Naliaka v Diamond Trust Bank Limited (Employment and Labour Relations Cause E059 of 2021) [2024] KEELRC 1748 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1748 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS CAUSE E059 OF 2021

HS WASILWA, J

JULY 11, 2024

BETWEEN

ROSE NALIAKA ..... CLAIMANT

AND

DIAMOND TRUST BANK LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant instituted this suit by a memorandum of claim dated 12th November, 2021, alleging to have been unfairly terminated and seeking for the following reliefs;-

    1 . Three months salary in lieu of notice of Kshs 419,664.

    2. Severance pay for 3 ½ years of Kshs 2,937,648.

    3. Compensation based on section 49(c) of the *Employment Act* of Kshs 1,678,656.

    4. Costs of this suit be borne by the Respondent.

    5. Any other relief this Court may deem fit to grant.

2. The claimant states that he was employed by the Respondent as a teller operator from the year 2015 earning a monthly salary of Kshs 139,888.

3. She stated that she served the Respondent diligently for three and half years without any meaningful warning record but that he was summarily, dismissed from employment on 15th November, 2018 without any notice or due procedure. Therefore, that the termination was in violation of sections 35, 41, 44 and 45 of the *Employment Act* and a further breach of the Claimant's rights under *the Constitution* and Convention 158 of the ILO.

4. The Respondent entered appearance through the firm of Oraro and Company Advocates on 21st December, 2021 and filed a response to the Claim and a Counterclaim on even date.

5. The Respondent stated that it employed the claimant on 9th April, 2015 as Assistant Manager(MG 4 Step 1) at a monthly basic salary of Kshs. 60,000 and House Allowance of Kshs. 60,000. That the claimant worked in that position until 15th November, 2018, when her services was terminated.

6. The Respondent contends that it followed due procedure in terminating the services of the claimant as such the claim herein is without basis. Further that the claim of violation of the claimant's right and fundamental freedoms is without basis.

7. It is averred that the contract of employment provided for termination notice of only one month which the Respondent paid the claim as part of his terminal dues as she was paid Kshs 100,882.75 and pension benefits of Kshs 309,539.35. However, that the Respondent used the claimant's terminal dues to offset part of his loan, which currently stands at Kshs. 1,003,279.04.

8. On reliefs, the Respondent stated that notice period as captured in the Employment contract was for a period of one month and not three months as alleged in the Claim. On severance claim, it is stated that the claimant was not declared redundant, thus not entitled to severance pay. Also that the termination was justified in reason and followed due procedure, thus the claim for compensation and costs in without merit.

9. In the Counterclaim, the Respondent stated that during the pendency of his employment, the claimant was entitled to among other things, staff loan at a preferential rates and in exercise of that right, the claimant applied for two loan facilities, the first of 1Million that was to be paid by December, 2020. Subsequently, she applied for another loan of Kshs. 533,625.55 which was disbursed on 18th September, 2017, all adding upto Kshs. 1,250,000.

10. It is stated that prior to the dispatch of the loan, the claimant executed an agreement with the Respondent on 15th September, 2017 that the loan will be paid in full in 60 months. It was further a term of the loan agreement that the Respondent retained the right to offset any monies due and payable to the claimant towards payment of any outstanding balances plus interests.

11. It is averred that before the claimant could fully pay the loan, her employment was terminated by the letter of 15th November, 2018 on grounds of gross misconduct and failure to comply with internal procedures and Policies. That at the time of termination, the claimant arrears stood at Kshs 1,003,279.04. Additionally, that due to the fact that the claimant was no longer their employee, the loan terms were converted to commercial rates and continue to accrue interest which stood at Kshs 1,427,464.17 as at 2nd December, 2021.

12. Based on the foregoing, the Respondent prayed for the following reliefs; -

    a. A declaration that the claimant is in default of her obligations under the staff loan agreement dated 15th September, 2017.

    b. Judgement against the claimant in the sum of Kshs 1,427,464.17 as at 2nd December, 2021 together with interest therein at the Respondent's commercial rates until payment in full.

    c. Costs of this suit be granted to the Respondent.

13. The matter was slated for hearing severally, in attendance of the claimant and in absence of the Respondent and on 25th April, 2024 and on 30th May, 2024, the matter proceeded for hearing of the claimant's case.

14. The claimant testified as CW-1 and stated that she is now employed by another company based in Nairobi albeit on contract. She adopted her witness statement dated 7th May, 2024 and stated that she

worked for the Respondent for 3 ½ years from April, 2015 to November, 2018. She produced the bundle of documents as her exhibits 1 to 5 respectively and urged this Court to allow the claim as prayed.

15. This matter having proceeded exparte, the Claimants case remained largely uncontroverted. The Respondents was served with a hearing notice for the hearing slated for 25/4/2024 but they failed to attend. This court thus ordered the hearing to proceed exparte.

16. The Claimant averred that she was terminated for no valid reasons and without any due process. Indeed without any evidence to the contrary, the Claimant was entitled to due process. There is no evidence that this was done.

17. This contravenes section 41 of the *Employment Act* 2007 which states as follows:

> " 41.
>
> (l). Subject to section 42 (l), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical grounds of incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

18. In the circumstances of the case, the termination of the Claimant was unfair and unjustified as per Section 45 (2) of the *Employment Act* 2007 which states as follows:

> " 45.
>
> (2) A termination of employment by an employer is unfair if the employer fails to prove—
>
> (a) that the reason for the termination is valid;
>
> (b) that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility; or
>
> (ii) based on the operational requirements of the employer; and
>
> (c) that the employment was terminated in accordance with fair procedure."

19. I therefore find for the Claimant and find for her and award her as follows:

(1) 1 month's salary in lieu of notice as per the Claimant's employment contract – 1 x 139,888 = 139,888/=

(2) Compensation equivalent to 10 months' salary for unfair and unlawful termination – 10 x 139,888 = 1,398,880/=

Total awarded = 1,538,786/=

Less statutory deductions

20. The Respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGMENT DELIVERED VIRTUALLY THIS 11TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Wangari holding brief Omenta

Court Assistant - Fred

Page 3 of 3