



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**Civil Appeal No. 26 Of 2009**

GRACE N. NDUNG'U.....APPELLANT

VERSUS

THE REGISTERED TRUSTEES ARCHDIOCESE OF  
NYERI.....RESPONDENT

*(Being an appeal from the judgment and order of Hon. K. Bidali, Resident Magistrate delivered on  
18.2.2009)*

IN

NYERI CCMC NO. 604 OF 2007

BETWEEN

GRACE N. NDUNG'U.....PLAINTIFF

AND

THE REGISTERED TRUSTEES

ARCHDIOCESE OF NYERI.....DEFENDANT

**JUDGMENT**

The appellant in this case has moved this court in the exercise of its appellate jurisdiction to allow the appeal, set aside the order of the court below dismissing the appellant's suit and substitute therefor an order allowing the appellant's suit as prayed in that court. The appellant further seeks an award of costs of the appeal.

By a plaint dated 24th September, 2007 the plaintiff/appellant commenced a suit against the respondent claiming that the latter terminated her contract of employment contrary to law and that the termination was motivated by malice and ill-will on the part of those she worked under.

She averred that in terminating her services, the respondent had no valid basis, acted in breach of contract of employment and did not avail her the natural right to be heard.

The defendant/respondent on its part resisted the claim in the court below by its statement of defence filed on 12th October, 2007.

The defendant denied among others that the plaintiff was its employee and pleaded in the alternative that even if the plaintiff were its employee, which it denied, her termination was lawful and that she was not entitled to any terminal benefits as alleged in the plaint.

At the trial only the plaintiff/appellant testified on her part and the defendant called two witnesses.

According to the appellant she initially got a temporary appointment on 17th September, 2001 as a tea girl and a cleaner. She was later confirmed and placed on contract 31st December, 2007. She was however terminated on 19th June, 2007.

According to her, she was never told why, however in the letter of dismissal she was accused of absconding duty and was also accused of being responsible for loss of some property of the respondent.

It was her evidence that she went on leave between 10th April, 2007 and 14th April, 2007. When she resumed duty she noticed some blankets and bed sheets had been removed from the beds in the guest house. She reported the matter to a Mr. Stephen Waweru (DW1) who did not respond immediately. It was her evidence that they later had conflict over the same with Mr. Waweru. According to her the summary dismissal was not warranted and she had not during her employment received any warning letter on any of the allegations against her.

DW1 testified that he knew the appellant as an employee of the respondent, working as support staff. She was in charge of cleaning and kitchen. According to the witness, the appellant had a job description which he revised on 14th June, 2007. He stated that despite the revision, the appellant's designation did not change except that she was no longer going to keep the rooms keys. These would henceforth be surrendered to the office assistant. According to DW1 the events leading to the appellant's termination of employment were not unlawful. He testified that on 8th June, 2007 the respondent was to have a Board meeting. Lunch was provided but the Board members could not have it as everyone had gone home. The food was left on the table until Monday. The food stayed on the table until Wednesday when it was removed by the appellant who according to him admitted she was at fault.

He stated that the Board held a special session with regard to the issue and called the appellant to defend herself.

In cross-examination DW1 stated that it was not the appellant who laid the table but someone by the name Jane, who bought and prepared the food. He stated that he did not know whether the appellant was aware of the food but that was her duty.

DW2 testified that on 14th June, 2007 the acting Development Co-ordinator brought to his attention that there was a case of neglect of duty and disobedience by the appellant. The case was that the appellant had neglected her duties and left food on the table for 6 days while it was her duty to clean.

It was his evidence that the appellant was called by Executive Committee to show cause why disciplinary action should not be taken against her but from what she explained the Committee was not convinced and that she showed no remorse. It was therefore decided that she be summarily dismissed.

In cross-examination he stated that the appellant was not served with a formal notice of accusations against her. He further stated that there were squabbles among members of staff and that he did not have details of the office politics. He stated that he had no idea why the appellant did not remove the food from the table.

In his submissions Before the trial court, counsel for the appellants submitted that whereas the appellant sued the respondent for a declaration that her summary dismissal was unlawful and prayed that she be awarded Kshs.98,960 as compensation. And further whereas she tendered evidence in support of her claim, the respondent in its defence made general denials including that the appellant was not its employee. According to counsel, the respondent never specifically addressed any of the plaintiff's claims as pleaded in the plaint.

Counsel submitted that the basis of the appellant's claim was a letter dated 18th June, 2007 which detailed the plaintiff's alleged offences. According to counsel, these accusations were so specific that one would have naturally expected the respondent to prominently feature them in their defence as well as testimonies during the trial.

Counsel submitted that the testimonies by witnesses on these issues while not pleaded was not only an afterthought but amounted to a departure from pleadings.

The respondent's counsel on his part submitted at the trial court that the plaintiff was dismissed because of misconduct in that she neglected her duties. She was evidently given an opportunity to defend herself but was not even remorseful as a result of which disciplinary action was taken. Counsel further submitted that the appellant having been dismissed due to gross misconduct was not entitled to any payment for the remaining period.

Concerning gratuity counsel submitted that the contract provided that this was payable at 15% of the basic monthly pay at the end of the year and the plaintiff not having completed the year was not entitled to gratuity.

The trial court in its judgment, the subject of this appeal considered the testimony and the submission of counsel and came to the conclusion that the appellant was given ample opportunity to defend herself and it was evident that the appellant neglected her duties justifying her summary dismissal. Concerning the issue of departure from pleadings the trial court found that the defendant denied the averments in the plaint and evidence was tendered in support thereof. The court therefore found that there was no departure from pleadings.

The appellant attacks the findings of the trial court on 8 grounds which this court has summarised to four main grounds. Grounds 1, 2, 3 and 7 of the appeal revolve around the same issue that is to say; the learned trial magistrate erred in finding that the appellant was guilty of gross misconduct. Grounds 4 and 8 stand alone while grounds 5 and 6 concern the same issue.

Concerning the complaint that the trial magistrate erred in finding that the appellant was guilty of gross misconduct when there was no evidence to support the said finding, counsel submitted as before the trial court that the defence tendered at the trial was an afterthought. According to counsel, the dismissal letter only referred to three reasons for dismissal namely:

- (i) Neglect of duties leading to loss of property.**
- (ii) Absenteeism without authority.**
- (iii) Rudness to those in authority.**

None of these reasons, counsel submitted were mentioned in the defence filed in the trial court. In response to this, counsel for the respondent submitted that the issue in the case was not whether it was the appellant who placed the food on the table or not, the issue was whether she obeyed directions of her superiors which she did not and it was proved.

It is right that the letter of dismissal dated 18th June, 2007 did not make reference to failure to remove food from the table as one of the reasons for the dismissal of the appellant. The letter makes reference to persistent negligence of duties that resulted to loss of property under the appellant's care. The defence did not contain any particulars of the appellants neglect of duty nor was any evidence led during the trial to show anything was lost as a consequence of the appellant's alleged negligence. The dismissal letter was therefore imprecise on the grounds for the appellant's dismissal.

It would seem that the main ground for the appellant's summary dismissal was the accusation that she failed to remove food placed by another staff member as lunch for the Board members.

The chronology of this saga is set out in defence exhibit 2 titled special report.

According to his report, on Friday June 8th 2007 food was delivered and served, but the Board members failed to turn up for lunch as they were busy until 6.00 p.m. Food was therefore left in the dining hall over the weekend. On Monday, the appellant did not remove the food. Tuesday, the situation remained the same and the staff who were now concerned were discussing the matter although it was not brought to the attention of the management since the acting Development Co-ordinator was away in the field. The situation remained the same until Wednesday, 13th June, 2007 when the matter was brought to the attention of the management by the Secretary. Acting Development Co-ordinator instructed that the matter was trivial and should be disposed of immediately. He then left for the field. Upon his return the issue still remained unsolved and was informed so by the cleaner (the appellant presumably). The cleaner refused to co-operate and declined to engage in discussion if there was any contentious issue regarding cleaning the dining hall.

On Thursday 14th June, 2007 the matter was brought to the attention of the Board members who demand to question the cleaner over the incident. The Board discussed the issue and directed that the matter was grave and required immediate remedy. They concurred on the difficulties the organization faced terming the matter as insubordination, failure to execute duty and disrespect. The cleaner (presumably the appellant) explained her action as justified since it was never communicated to her what the food was for and when it was going to be disposed of by the management. Board members caution her on the gravity of the matter, and that it was not necessary to wait for a communication in the matter. The appellant apologised and accepted her mistake.

In addition to the chronology of events outlined above, DW2 in his evidence to the court testified that the appellant was not served with formal notice of accusations against her. It was his evidence that there were squabbles among members of staff. The previous Co-ordinator left about one year earlier. It was his testimony that he did not have details of office politics.

From the chronology of facts as contained in the reports, and the evidence of DW2, it would appear to the court that there was more to the alleged failure by the appellant to remove the food from the table. According to her she was not told and according to DW2 there were squabbles among staff. Besides this issue appeared to have been resolved when the Board warned the appellant and she accepted her mistake and apologised. Apart from the fact that it was not directly referred to in the appellant's letter of dismissal, it could not be a ground for summary dismissal after the Board had considered it and warned the appellant who accepted her mistake and apologised. The court therefore agrees with the appellant that the learned trial magistrate erred in finding that the appellant was guilty of gross misconduct when there was no evidence to support the said finding. The trial court erred when it failed to consider that the appellant was not the one who had kept the offensive food on the table and may not have been aware why it was there. For the above reasons this ground of appeal succeeds.

The court would like to consider the third ground of appeal as framed by the court, that is whether the learned trial magistrate erred in failing to consider that the defence as filed by the respondent was mere afterthought and that the reason advanced for summary dismissal was not the one advanced in support of the defence case.

The court has already found that the issue of the food left on the table for inordinately long was not a valid reason for summarily dismissing the appellant since the matter had been dealt with by the Board. The evidence by the respondent's witnesses on the issue therefore become of no use in justifying the appellants summary dismissal. The defence filed by the respondent was a bare denial of the plaint. It is a settled rule of pleadings that a party should plead concisely but clearly in order for the opponent to know what case to expect and adequately prepare. To merely deny averments in the plaint only to offer a more detailed rebuttal at the trial by way of testimony by witnesses amounts to ambushing and contrary to rules of pleading. The appellant in her letter of dismissal was accused among other of neglect of duty leading to loss of property. Her suit revolved around this letter of dismissal. She may have come to court ready to show she never neglected her duties and no property was lost as a result. It was therefore unfair to confront her with the issue of the food left on the table which she might have well thought was

resolved. To this extent, counsel for the appellant is right when he complained that the testimonies of the respondent's witnesses were an afterthought and outside the framework of the defence filed in court. They indeed amounted to departure from the pleadings. This ground of appeal too succeeds.

Having found as above, grounds 2 and 4 of appeal as framed by the court flows from such finding and succeed without any further consideration.

This being the first appellate court, it has power to reevaluate the evidence and substitute the decision with that of the trial court.

This cause of action accrued prior to the enactment of the Employment Act, 2007 to that extent the provisions of the Act will not apply. The applicable Act is the repealed Employment Act – Cap 226.

Section 14(5) of that Act provided in the relevant part that every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall be deemed to be where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty eight days next following the giving of notice in writing.

The appellant was a fixed term contract employee but with a provision in the contract that it could be terminated by a written notice of at least one month or by payment of one month's salary in lieu of notice by the party breaking the contract. This court having found that the appellant's summary dismissal was unlawful hereby reduces her termination to normal termination without notice and awards her one month's salary in lieu of notice. The court further orders that the appellant be paid salary for the 16 days worked in the month of June 2007 when she got dismissed.

Concerning gratuity, the court concurs that this was payable annually, however its calculation was at the rate of 15% of the monthly salary. For this reason, at the point of the appellant's termination she had earned some amount of gratuity. To this extent the court will award the appellant pro rata gratuity for 6 months that she was with the organization/respondent.

In conclusion, the appeal is hereby allowed and the court hereby substitutes the lower court's order dismissing the appellant's suit with the following order.

The appellant shall be paid:

	<b>Kshs.</b>
1. One month's salary in lieu of notice	12,370
2. Salary for 16 days worked in June, 2007	
<u>(12,370 x 16)</u>	
26	7,612
3. Pro rata gratuity for 6 months <u>(12,370 x 15 x 6)</u>	
	100 <u>11,115</u>
	<b>31,115</b>
	=====

This award shall attract interest at court rates. The appellant will have costs of the appeal and at the trial court.

It is so ordered.

*Dated at Nyeri this 4th day of October, 2013.*

**NELSON ABUODHA J.**

**JUDGE**

*Delivered in open Court in the presence of Wahome for the Appellant and in the presence of Kioni for the Respondent.*

**NELSON ABUODHA J.**

**JUDGE**