



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT**

**AT NAIROBI**

**CAUSE NO.481 [N] OF 2009**

**BETWEEN**

**ANNE ATIENO SADIEDA.....CLAIMANT**

**VERSUS**

**LAVAGE LAUNDRETTE & DRYCLEANERS.....RESPONDENT**

**ISSUE IN DISPUTE**

**“Wrongful and Unfair Dismissal from Employment”**

**AWARD**

Anne Atieno Sadieda filed a statement of claim on 28<sup>th</sup> August 2010, through the firm of Gitonga, Kinyanjui and Company Advocates. She stated she was employed by the respondent Drycleaner as a shop attendant and Manager on or about 25<sup>th</sup> March 2005. She alleged she was unlawfully and unfairly dismissed from employment by the respondent on 21<sup>st</sup> March 2009. The claimant gave evidence and closed her case on 21<sup>st</sup> March 2011. She was led by Mr. Kinyanjui.

The claim was opposed. The respondent filed a statement of reply on 1<sup>st</sup> October 2009 through the firm of Taibjee and Bhalla Advocates. Pamela Atieno Owiny, a supervisor employed by the respondent, gave evidence on behalf of the respondent. The response to the claim was led by Mr. Adera.

The claimant’s position was that she was employed by the respondent as a shop attendant cum-manager on or about 25<sup>th</sup> March 2005. She served diligently, and without any warning letters from the respondent. Around 10<sup>th</sup> March 2009, the respondent summarily dismissed her. There was no notice or

reasons given. The dismissal letter dated 15<sup>th</sup> March 2009, alleged the claimant was negligent in her work. The decision by the respondent was malicious and made in order to deny the claimant her terminal benefits. The claimant stated the dismissal was in violation of rules of Natural Justice and the Employment Act 2007. At the date of dismissal, she earned a monthly salary of Ksh.9,565 [nine thousand, five hundred and sixty five only].

The claimant asked the Court to find her dismissal to have been unprocedural, unfair and unlawful and Award her:-

1. 1 monthly salary in lieu of notice at Ksh.9,565 [nine thousand, five hundred and sixty five only].
- 2 Service pay at 20 days salary for each of the 4 years in service at Ksh.25,506 [twenty five thousand, five hundred and six only].
3. Accrued leave pay for 2005-2008 at Ksh16,765 [sixteen thousand, seven hundred and sixty five only].
4. 16 hours overtime pay, for March 2009 at Ksh.1,275 [one thousand, two hundred and seventy five only].
5. Salary Arrears 1<sup>st</sup> March to 10<sup>th</sup> March 2009 at Kshs.3,678 [three thousand, six hundred and seventy eight only].

The claimant asked the Court to Award her 5 months' salary in compensation and to order the respondent to issue her a certificate of service.

The respondent submitted and testified that Anne Atieno Sadieda was its employee. She however served as a shop attendant, not a manager. Her employment was legally terminated. She was paid all terminal dues. The decision taken by the respondent was not malicious. Sadieda had received previous verbal and written warnings.

The claimant was paid 1 month salary in lieu of notice. She conceded she received this from the Labour Office. Service pay was not claimable, as the claimant was a member of the N.S.S.F. The claimant took her leave, except for the year 2008-2009 for which she was compensated. Overtime pay had not been supported by evidence. 9 days salary for March was paid to her by the respondent. She was not entitled to the prayer for terminal benefits.

Mr. Adera submitted evidence given by Pamela Atieno Owiny showed the claimant was dismissed for valid reasons. As per receipt Number 37058, a customer Wanjiku Kimani brought in a duvet and paid Ksh.1,400 [one thousand, four hundred only] for laundry. The claimant gave this item to a different customer, which led to the respondent paying compensation in the sum of Ksh.14,000 [fourteen thousand only] to Wanjiku Kimani. The claimant issued receipts to customers, undercharging for laundry services rendered. She failed to inform customers when to collect their items. She lost a customers suit, having mistaken the Navy Blue Suit for a Grey one. Sadieda claimed to be colour blind. The respondent asked the Court to dismiss the claim, and allow its counter claim for the sum of Ksh.22,400 [twenty two thousand, four hundred only] sustained in losses on account of the claimant's negligent performance of duty.

We have considered the evidence and submissions on record and have reached the following conclusions:-

1. Anne Atieno Sadieda served the respondent as a shop attendant from 28<sup>th</sup> March 2005 to 15<sup>th</sup> March 2009. Her last salary was Ksh.9,565 [nine thousand, five hundred and sixty five only]. Her letter of termination issued on 15<sup>th</sup> March 2009. Her last working day however, was on 9<sup>th</sup> March 2009. Upon termination, the respondent paid to the claimant:-

- 9 days' salary for work done in March 2009 at Ksh.2,870 [two thousand, eight hundred and seventy only].
- 16 hours overtime for work done March 2009 at Ksh.1,275 [one thousand, two hundred and seventy five only].
- One month leave pay for 2008 – 2009 at Ksh.9,565 [nine thousand, five hundred and sixty five only].
- Notice pay of 1 month at Ksh.9,565 [nine thousand, five hundred and sixty five only]

Total paid Ksh.23,275 [twenty three thousand, two hundred and seventy five only].

Payment of this amount was acknowledged by the claimant on 4<sup>th</sup> May 2009, and by her Advocates in their demand letter dated 18<sup>th</sup> May 2009.

2. It was improper in view of this, for the claimant to seek 1 month notice pay, overtime pay and salary for days' worked in March 2009. These claims are not payable a second time. There is sufficient evidence on record to show the claimant worked for 9 days in March, not 10, for which she was compensated. Service pay was not merited under Section 35 of the Employment Act 2007. The claimant was a contributor to the N.S.S.F, and therefore not covered under the service pay obligation created under Section 35 above. We were persuaded by the evidence of the respondent that the claimant went on paid leave except for the year 2008-2009. She was compensated for unutilized annual leave. The claim stretching back unpaid annual leave to 2005 was not established by evidence. In total, we find the claimant was paid the correct terminal benefits. Her claim for another round of payment was groundless.

3. There were valid reasons under section 43 and 45 of the Employment Act., for the Employer to terminate the claimant's contract of service. She performed her duties carelessly and improperly, an employment offence under Section 44 of the Employment Act 2007. She was an attendant at the respondent's business. She gave customers' Laundry items to other customers; gave wrong pricing for dry-cleaning and washing; and, lost customers' clothings. The particular incidents were not denied, or satisfactorily explained away by the claimant. The bottom-line is that she performed her duties carelessly and improperly and this was a valid ground in dismissing her. This consequently leads to the conclusion that we find for the respondent in terms of its counter-claim for the sum of Kshs.22,400 [twenty two thousand, four hundred only].

4. Procedural justice lacked from the dismissal process. The respondent had issued the claimant warning letters in 2005. These two letters had no validity at the date of dismissal, and ought to have been removed from the claimant's employment record way back in 2006. Warning letters, even where validly issued, do not take away the employer's duty to give the employee a hearing under Section 41 of the Employment Act 2007, before decision to terminate employment is reached. Substantive justification does not take away the duty by employers to avail procedural fairness to affected employees. There is no evidence on record to show that the respondent gave the claimant a chance to be heard under Section 41. Section 41 and 45 of this Act called upon the respondent to adopt a fair procedure in ending the claimant's contract of employment. There was a procedural lapse. The dismissal procedure was unfair. We Award the claimant 4 months' salary in compensation under Section 49 of the Employment Act 2007, as read with Section 15 of the Labour Institutions Act 2007.

5. In the end, we Award as follows:-

**a. The claimant's dismissal from employment by the respondent was procedurally unfair.**

**b. The claimant be paid 4 months' salary in compensation by the respondent, adding-up to Ksh.38,260 [thirty eight thousand, two hundred and sixty only].**

**c. The counter-claim for Ksh.22,400 [twenty two thousand, four hundred only] is allowed, and be deducted from the sum in [b].**

**d. The total Award of Ksh.15,860 [fifteen thousand, eight hundred and sixty only] be paid by the respondent to the claimant in full and final settlement of the claim, within 30 days of the reading of this award.**

**e. Parties to bear their own costs of the claim.**

The members agree, it is so ordered.

Dated and delivered at Nairobi this 5<sup>th</sup> day of May 2011.

J.Lokwee

D.K. Siele

MEMBER

MEMBER

Hon. Justice James Rika

JUDGE.