



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.157 OF 2015

(Before D. K. N. Marete)

LEAH JEROTICH KOECH.....CLAIMANT

VERSUS

KEIYO TEACHERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED

(PRIME TIME CO-OPERATIVE & CREDIT SOCIETY LIMITED).....RESPONDENT

JUDGMENT

This matter was brought to court vide a Memorandum of Claim dated 22nd June, 2016. It does not disclose an issue in dispute on its face.

The respondent vide The Respondents Statement of Response dated 7th July, 2015 denies the claim and prays that the same be dismissed with costs to herself.

The claimant's case is that he was employed by the respondent as a clerk in 1986 and that at the time of her unfair termination she earned a gross salary of Kshs. 22,743.00. She also doubled as a cleaner and partook other assignments as instructed by the respondent. It is the claimant's further case that she served the respondent dedicatedly, unsavory and without a meaningful warning on her employment until the date of her unlawful termination from service on 1st August, 2013. The claimant avers and submits that this was contrary to proper procedure per the provisions of the Employment Act, 2007. It is her further case that her services were terminated on grounds of public interest when she was 54 years and not 55 as alleged by the respondent. She submits that the reasons given in the letter of 27th May, 2013 are not valid, more so after she had served for more than two decades.

She pleads violation as follows;

7. The Respondent violated Sections 41 (1) of the Employment Act 2007 which provides that when an employer intends to dismiss or terminate the employment of an employee..... it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that the respondent never explained to her precisely the reasons for the termination of service and neither did the respondent allowed her to dispute the reasons given for her termination of service.

8. Section 43 (1) of the Employment Act provides that in any claim arising out of termination of

contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination of the employment shall be deemed to have been unfair. Claimant contends that the respondent never explained to him precisely the reasons for the termination of service and neither did the respondent prove the said reasons of termination as valid reasons.

9. The respondent terminated claimant's employment without following the procedure laid down in the Employment Act, especially the procedures laid out in Section 45 and 41 of the Employment Act.

10. THAT the claimant avers that the alleged reasons given by the respondent that the claimant was retired on public interest pursuant to the terms and conditions of service paragraphs 33 (1) (f) and 33 (1) (d) (viii) (d) was malicious and well calculated to form a basis to unfairly terminate the claimant from employment on the following grounds:-

(i) No evidence was availed to the claimant of the alleged public interest;

(ii) The respondent did not prove that the members of the public were in dire need to have the claimant retired.

(iii) No notice to show cause was availed to the claimant to dispute the said allegations.

(iv) The claimant was never accorded a hearing nor an opportunity to call her witness in her defence and/or dispute her termination from service;

(v) The reasons cited to terminate the claimant from her employment is not a valid reason.

11. That the claimant avers that the termination was unfair because the respondent did not act in accordance with justice/equity and it failed to prove that the reason for termination was valid thus violated Section 45 and 46 of the Employment Act 2007.

12. That the claimant avers that termination was unfair and/or illegal on the following grounds;

(i) The respondent did not give the Claimant sufficient Termination notice as provided by Section 35(1) c & 36 of the Employment Act and paragraphs 33 (1) (f) of the employees terms and conditions of service.

(ii) The respondent denied the Claimant's employment without following the procedure laid down in the Employment Act specifically the procedure laid out in Section 15, 41 and 45 of the Employment Act.

(iii) The respondent terminated the claimant's employment without proving that the reason for termination was valid as provided under Section 43 and 45 of the Employment Act;

(iv) The respondent did not regulate the working hours of the claimant as provided by Section 27 of the Employment Act and paragraph 26 (o) of the

employees terms and conditions of service;

(v) The respondent declined to pay the claimant her lawful entitlements in terms of compensation and gratuity as provided under paragraphs 35 (d) of the employees terms and conditions of service.

(vi) The respondent failed to pay the Claimant her 12 months wages for loss of Employment

as provided under Section 15 of the Labour Institutions Act and Section 49 (c) of the Employment Act;

(viii) The respondent did not pay the claimant's terminal benefits. (See the annexed copy of calculations attached herein and marked an Appendix V)

She prays as follows;

- a. The Claim be allowed in its entirety with costs and interest be borne by the respondent.
- b. Any other further and better relief the Honourable Court may deem just and fit to grant
- c. CLAIMS:-

1. A declaration that the termination of employment was unfair, unprocedural and a fundamental violation of the rights of the claimant and thus the claimant is entitled to compensation.

2. A Certificate of Service as per Section 51 of the Employment Act;

3. Costs and interest of this suit.

Compensation Calculated as follows:-

1. 9 months salary in Lieu of notice for mandatory retirement before attaining the age of 55 years in this case it could have been December, 2013 not August, 2013. (Pursuant to paragraphs 33 (1) (f) of the Employee Terms Conditions of Service)

9 x 22,743 Kshs. 204,687/-

2. Breach of Employees Terms and Conditions of Service for early retirements

4 x 22,473 Kshs.90,972/-

3. Retirement benefits:-

a. Gratuity (Pursuant to paragraphs 35 (A) & (D) (1) of the Employee Terms & Conditions of Service Kshs. 3,117,336 (Total salary earned in 27 years) x $\frac{1}{4}$ Kshs. 779,334/-

Less amount paid Kshs. 280,000/-

Total amount claimed Kshs. 499,334/-

b. Compensation (pursuant to paragraphs 35 (b) & (d) (2) of the Employee terms & conditions of service. Last basic salary x years worked x 12 months in a year x $\frac{1}{4}$ Kshs. 17,717/- (last basic salary) x 27 (years worked) x 12 (months in a year) x $\frac{1}{4}$ 17,717 x 27 x 12 x $\frac{1}{4}$

Kshs. 1,435,077/-

4. Overtime Kshs. 1,435,077/-

5. Compensation for unfair termination Section 15 Labour Institutions Act & Section 49 (c) of the Employment Act. Kshs. 272,916/-

The respondent's case is that she is now known by the name of Prime – Time Sacco Society Limited and not the former name as it appears in the claim. She denies that the claimant was her employee and further denies the particulars of employment as claimed. She also denies the allegations of termination and good, dedicated service of the claimant as expressed and laid out in the claim.

The respondent in further opposition sets out a general denial of the claim as made and documented in what comes out as a frivolous and hollow defence suitable for striking out in the first instance.

The respondent in The Respondent's Ammended Statement of Response amends the response to introduce a change of date from 2004 to 1994 as follows;

3.3 The respondent currently does not handle this matter since the claimant's employer, Keiyo Marakwet Teachers Sacco, was dissolved in the year 1994.

The matter came to court on 16th February, 2016 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unprocedural, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this cause?

The claimant in his written submissions reiterates the claim and evidence as pleaded and prays for relief as set out. She seeks to rely on the provisions of Section 45 of the Employment Act as follows;

“No employer shall terminate the employment of an employee unfairly.

A termination of employment by an employer is unfair if the employer fails to prove

- a. *That the reason for termination is valid.*
- b. *That the reason for termination is a fair reason-*
 - i. *Related to the employee's conduct, capacity or*

compatibility; or

- ii. *Based on the operational requirements of the employer;*
- c. *That the employment was terminated in accordance with fair procedure.”*

Again, paragraph 33. 1 (f) of the Employee Terms and Conditions of Service provides;

“The society may terminate an employee's employment in the manner prescribed.

- i. *The officer attaining the mandatory retirement age of 55 years*
- ii. *In accordance with the Society's agreement terms with an employee*
- iii. *The employee may also terminate his services with the society of his own volition*

In each case, the terminator of the service will give notice of not less than one month or one month's salary in lieu of notice.

In case of mandatory retirement, the employee will be notified not less than nine months prior to his actual date of retirement.

The employee is entitled to all his benefits and privileges before leaving employment.”

The claimant further submits that the hearing was mandatory in her case in line with the provisions of Section 41 of the Employment Act for purposes of ascertaining her age. That the fact that the respondent ignored his position of the law makes the validity of the reasons given invalid.

The claimant wishes to state further that in a case where there is a dispute as to the exact age of an employee, then the employer should have taken 31st

December, 2013 to avoid unnecessary speculation of the exact age of retirement.

The claimant also sought to rely on the authority of **Michael Otieno Oumo v Carlake Nominees Limited t/a Diana Sea Resort Industrial Cause Number 30 of 2013** (4 October 2013) court held that:-

“An employee in the private sector cannot retire an employee summarily as there is no law for providing mandatory retirement at any age. The matter of retirement therefore remains a mode of termination of employment which must be agreed upon by the employer and the employee.

Consequently if the same is not agreed between the parties, it is presumed that the employment is indefinite unless terminated by notice, breach, dismissal, impossibility or death.”

The claimant further sought to rely on Section 45 (4) (b) of the Employment Act, 2007 as follows;

“...that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.”

The claimant further seeks to rely on the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where the Court held that;

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

Further, the claimant sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements for termination of employment on grounds of misconduct (including gross misconduct) poor performance or physical incapacity as set out in Section 41 of the Employment Act as follows;

- a) That the employer has explained to the employee in a language the employee understand the reasons why termination is being considered;*
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- c) That the employer has heard and considered any explanation by the employee or their representative;*
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

This she submits was not articulated in the process of termination.

Again, in the case of **Kabengi Mugo V Syngenta East Africa Limited Industrial Cause Number 1476 of 2011** court held that;

“The Kenyan employment law no longer accepts that “at will doctrine” whereby an employer can fire employees at will, for any reason or no reason.”

The respondent’s written submissions dated 9th March, 2016 are a replica of the defence. They are a denial of the claim and are more detailed. Unfortunately, there is no tally between the submissions and the defence. The submissions fall short of being a support for the defence and the respondent’s case does not come out in both the defence and submissions. I am, however, hesitant to outrightly strike out the defence as should be the case here.

The claimant pleads and submits a case of unlawful termination. Both parties annex a letter to the claimant dated 27th May, 2013 alerting the claimant of her retirement from employment. This letter is brief and scanty of detail. The claimant denies that she was due for retirement and this is not answered by the respondent. Instead, the respondent denies liability and puts in a case of change of employer by virtue of change of the name of the respondent. A balance of probability tilts this matter in favour of the claimant. This is because the fumbled defence of the respondent does not help in establishing the position of the matter. The submissions of the respondent do not assist either. I find that there is no tangible defence to a case of termination of employment. The claimant therefore takes the day with a case of unlawful termination of employment.

On a finding of unlawful termination of employment of the claimant, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. That a declaration be and is hereby issued that the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful.

ii. One month salary in lieu of notice = Kshs. 22,743.00

iii. Ten (10) months compensation for unfair termination of employment

= Kshs. 227,430.00

TOTAL = Kshs. 250,173.00

iv. That the respondent be and is hereby ordered to meet and pay retirement benefits to the claimant.

v. That the Commissioner for Labour be and is hereby ordered to, with the involvement of the parties, compute retirement benefits at (iv) above and file a report within 120 days of this judgment of court.

vi. That the respondent be and is hereby ordered to issue a certificate of service to the claimant within 30 days.

vii. Mention on 7th December, 2016 for a report of the Commissioner for Labour and further directions of court.

Delivered, dated and signed this 30th day of June 2016.

D.K.Njagi Marete

JUDGE

Appearances

Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.

Mr. Cheptarus instructed by Josph C.K. Cheptaru & Company Advocates for the respondent.