asked her to resume work. That the reason for call was that the claimant had just threatened the RW1 with court process. That due to the deteriorating relationship with the respondents, she declined the offer for reinstatement in fear that she may be victimized through framed up cases. The claimant only asked her to pay her dues.

She prays for the terminal dues as pleaded which include Notice pay, leave days for 3 years served, under payment and certificate of service. The claim for underpayment was based on the statutory guidelines which provided for her pay than what she was being paid.

On cross examination she maintained that RW1 told her to go home and relax and wait for his call. That according to her that was not dismissal. She however also said that during the subsequent calls she also believed that she had not been dismissed. She also confirmed that later RW1 and RW2 told her to return to work. She also confirmed that she used to pass by the work place to and from her college.

She confirmed further that she told her colleagues that she was to resume work after collage. She maintained that she requested for the leave in writing through RW2 who was the active manager of the business. She denied being hostile to other workmates. That when he was dismissed, she was on duty but when she went to protest the dismissal to RW1, she found out that he had been mislead that she had deserted work.

On further cross examination, she insisted that she went to Aisha Branch to see RW1 and not to collect her Health Certificate. That she collected her certificate later in October 2012 because it was being used to employ other workers. She denied the allegation that on 20/9/2012 a customer complained of being served with cold tea. She also denied seeing RW3 at her work place (blue bubbles) on 20/9/2012. She insisted that she was only asked to resume work after demanding for her terminal dues and threatening to sue the respondents.

RW1 introduced himself as a businessman operating in the name of second respondent which runs three hotels namely, Blue Bubbles, Red Rose and Aisha. He confirmed employing the claimant in August 2009 after she was introduced to him by her uncle.

That on 20/9/2012, he went to the Blue bubbles where the claimant was working at 4 pm and RW2 told him that claimant had served a customer with cold tea. That he found the claimant there but she never talked to him. He denied the allegation that she came to see him at Aisha on that day. That the first time he dealt with her was on 15/3/2013 when she called him demanding her terminal dues but instead he told her to return to work. In his evaluation the claimant was a good worker and sacking her would have offended her uncle who was his friend. According to him the claimant went for a two month study leave and he was excited about that because he intended to computerize the business. That other workers had already gone for such course and were even reimbursed their fees.

That the hotel uniform was not for an individual employee and when one is sacked he removes his uniform instantly. In the claimants case she did not surrender the uniform. He further testified that all his workers had medical certificate and the claimant's certificate was at Aisha where she was working before transfer to Blue Bubbles. That on 11/12/2012, he wrote a letter to the labour office after claimant deserted work because he foresaw a dispute coming. According to him she is not sacked but still his staff member.

On cross examination he confirmed that no NSSF remittance were made on her behalf since she went to college. He also admitted that he never gave any annual leave to her but only offs to attend to burials, weddings or to take children to school. He also confirmed that her salary was deducted in respect of all such off days.

He further confirmed that during the alleged leave and while on her studies, the claimant was not paid any salary because she never went for the same although she used to passby. That on 24/9/2012, she was only paid for the 20 days worked in September 2012.

Lastly he admitted that he never gave her any leave approval letter indicating the date for resuming duty. Surprisingly on re-examination RW1 said that on 20/9/2012 the claimant looked annoyed and was given an off on her own request pending the start of her leave on 1/10/12.

RW2 is the RW1's wife. She admitted that the claimant was her employee upto now. She denied the alleged dismissal of the claimant on 20/9/12. That on the said date the claimant sought a one month leave for study and because she was good employee she gave her two months for her studies. That the request was done orally and also the permission was oral for that leave to commence on 1/10/12.

That on the same day, the claimant served cold tea to a customer and a complaint was made. When the Supervisor (RW4) asked her she responded rudely. That when RW2 received the report from the supervisor she did not treat the matter so serious and told the supervisor to deal with the matter calmly. That shortly thereafter, the supervisor returned to her and told her that the claimant was requesting for an off which she allowed pending commencement of leave.

That later the claimant went to her and told her that she was tired and looked annoyed. That she (RW2) told the claimant to go home and relax and return after her studies. That she later met the claimant once at Aisha taking soda during her studies and greeted her.

That on 2/12/2012, RW2 called her after she failed to return from leave but could not be reached. That she then reported the desertion to RW1. That she called her again in March 2013 after learning that she had talked to RW1 through COTU. That the claimant was still not happy with the incidence of 20/9/2012. She denied ever denying the claimant any study leave when indeed she wanted a computer literate staff in order to computerize the business. She denied dismissing the claimant and gave her liberty to return to work as she is a very good worker.

On cross examination she admitted that leave was to start on 1/10/2013. That NSSF deductions were not remitted because of the ignorance of the law and the fact that the claimant not worked to earn the money from which to deduct the remittances. She admitted that she never gave the claimant any annual leave because she never sought one.

RW3 told the court that on 20/9/2012 she went to the Blue Bubbles and met the claimant. She told claimant that the tea was cold and she needed to warm it but the claimant replied that the tea was little and more was being cooked. That later at 4 p.m the claimant went to Aisha and demanded her medical certificate because she was tired. That she declined to release the medical certificate on instructions from RW4. That the claimant returned after a week and collected the certificate. That she never came back again after collecting her certificate.

On cross examination, she confirmed that the claimant work station was not Aisha. She also confirmed that the claimant was not the cook at the Blue Bubbles. RW4 is the supervisor at Blue Bubbles. She confirmed that on 10/9/2012, the claimant sought permission to go for studies and it was allowed with effect from 1/10/2012 and end non 1/12/2012. That on 20/9/2012 she went to Blue Bubbles at 11.00 a.m. and found that tea was cold and the customers were complaining. That on enquiry, the claimant looked annoyed and the RW4 instructed other workers to warm it. That at 3.00 p.m of the same day the claimant asked for a one week off to travel before she could start her studies which was granted by the boss. That she left at 4 p.m after her shift.

That shortly, thereafter RW3 called to inform her that the claimant was at Aisha demanding for her medical certificate. That she (RW4) instructed RW3 not to release the medical certificate to the claimant because she was not leaving employment. That the claimant then returned to Blue bubbles and spoke to the boss and she said she was tired.

That after one week she met claimant at Aisha during lunch time. That the claimant never told her that she had left employment or was sacked. She however never returned to work and the RW4 believed that the claimant was still doing her studies.

On cross examination she insisted that the claimant's shift was to end at 4pm as the shift started in the morning and not 12 noon. That 11.00am she only enquired as to why the claimant was serving cold tea but denied telling her to remove her uniform thereafter. She also denied that the claimant was around Blue bubbles at 5pm. She concluded by denying that she was sent by the RW2 to tell the claimant that her performance was not good. At the close of the hearing both parties filed written submissions.

I have carefully read through and considered the pleadings, evidence and the written submissions by the two sides. In my view the case is very interesting especially because whereas the employee insists she was dismissed, the employer denies it and maintains that the claimant is still their employee. The foregoing observation notwithstanding the court has the necessary jurisdiction to determinate the dispute by dint of Section 12 of the Industrial Court Act and Article 162 (2) (a) of the constitution. The issue for determination are:

- 1. Who employed the claimant?**
- 2. Whether the claimants employment was terminated by the respondents on 20/9/2012.**
- 3. Whether termination of the employment was unfair.**
- 4. Whether the relief sought ought to issue.**

In the first issue, the court notes the denial by the 1st respondent that he was not the employer. The claimant pleaded that the 1st respondents operates business in the name and style of the 2nd respondent. She did not plead that the 2nd respondent was an independent legal person from the 1st respondent. The claimant being unrepresented by a counsel was handicapped to some extent and the court will not punish her for that incapacity. I will consider that it is only the 1st respondent who should have adduced evidence to prove his allegation that he was a separate person from the 2nd respondent which he did not.

The next point to consider is the pleadings by the claimant that the respondent orally employed her on 19/8/2009. That the 2nd respondent cannot have spoken to the claimant verbally in person. It must have been the natural person of the two respondent who hired the claimant verbally. That fact is corroborated by the testimony of the 1st respondent when he said that the claimant was introduced to him by her uncle who was his friend. RW2 also said that all the dealings with the claimant was verbal from the recruitment. In such circumstances wherein no written contract exists and without any evidence to prove that the 2nd respondent was a limited liability company, the court will find that the claimant was employed by the 1st respondent to work for him in what the claimant calls his three "firms".

The second issue to consider is whether the claimant is still in employment or whether she was dismissed on 20/9/2012. the claimant maintains that she was dismissed for repeating her request for accrued annual leave. It is her evidence that she requested for leave on 10/9/2012 but it was declined. That when she renewed her request on 20/9/2012 it was again declined and then she was dismissed on the same day by the RW4 with instructions from the Rw2.

The defence has denied that allegation and lined up the aforesaid four witnesses. They all allege that the claimant was on leave and not dismissed. RW2 alleges that on 20/9/2012 the claimant sought verbally a one month study leave because she was very good she doubled the leave to two months starting from 1/10/2012. That on the same day she also received a complaint from RW4 that the claimant was selling cold tea to customers but she dismissed it as a non-serious matter and told RW4 to deal with it calmly. That shortly the claimant reported to the RW2 that she had been ordered to remove her uniform and go away. To her she had been dismissed and she was appealing to her manager.

In my view a lot of things happened within a very short time after the RW2 returned to Blue Bubbles. She received a new application for leave, a complaint for service of cold tea and then an application for off pending leave all of which were verbal! The claimant was never heard by the RW2 until she protested for the summary dismissal.

The question in my mind is why would the claimant have reacted angrily and protested against summarily dismissal if at all all her requests for leave and off pending leave had been granted. In my view it is hard to believe that the respondents evidence on that question. It is not probable that an employee who gets her requests from the employer would protests and desert work. The vice versa is reasonably probable. An employee who has worked faithfully for three years without leave whose leave application is denied and then dismissed summarily, by her supervisor is likely to protest upto the senior most authority at the work place.

In my view the claimant had no intention of deserting work and that is why she sought for leave. In her own evidence, which I believe, did not even demand for release of her medical certificate on 20/9/2012. She only went to Aisha to see the 1st respondent to protest her dismissal after RW2 failed to reinstate her after dismissal by the RW4.

I also believe her evidence which is corroborated by RW1 that she was not reinstated even by the said RW1 but only told to go and rest and wait for his call which never materialized.

It is my finding that the claimant was dismissed summary on 20/9/2012 by RW4 which was upheld by RW2 and RW1. That was confirmed by the fact that the claimant was paid her salary only for the 20 days worked in the month of September 2012. In addition to the foregoing, the respondent never paid any more salary during the alleged two months leave in October and November 2012. That even if the claimant was to be blamed for not going to collect her salary, which is not true, the respondent should have at least remitted her NSSF dues.

In conclusion on this matter the RW2 said it all and when in cross examination she said that NSSF remittances could not have been possible without the claimant working to earn a salary from which NSSF deductions could have been made. So what kind of leave was she in if no pay was being earned?

As regards the third issue of whether the dismissal was unfair, the court notes that all the defence witnesses praised the claimant for being a good worker except RW3 and 4 who accused the claimant for serving cold tea which did not seem to be a serious problem for RW2.

A few questions arise in my mind on the foregoing. Why would RW3 leave his work station just to be at Blue Bubbles at 11.00a.m to inspect tea yet there was a supervisor RW4? Who between the two discovered that the tea was cold at 11.00 a.m? Who between the two enquired from the claimant why the tea was cold? Why was the issue of cold tea not pleaded in the defence? Why was no evidence tendered by any other person including the RW4 to show that indeed RW3 went to the Blue Bubbles at 11.00a.m and reported about cold tea being served by the claimant?

In my view the RW3 had lied to the court and she did not prove that she went to Blue bubbles on 20/9/2012 at 11.00am . If she did, she should have met RW4, the hotel supervisor and reported that customers were complaining about being served with cold tea by the claimant. The RW4 is also not telling the truth on the matter of cold tea. That issue was only designed after filing defence. It shows that she did not appreciate the claimant's service. Whereas the RW1 and RW2 were happy with her services RW4 was not, that is why she went as far as colluding with RW3 to give false evidence against the claimant to show that her performance was not good. In addition, when she was told to deal with the tea issue calmly, she did not but went ahead and just dismissed the claimant.

The foregoing notwithstanding, the dismissal of the claimant was unfair because it breached Section 41, 43 and 45 of the Employment Act. Section 41 provides that before terminating an employment on ground of misconduct or poor performance an employer must explain the reason to the employee and allow him to present his defence. That during such explanation the employee shall be accompanied by a colleague

or shop floor union representative of his choice. In this case that opportunity was not given. The employer did not prove that aspect of hearing but only alleged that the claimant was never dismissed.

The dismissal was also unfair because the respondent did not prove the reason for termination. If the reason is for poor performance then the evidence of RW1 and RW2 is that she was a good performer and they needed her back. To that extent the dismissal was unjustified and unfair and it is so declared.

Lastly, I turn to the issue of relief sought. She prays for one month salary in lieu of notice, 66.5 leave days not utilised for 3 years 2 months, 12 months salary for unfair termination, certificate of service and costs. I will not award the alleged underpayment to avoid setting a bad precedent. Underpayment was not the reason she was dismissed but leave. Had she demanded for proper pay as she did for leave and earned a dismissal, I would have award it to her.

I award the above prayers as prayed because they were not sufficiently contested.

In summary therefore I enter judgment in favour of the claimant and against the respondents jointly and severally for Ksh.145,623. I have included the 2nd respondent in the judgment to avoid duplicity of proceedings in case it turn out that the 2nd respondent was a legal person and the correct employer of the claimant. It is my view that the dispute has to be brought to a rest in one way or another including having the two defendants share or bare individual liability.

Each party shall bare his or her own costs. The judgment debt shall however attract interest from today.

Signed dated and delivered this 8th July 2013

ONESMUS MAKAU

JUDGE