Masinga v Tata Africa Holdings Ltd (Cause 412 of 2016)
[2023] KEELRC 93 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 93 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 412 OF 2016

AN MWAURE, J

JANUARY 19, 2023

BETWEEN

JUDITH NTHAMBI MASINGA ..... CLAIMANT

AND

TATA AFRICA HOLDINGS LTD ..... RESPONDENT

JUDGMENT

1. The claimant by the memorandum of claim dated the February 26, 2016 and filed on the March 17, 2018 claims unfair and unlawful termination of employment. She alleges that on or about the January 3, 2012, the Respondent employed her as a professional service representative with a salary of ksh 55,000 pm.

Claimant's Case

2. The claimant averred that the Respondent without following due process abruptly and illegally terminated her employment on the January 11, 2016 and without any just cause which has occasioned loss and damage to the claimant.

3. The claimant prays for the following remedies;

    a. 3 months' salary in lieu of notice = ksh 165,000.00

    b. Service pays

    c. Severance pays

    d. General Damages

    e. Costs of this suit

    f. Interests on c and b above at court rates

g. Any other

h. Any other relief which the honourable court may deem fit to grant.

Respondent's Case

4. The Respondent filed a memorandum of appearance through the firm of Taibajee & Bhalla, Advocates on the May 10, 2016. It also filed a reply to the claim on the same date. The Respondent says that the employment contract was terminated upon just cause contrary to what is indicated in paragraph 4 of the claim as claimant was in constant breach of her employment contract which she had previously admitted. The Respondent avers that the claimant was initially posted to Mombasa till July 2014 when she was transferred to Nairobi on account of poor performance.

5. Further the respondent says that the claimant was then assigned to work in Nairobi and Nakuru regions but it was noticed that she later claimed for more mileage than expected. The Respondent states that upon the claimant being requested by her supervisor to provide an explanation clarifying the issue of mileage she provided falsified mileage records to her employer and pleaded that the same would not be repeated.

6. The Respondent avers that prior to the admission, the claimant had conveyed to the Respondent as mileage tabulation entries which were conflicting on the distance covered from Nairobi to various destinations. The Respondent further says that on the December 1, 2015, it received a letter from Valley Hospital Nakuru indicating that the claimant had conveyed to them a consignment of medical drugs based on non-existent Local Purchase Order (LPO) No 1357/1358 dated the October 26, 2015 and whose authenticity was denied by the said hospital.

7. It is the respondent's contention that the claimant's involvement in what was clearly an illegal enterprise was in complete breach of her duties and obligations. It is stated that the Respondent then sought for an immediate explanation from the claimant but she refused and failed to respond as required. The Respondent says that the claimant was duly warned that any further misconduct would necessitate disciplinary action that included termination of her employment. The respondent submits that the claimant was rightfully terminated and her claim should therefore be dismissed with costs.

Claimant's Evidence

8. Judith Nthambi Masinga the claimant gave sworn testimony and adopted her witness statement dated the February 26, 2016 as her evidence in chief. She is also relying on the documents contained in the list dated the February 8, 2019 as exhibits in the case. She testified that she worked for the Respondent for 4 years from January 2012 to January 2016 as a medical sales representative marketing pharmaceutical. She says that what was given as reasons for termination of her employment does not exist in the employment contract and she was not given a human resource manual at the commencement of her employment.

9. She informed the court that she was working diligently and there was no problem with her performance. She informed court that before termination there was no hearing done and that she was issued with warning letter in December 2015 whilst dismissal was in January 2016 and so the warning letter was not related to the termination.

10. On cross-examination, the claimant did testify that she was hitting her targets and had no issues with performance. She says she was selling drugs for human beings and she had to carry her duties diligently. She said that she was taken through procedures for Nairobi, Machakos, Nakuru and Nyahururu. She further says that the country manager raised the issue of false mileage which she explained and said

was due to a typing error as she wrote 340 instead of 240 and subsequently she apologised. She further was asked if she was aware that Valley hospital wrote a letter of complaint of drugs delivered to them without an LPO and she said she was not aware of the same.

11. She further expounded that she wasn't aware that Valley Hospital said that they were supplied with goods without an LPO and without authorisation. She was also not aware that the hospital wrote a letter on the October 8, 2016 asking for the supply to be picked as they were delivered without any LPO.

Respondents Evidence

12. The respondent's witness Ruth Muthusi gave sworn testimony. She said she is working as the HR Manager having joined the Respondent in the year 2019. She adopted the witness statement dated the June 21, 2016 as her evidence in chief. She also adopted the reply to the claim dated the May 9, 2016 as primary evidence in the case. The witness produced the filed six documents as exhibits in support of the case. The witness referred to exhibit 'A' and said that the claimant was told to account for her mileage by an email dated the December 1, 2015 with a reminder to respond on the December 7, 2015. The mileage covered was to be reimbursed to the employee and that the claimant had exaggerated the mileage covered.

13. The witness further also told court the Valley hospital complained that that drugs delivered were not ordered as they had not issued the LPO quoted which is required to be issued before the goods are delivered. So the witness testified that the reason for the termination of claimant's employment was integrity ie misinformation to the company.

14. On Cross examination the witness said that the employees sign Tata code of ethics once they join the company and that the code of conduct is not produced in court. On being referred to the termination letter she said that it refers to clause 17 and does not link the termination directly to the warning letter. She added that she could not confirm whether the claimant was afforded a fair hearing before termination or confirm whether between the issuance of the warning letter on the January 21, 2015 and the termination letter on the January 11, 2016 the claimant committed any other similar offence.

15. On re-examination the witness said that the claimant breached the TCOC by giving false mileage and false LPOS and the company had no reason not to believe the letter which was from the hospital. She also said that the claimant admitted having exaggerated the mileage.

Claimant's Submissions

16. The claimant submits that a summary dismissal is allowed under the provisions of section 44 (3) and (4) of the *Employment Act , 2007* for fundamental breach of the employment contract and for gross misconduct.

17. It is claimant's further submissions that an employee said to be insubordinate is subjective and the one making the allegation should provide evidence for interrogation by the subject employee. The rationale is that where there is a fair reason for terminating an employee's service, fair procedure demands that the employer does it in a way which conforms to the statute.

18. Section 41 of the *Employment Act* provides the procedure for termination of employment. Section 41 of *employment act* provide that an employee be accorded a hearing in the presence of a fellow worker of his choice or a shop floor union representative.. The claimant argues that the warning letter the Respondent relied upon raised an issue of insubordination which was never substantiated.

19. The claimant cited, inter alia, the Court of Appeal in the case of Standard Group Limited versus Jenny Luesby 2018 EKLR that:

> "there are no exceptional circumstances that have been established by the Respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is, a notice and a hearing made before the summary dismissal. That hearing is as is important as the law made it mandatory even in the worst-case scenario where an employee grossly misconducts oneself. The right to hearing is what amounts to meeting the true tenets of natural justice. Such a hearing in employment relationship should be conducted in the presence of the affected employee together with another employee of her choice as this is the true meaning of a fair hearing. However senior an employee is, where the case is that of misconduct, the seniority is not justification for failure to meet mandatory requirements of the law. It remains the sacrosanct duty for an employer to uphold. This was denied of the claimant and I find this to be unfair labour practice."

20. The claimant submits that in this case she is seeking damages for wrongful and unfair termination of employment. Upon show cause and despite the written response, the feedback given was the termination of the contract. With regard to the adopted procedures by the Respondent, there was no adherence to the provisions of section 41 of the *Employment Act , 2007*. The claimant should have been called to give her defence in the presence of a fellow employee to argue her case.

21. The claimant also relied on section 41(2) of the *Employment Act* which provides that an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) of (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and in the presence of the person chosen by the employee within subsection (1) may make.

22. The claimant also relied on, inter alia, the case of Heoby Aloo Inyanga versus Stockwell One Homes Management Limited and Another 2022 eKLR where court held that the provision of section 41 (2) cannot be looked in any other way, it provides for a procedure, inter alia, to be adhered to before an employee summarily dismisses an employee.

23. The claimant argues that clause 14 of the contract which the Respondent makes reference to is non-existent. The claimant does not know the purported code of conduct which was never produced in court and the information in the termination letter is also not disclosed.

24. The court did not find any submissions for the Respondent in the file and CTS at the time of writing the judgement.

Issues for Determination

25. The court has analysed the pleadings and the evidence presented before court and frames the following issues as due for determination;

    a. Whether the termination of the claimant's employment was substantially and procedurally fair

    b. The remedies, if any, the claimant is entitled to

26. It is not disputed that the claimant was employed by the Respondent from January 3, 2012 to the January 11, 2016. The agreed salary payable was ksh 55,000.

27. The termination letter dated the January 11, 2016 stated the reason for the termination of contract of employment as 'acting contrary to Integrity of information of the TOC/Employment contract

between yourself and Tata Africa Holdings K ltd". There is then a reference that 'clause 14 states that during your employment you shall not make any wilfully omissions or material misrepresentations that would compromise the integrity or our records, internally or externally in reports including financial reports.

28. The reason for the termination in the letter of termination is coached as 'acting contrary to the integrity of information' which is understood to refer to the alleged tempering with the mileage as had earlier been the subject of discussion between the claimant and her supervisors. It is not apparent why the Respondent elected to rely on the issue as ground for termination after the election to issue warning dated the December 21, 2015 in respect of the allegations. It is not alleged that there was a further misconduct following the warning letter. And there is also indication from the email communications of acceptance of the apology offered by the claimant.

29. To delve abit further into the issue of mileage claims the claimant showed 1120 KM from Nairobi to Nakuru and to Nyahururu and back to Nairobi. Claimant was asked to explain the mileage. In her explanation she said she covered 340 KMS on that trip instead of 240 kms. She admitted that was a mistake and it would not be repeated.

30. As for delivery of drugs to Valley hospital without an LPO that again is a serious misdemeanour of the part of the claimant. The respondents were not satisfied with the claimant's explanation. The fact remained that the said hospital insisted they had not placed the order and the consignment had to be returned to the respondent.

31. The court is well persuaded that the respondent had solid reasons to discipline the claimant. The exaggerated mileage and lack of plausible explanation was a valid ground to discipline the claimant. As regards the allegation of the orders rejected by the Valley hospital, again that was a serious anomaly by the claimant. The claimant had worked for the respondent for about four years and no doubt knew the policies and the code of ethics of the respondent.

32. She may have been under pressure to close some sales but she was still bound to follow the right procedure in selling drugs to respondent's clients.

33. The court having found that the respondent had solid grounds to invite the claimant to a disciplinary hearing in accordance to section 41 (1) of *Employment Act* now finds that is where the respondent failed. He did not invite the claimant for a hearing in the presence of a fellow worker of her choice to be present during her explanation.

34. In Cause 1792 of 2011 Nicholas Muasywa Kyula versus Farmchem Ltd Byram Ongaya J held that:

> In making the finding the court considers that it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. Typically, the process would entail the following steps:
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> a. A report to the relevant authority that a misconduct has been committed by an employee. (b) A preliminary report to gather relevant information on the alleged misconduct.
>
> b. If the evidence is obvious and the misconduct is gross, the employer can summarily dismiss.

c. If the evidence is not obvious and the misconduct is not gross or its weight is not clear during the preliminary investigation, the proper notification is drawn.

d. If the evidence is obvious and the misconduct is gross, the employer can summarily dismiss. The notification commonly called a show cause letter must clearly spell out the intended ground for termination being misconduct, poor performance or physical incapacity. The particulars must be clear enough for the employee to be able to effectively defend himself or herself. The notice must give the employee reasonable time within which to respond.

e. Upon responding or the time allowed lapsing, the employee should be called to a hearing. At the hearing all relevant information should be recorded in a fair process where the complainant is not leading or chairing the proceedings. The employee should be given ample chance to exculpate oneself. A third party of the employee's choice should be permitted to attend the hearing.

f. A report of the hearing proceedings should be drawn and formally maintained by the employer as evidence of due process of fairness. The report must set out the findings on the allegations, any mitigating or aggravating factors and the recommendations which may include the termination.

g. The decision made must then be communicated to the employee.

35 In the case of Raymond Cherokwe Mrisha V Civicon Limited (2014) e KLR the court held that even if a claimant breached a contractual obligation the claimant was entitled to a fair hearing under the *Employment Act*.

36. This court as in the foreshadowed cause finds there was no due hearing and notification as contemplated by sections 41 and 43 of the Act notwithstanding that the respondents had valid grounds to even consider terminating the claimant on grounds of gross misconduct. The respondent failed in following the procedure requiring due notification and a hearing was not complied with. The termination was procedurally unfair. For that ground alone the court will enter judgement in favour of the claimant.

Remedies

37. The next issue for determination is whether the claimant is entitled to the remedies as prayed for. The claimant has prayed for the 3 months' salary in lieu of notice. The contract of employment at clause 11 provides for the 1month payment. The claimant is awarded 1 month salary in lieu of notice Ksh 55,000/.

38. The claimant never raised evidence that the remittances for the NSSF were not made. The prayer for service pay is rejected.

39. The claimant was dismissed from employment and there was no allegation of redundancy in the evidence tendered in court. The claim for severance pays is therefore irrelevant and is dismissed.

40. The claimant is awarded 1 month's gross salary for un procedural termination 55,000x1= Ksh 55000/ = considering the circumstances of termination were justified but procedure was flouted.

41. The total award is Kshs 110,000/= and each party will meet their respective costs.

42. Interest will accrue at court rates from date of judgement till full payment.

Orders Accordingly

Dated, signed and delivered virtually at Nairobi on this 19th day of January 2023.

ANNA N. MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the ***Civil Procedure Act*** **(Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA N. MWAURE

JUDGE

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