



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1211 OF 2017

STELLA KANANA GITONGA.....1ST CLAIMANT

LUCY WANJA GATHIL.....2ND CLAIMANT

AUGUSTINE MUSAMALI SITATI.....3RD CLAIMANT

VERSUS

BLISS GVS HEALTHCARE LIMITED.....RESPONDENT

JUDGEMENT

1. The claimants aver vide the statement of claim dated 27th June, 2017, that they were employed by the respondent in different capacities. The claimants allege that the respondent unlawfully terminated their services and as a result, have sought various reliefs from this court.
2. The respondent entered appearance through the firm of Lusweti & Nabutola Co. Advocates. The respondent later filed a Notice of Change of Advocates dated 27th February, 2018, hence effectively, the firm of Midirika & Co. Advocates came on board on its behalf. However, despite the appearance, the respondent did not file any defence hence the matter was undefended.
3. The matter proceeded for hearing on 11th November, 2021 and the respondent was absent from court. The claimants through their Advocate produced an Affidavit of Service sworn by one Oscar Odhiambo Agot on 9th November, 2021, wherein he deponed that he had effected service of the days hearing notice upon the Advocates on record for the respondent.
4. Upon being satisfied with the return of service, the matter proceeded in absence of the respondent, pursuant to Rule 22 of this Court's Rules.
5. At the commencement of the hearing, all the claimants sought to rely on their respective witness statements which they asked the court to adopt as part of their evidence in chief. They also produced the documents filed together with the claim as exhibits before court.

1st claimant's case

6. The facts as presented by the 1st claimant is that, she was employed by the respondent sometimes in February, 2012 as a data clerk and was earning a salary of Kshs 11,000.00 exclusive of house allowance. It was her testimony that she served the respondent with a lot of diligence hence her salary was increased gradually upto Kshs.15,294.00. She averred that the respondent failed to issue her with a contract of service nor a pay slip.

7. She averred that on 6th May, 2016, she requested her branch manager by the name Mr. Bobby for a day off, and the same was granted. That on 7th May, 2016, her son fell ill in the morning hence she called the respondent's Human Resource Manager by the name Ms. Esther to inform her as much and the fact that she would not make it to work on that particular day. That she was unable to reach Mr. Bobby on phone but the Human Resource Manager promised to notify him of the reason of her absence from work. That thereafter, she took her son to the hospital. That at around 9:45 am, she received a call from her colleague, one Mr. Augustine who informed her that her services had been terminated, the reason being that she had given out the key to the main door. That she was later issued with a backdated termination letter upon her Advocate issuing a demand letter to the respondent. In concluding her testimony, she prayed that her claim be allowed as prayed.

2nd claimant's case

8. The 2nd claimant averred that she was employed by the respondent with effect from 1st April, 2014 as a laboratory technologist and was earning a gross salary of Kshs.22,000 per month exclusive of house allowance. That her salary was later increased to Kshs.25,000/= per

month due to her diligence in the delivery of duty. She informed court that the respondent issued her with a contract of employment but did not issue her with a pay slip.

9. She averred that on 7th May, 2016, she was caught up in a traffic snarl up as her normal route to work (Thika road) was closed due to the burial of Her Excellency, the late Lucy Kibaki. That upon arrival at the office, she was tasked to explain the reason for her lateness and was later summoned to the nursing room together with other colleagues who were also late on that day. That they were informed that their services had been terminated. That upon her Advocate issuing a demand letter to the respondent, she was issued with a backdated termination letter. She asked the court to grant her prayers as sought in the claim.

3rd claimant's case

10. The 3rd claimant avers that he was employed with effect from 10th January, 2015 by the respondent as a Pharmatech and was earning a gross salary of Kshs.35,000/= . That the respondent never issued him with a pay slip throughout the employment period.

11. He averred that on 7th May, 2016, he was caught up in an unusual traffic snarl up as his normal route to work (Thika road) was closed on account of the burial of Her Excellency, the late Lucy Kibaki. That as a result, he was late to work by about 30 minutes. That upon arrival at his workplace, he was summoned to the nursing room together with other colleagues where they were informed that their services had been terminated on account of the lateness to work. That he was later issued with a backdated termination letter upon the respondent being issued with a demand letter by his Advocates. He prayed that his claim be allowed as prayed.

Submissions

12. The claimants filed written submissions through which they urged the court to find that their services were unlawfully terminated by the respondent as the same was not substantively and procedurally fair. They invited the court to consider the cases of **David Gichana vs Mombasa Maize Millers Limited (2014) eKLR** and **Shankar Saklani vs DHL Global Forwarding (k) Ltd (2012) eKLR**.

Analysis and determination

13. From the pleadings on record as well as the evidence placed before me, this court is being called to determine the following twin issues;

a) Whether the claimants' termination was unfair and unlawful?

b) Are the claimants entitled to the reliefs sought?

Whether the claimants' termination was unfair and unlawful?

14. The claimants have alleged that their services were unfairly and unlawfully terminated by the respondent. This issue can only be determined upon analysis of the relevant facts and circumstances vis a vis the relevant provisions of the Employment Act.

15. Pursuant to **Section 43(1)** of the Employment Act (Act), an employer has the burden of proving reasons for termination and failure to do so, such termination is deemed to be unfair. Further, **section 45 (2)** of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

16. There is more. Under **section 45 (2) (c)** of the Act, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. **Section 41(1)** of the Act provides in detail what constitutes fair procedure. In this respect, it requires an employer to notify an employee of the intended termination. Accordingly, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

17. The foregoing is what constitutes the requirements of fair termination. It also encapsulates the test necessary to determine whether the termination was substantively and procedurally fair.

18. As stated herein, an employer is required to prove reasons for an employee's termination. This is what entails substantive fairness.

19. From the evidence of the claimants herein, they were verbally informed of the reasons for their termination. They were also issued with similar letters of termination, all dated 7th May, 2016. Notably, the letters of termination do not contain any reasons, save that they make reference to section 44 (1) (c) and (e) of the Employment Act. It is noteworthy that the Act does not contain the said section 44 (1) (c) and (e) hence it is not possible to infer the appropriate section being referred to by the respondent.

20. Be that as it may, it is not sufficient that the employer spells out the reason for the termination. The same must be justified, in the sense, that the same ought to be valid and fair. Validity and fairness of the reasons for termination can only be inferred from the circumstances of the case. In this case none were proffered by the respondent as it failed to tender any defence or participate in the trial. Besides, the reason ought to have been clearly spelt out in the letters of termination and backed by evidence but apparently, this was not done.

21. In the circumstances, it can be determined that the respondent did not satisfy the requirement of substantive fairness as no reason was advanced to justify the claimants' termination at all.

22. Further, there is no evidence that the claimants were notified of any reasons to warrant their termination from employment. Similarly, there was no evidence to suggest that the respondent gave the claimants an opportunity to tender their respective defenses against the allegations if any. There is no evidence that such process was undertaken prior to the letters of termination being issued. The fact that the respondent failed to participate in the trial did not help matters at all.

23. Coupled with the foregoing, the respondent did not tender any evidence to rebut the assertions by the claimants. Therefore, the only inference that can be drawn based on the evidence on record is that the claimants were not taken through a disciplinary process. It was not sufficient for the respondent to issue the letters of termination and purport to base the same on certain sections of the Act. It was duty bound to strictly comply with all the provisions of the law and this it failed to do.

24. In the case of **Kenfreight (E.A.) Limited v Benson K.Nguti, Civil Appeal No. 31 of 2015**, the Court of Appeal held that;

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken”.

25. Similarly, and in reiterating the findings of the Court of Appeal, the respondent was required in the instant case, to explain to the claimants the reasons for their termination in the presence of other employees or a union official in a language they understood. As stated herein, there was no evidence that the respondent took any steps to explain to the claimants the reasons for the termination.

26. The total sum of the foregoing is that the claimants’ termination was unfair and unlawful as it did not meet the legal threshold stipulated under sections 43(1) and 45(2) of the Employment Act.

27. Having found as such, I now turn to the reliefs due to the claimants.

Reliefs

House allowance

28. All the claimants have prayed for house allowance on the basis that their respective salaries were exclusive of house allowance. This claim is inadmissible pursuant to Section 90 of the Act, which renders any claim time barred, if not instituted within a period of 3 years from the date the cause of action arose. In this case, the claim of failure to pay house allowance constituted a continuing injury hence became time barred as it was not brought within 12 months from the cessation thereof. In this regard, the claim for house allowance ought to have been brought timeously and failure to do so, the same became inadmissible. As such and since the issue of time bar goes to jurisdiction of this court, the same cannot be entertained. Such was the finding by the Court of Appeal in the case of **Thuranira Karauri Vs Agnes Ncheche [1997] eKLR**.

Compensatory damages

29. Having found that the claimants’ termination was unfair and unlawful, I will award them compensatory damages as follows; the 1st claimant is awarded six (6) month’s gross salary; the 2nd claimant is awarded four (4) month’s gross salary and the 3rd claimant is awarded four (4) month’s gross salary. These awards have been informed by the claimants’ respective length of service and the fact that the respondent did not advance any reasons to justify the claimants’ termination from employment nor subject them to fair process.

One months’ salary in lieu of notice

30. I further award each of the claimants one (1) month’s salary in lieu of notice.

Orders

31. The upshot of the foregoing is that I enter Judgment in favour of the claimants against the respondent as follows;

(a) A declaration that the claimants’ termination was unfair and unlawful.

(b) The 1st claimant is awarded compensatory damages in the sum of Kshs 91,764.00 which sum is equivalent to 6 months gross salary and one month’s salary in lieu of notice being Kshs 15,294.00 hence the total award is Kshs 107,058.00

(c) The 2nd claimant is awarded compensatory damages in the sum of Kshs 100,000.00 which sum is equivalent to 4 months gross salary and one month’s salary in lieu of notice being Kshs 25,000.00 hence the total award is Kshs 125,000.00

(d) The 3rd claimant is awarded compensatory damages in the sum of Kshs 140,000.00 which sum is equivalent to 4 months gross salary and one month’s salary in lieu of notice being Kshs 35,000.00 hence the total award is Kshs 175,000.00

(e) The claimants shall also have the costs of the suit.

(f) Interest on the respective awards as contained in (b) (c) and (d) at court rates from the date of Judgement till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Gomba

For the Respondent No appearance

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE