REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 812 of 2010

TAILORS & TEXTILES WORKERS UNION ……...……..……... CLAIMANT

VS

ROSKY INDUSTRIES..……..….RESPONDENT

JUDGMENT

The Claimant has sued the Respondent, her former employer claiming terminal dues of Kshs.227,164.30 for unfair and unlawful termination of employment on the grievant.

The Respondent has denied liabilities and justified the termination on ground that the grievant was guilty of gross misconduct. The case was heard on 23-7-2012 and 1-9-2012 when the claimant called, the grievant who testified as CW1 and the Respondent called Sephran Odundo Odera as her only witness who testified as RW1.

The grievant told the court that she was employed by the Respondent from February 1996 to 19-8-2009 as a machinist earning Kshs.6,948/-. That in total she served for 13 years. That the salary was below her expected pay under government wage guidelines and she was not paid any house allowance.

That she was dismissed when she demanded payment of their salary increment as per the government guidelines. That the termination was by a letter alleging that she was not meeting her production target. She was not given any opportunity to depend herself. The letter is dated 19-8-2009 and it took effect immediately.

That the Collective Bargaining Agreement in issue entitled the grievant to a 2 month's notice as salary in Lieu of Notice. That she was the only one dismissed for the alleged go-show.

On cross examination she insisted that she was employed in February 1996 and given an Identity Card which she showed to the court indicating the job title as 'Machinist'. Her duty was tailoring. That her salary was Kshs.6,948/- all through despite her verbal complaint. That according to General Wages Order 2009, the salary for a machinist is Kshs.7,931/-. That the salary she was paid was for a machine attendant of Kshs.6,948/-. That she denied fairly meeting her target which she also said she did not know it.

That as per the Collective Bargaining Agreement, service gratuity was 10-days per year of service but she insisted that she was claiming 15 days per year of service. That she denied ever being paid House Allowance which she alleged was 20% of the basic salary.

That she was given notice to improve performance dated 5-8-2009 only to be terminated on 19-8-2009. That she admitted decrease in her production due to lack of materials. That she did not collect the dues because they were too little. She confirmed that she was contributing to NSSF.

On the examination she confirmed that the employer never gave her employment letter but only employment card No.11646575 for job title machinist. That the letter dated 19-8-2009 was for 'termination' not 'dismissal'. That on 17th to 18th August 2009 there were no materials for production.

On his part, RW1 stated that he was the Human Resource Manager for the Respondent since 1996. That the Respondent is a mass production entity dealing with clothes. That mass production means production in large quantities where no one person does a complete garment alone. He confirmed knowing the grievant as a mass production machinist. He denied that she was wrongfully dismissed. He contended that the dismissal was in order because a notice was given before dismissal for low production. That the notice was given to the whole group in the mass production to increase production but in vain.

That after the general notice the grievant never took her salary like her colleagues even upto now. She wrote a demand through the claimant .

He confirmed that she was dismissed under letter marked Appendix '5A' dated 19-8-2009. Her salary was Kshs.6,948/- plus House Allowance of Kshs.1,389/- to total to Kshs.8,337/-. He declined that the respondent had a job title called Machinist made to measure. That she was paid under the General Wages Order 2009 marked Appendix '6'.

On cross examination he confirmed that the grievant was employed in 1996. That her employment identify card shows that she is a machinist. He denied that the column 5 of the General Wage Order 2009 (Appendix 6) applied to the grievant because the respondent's factory was only for mass production.

He confirmed that the grievant's employment card was clear that her job was a machinist whose salary was Kshs.7,931/- plus 20% as House Allowance. He confirmed that the grievant was being paid Kshs.6,948/- was the correct pay for her. That the termination notice was for one day instead of one month's notice.

Under the Collective Bargaining Agreement the commencement date was 2005 and hence service pay was tabulated for 4.8 years according to the Collective Bargaining Agreement. That service pay was to start as provided by the Collective Bargaining Agreement not from the day of employment. He admitted that the Respondent was ready to pay.

He justified that the dismissal was not wrongful because the Respondent offered to pay one month's salary in Lieu of Notice. He contended that mass production machinist was different from machinist made to measure.

After the close of the hearing the two parties filed written submission. I have carefully gone through the pleading and considered the testimonies by the witnesses together with the written submissions filed.

It is not in dispute that the grievant was employed by the Respondent in his factory as a machinist between February 1996 and August 2009. It is not also in dispute that the grievant did tailoring duties in a group of other tailors.

The issues for determination are:-

(a)Whether the grievant's contract of service was unfairly and wrongfully terminated by the Respondent.

(b)Whether the grievant is entitled to remedies sought in view of (a) above.

To answer the first issues, I have considered the letter for dismissals dated 19-8-2009. It informed the grievant that her production had gone down by 50% between 14th and 17th August, 2009 and the Respondent deemed it as a go-slow strike and terminated her services. She was advised to collect her dues on 20-8-2009.

In my view the termination took effect immediately without any room for defence or appeal. The

grievant has alleged that her dismissal was due to her demand for a higher pay under the government wage guidelines. She also blames the low production on the period stated on lack of materials which were to be supplied by the Respondent. That allegation of lack of materials was not contested by the Respondent either in pleadings or evidence.

As for the allegation of dismissal for demand of higher pay is also probable considering the date of the Legal Notice No. 70 (Appendix 6) which introduced the wage review and the time when the grievant was dismissed. The issue of job title was contested even in the trial each side giving different interpretation. The reason for the contest was because the wages which went with the meaning given. I blame the Respondent for the confusion she created when she gave to the grievant an ambiguous job title.

The duty of explaining the job title and the job description to an employee lies with the employer. She should have made it clear to the grievant what she was and what were the terms of employment. That should have been done in good time to avoid disagreement as the one experienced.

Consequently, I find that the termination of employment without notice and without giving the grievant a hearing to be unfair and wrongful. In addition, the mere allegation by RW1 that the production by the grievant fell by 50% without any statistical data is not enough to justify the dismissal. The law places the burden of proving that the reasons for termination were valid on the employer.

In my view, mere allegation is not enough proof. Even if the claimant admitted that production went down, she explained why it went down and not by 50%. She also contended that she did not what was her expected production target. I blame the employer for the foregoing explanation by the grievant. In any event, the Respondent alleges that the grievant was part of a team in mass production and as such she could not bear personal blame for the low production in the factory. The buck stops with the factory's supervisor.

As regards the issue of whether the relief sought ought to be granted, I will now revisit the issue of the job title for the grievant. I will believe the respondent's explanation that her factory was only for mass production of clothes wherein the grievant was a tailor. In that case I will treat the grievant as a Mass Production Machinist entitled to a salary of Kshs.6,948/- plus house allowance of Kshs.1,389 to total to Kshs.8,337/- per month.

Her terminal dues under section 35, 49 and 50 of the Employment Act read with the Collective Bargaining Agreement between the parties herein work as follows:-

(a) 2 months salary in Lieu of Notice - Kshs.16,674.00

(b) Salary for July 2009 - Kshs. 8,337.00

(c) Salary for April 2009 - Kshs. 5,280.10

(d) Service pay @15 days per year of service for

13 years - Kshs.54,190.50

(e) 6 months salary for unfair termination - Kshs.50,022.00

TOTAL = Kshs.134,503.60

I have not granted the prayer for leave because the employer has adduced records to prove that leave was taken and all the House Allowance paid with the salary. I have also not granted the prayer for under payment because I have believed the employer's explanation as earlier stated that the only job title akin to machinist was mass production machinist. I also did not receive a good reason for awarding the maximum 12 months' salary for unfair termination.

Accordingly there shall be judgment in favour of the grievant for Kshs.134,503.60 plus costs and interest. The Respondent is also ordered to issue the grievant with a certificate of service.

Orders accordingly

DATE and **DELIVERED** at NAIROBI this 16th day of November, 2012.

Onesmus N. Makau
JUDGE.