



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1684 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

JANE MARIZIAH INDONDO.....CLAIMANT

VERSUS

ISLAMIA MADRASA SOCIETY.....RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 12th June 2017 filed on 25th August 2017, the Claimant instituted proceedings against the Respondent alleging wrongful and unfair dismissal and prays for –

- (a) A declaration that the Claimant was wrongfully and unfairly terminated from her employment
- (b) Unpaid dues Kshs.190,607.50
- (c) Notice Kshs.11,835.00
- (d) 12 months' salary compensation Kshs.141,900.00
- (e) Punitive and aggravated damages for breach of constitutional rights
- (f) Costs and incidental to this suit

2. The Respondent filed its response on 15th March 2018 after the Court granted it leave on 1st March 2018 pursuant to an application under certificate of urgency dated 20th February 2018.

Claimant's Case

3. The Claimant's case is pleaded as follows: That she was employed by the Respondent on or about 2001 as a Tea lady in its kitchen and her salary was reviewed upwards on 27th July 2010 to Kshs.11,825.00 per month.

4. The Claimant avers that on 18th February 2015 the Respondent wrongfully suspended her from work to pave way for investigations for alleged theft.

5. That she was an excellent employee and served the Respondent diligently, until she was terminated on 18th March 2015. That she did not receive any notice of termination, payment in lieu of notice, outstanding wages and/or severance pay.

6. The Claimant contends that the Respondent breached the terms of the employment contract by failing to provide a termination notice and/or pay her dues. That the Claimant was entitled to house allowance, vacation pay, overtime, notice, severance and compensation for unfair termination.

7. In addition, it is averred that the Claimant is entitled to aggravated damages for the mental distress, inconvenience and psychological injury resulting from the termination.

Respondent's Case

8. The Respondent avers that contrary to the Claimant's allegation that she was suspended from duty for no reasons, the suspension period had even been extended from a previous one communicated on 18th February 2015 as investigations were on-going.
9. The Respondent denies that the Claimant was a diligent employee but admits that she was employed on or about 2001 and was lawfully terminated. It is also averred that the Claimant had poor work etiquette, fraudulently acquired bread and frequent episodes of stealing from the Respondent and had been warned by word of mouth. That by a letter dated 14th June 2010, the Claimant was given another chance by the Respondent following incidences involving milk.
10. The Respondent further avers that it had a justifiable reason to dismiss the Claimant summarily and had no outstanding obligations to the Claimant.
11. It is further averred that the Claimant was incorrigible and the Respondent did not owe her the items identified in paragraph 11 of the memorandum of claim and had exhausted her leave days and received leave allowance.
12. It denies that the Claimant made any effort to resolve the matter amicably before filing the suit and prays for its dismissal with costs.

Evidence

13. CW1, JANE MARIZIAH, adopted the witness statement and was cross examined. She testified that she was not given a letter of termination and was neither taken through a disciplinary hearing nor given an opportunity to defend herself. She denied having stolen loaves of bread. She testified that she did not proceed on leave for some months but recalled she did so in 2009 only and had not from 2001 – 2008. That she was a member of NSSF and NHIF.
14. On cross examination, the Claimant confirmed that her children were born in 1997, 2001 and 2009 and had proceeded on maternity leave in 2001 and 2009. She confirmed that she had seen the contract of employment dated 10th July 2001 and signed it on 11th May 2009. The Claimant was emphatic that she was unaware of the claim for unpaid dues of Kshs.190,607.50. That the carrying forward leave days required a request to that effect. The Claimant admitted that she was bound by the terms of the contract signed in 2001.
15. In addition, the witness admitted having written an apology letter dated 7th June 2010 stating that she had misrepresented the price of milk, was sorry about it and promised not to repeat the same.
16. She also admitted having misrepresented the fact that she was an excellent employee. That she had been suspended in 2010 but was not terminated.
17. On leave, the Claimant admitted that she had in fact proceeded on leave from 2001 as opposed to earlier testimony but denied having proceed on leave in 2009.
18. The Claimant confirmed that she was suspended on 18th February 2015 and had acknowledged receipt of the suspension letter which explained the reasons for the suspension. That when she reported in March 2015, the suspension was extended. She denied that there were any investigations or having been called for a disciplinary hearing. The witness denied having received the termination letter but when shown the averments in the memorandum of claim, she changed her testimony.
19. The Claimant admitted having been a member of the NSSF and NHIF but still prayed for service pay.
20. On re-examination, the Claimant admitted that to err is human and had not been given any documents on the outcome of the investigation by the Respondent.
21. RW1, MWANAISHA OMAR adopted the written statement and testified that she had suspended the Claimant in 2015 and the suspension had been extended on 2nd March 2015 to finalise investigations. The witness testified that the investigation was conducted by the security company incognito and the Claimant was the culprit. The witness testified that the Claimant was taken through an oral hearing but could not recall the date.
22. That the Claimant admitted having lied about the bread when the supplier appeared at the hearing. That the Claimant received the termination letter, was requested to hand over the key to the kitchen and leave the compound immediately. The matter was not reported to the police.
23. The Court was told that the Claimant was paid up to 18th March 2015 and had no outstanding leave days. That the Claimant was forgiven for having lied about the milk.
24. On cross examination, RW1 confirmed that she was the Respondent's Finance and Human Resource Manager. She confirmed that the Claimant would sign a delivery notice every morning from Monday to Thursday and would receive 10 loaves of bread daily but the witness had no evidence of the delivery note in Court nor the Claimant's admission of having lied about the bread.
25. The witness confirmed that the proceedings were oral and no minutes were recorded. It was further confirmed that the Claimant had no outstanding leave days and none had been carried forward from previous years. That the Claimant had confessed by word of mouth that she

had stolen bread.

26. Finally, RW1 testified that the termination letter dated 18th March 2015 stated the reason for termination and the Claimant received the letter without any protest.

Claimant's Submissions

27. The Claimant identifies two issues for determination –

- i) Whether the termination of the Claimant's employment was wrongful, unfair and unjustified.
- ii) Whether the Claimant is entitled to the reliefs sought.

28. On termination, the Claimant submits that Section 45(2) of the Employment Act, provides for the requirements for a termination to pass the fairness test in terms of the reason(s) and procedure. Reliance is made on the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** to reinforce the submission. The decision in **Pamela Nelima Lutta v Mumias Sugar Company Limited [2017] eKLR** is also relied upon for the same proposition.

29. On procedure, the Claimant relies on Section 41 of the Employment Act and submits that the procedure adopted by the Respondent could not pass the test for procedural failures because the Respondent did not issue a notice to show cause or subject the Claimant to any form of disciplinary hearing. Reliance was made on the sentiments of the Court in **Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR** which the Court of Appeal cited with approval in **National Bank of Kenya v Anthony Njue John [2019] eKLR**.

30. The Claimant submits that irrespective of the offence an employee is alleged to have committed, if the employee is not heard, the termination is unfair.

31. It is also submitted that since the Respondent did not establish that any bread had been lost, the Claimant's termination was substantively and procedurally unfair.

32. On reliefs, it is submitted that the Claimant is entitled to the one month pay in lieu of notice based on the staff service contract produced by the Respondent.

33. On service gratuity, reliance is made on page 5 of the contract of employment. The sum of gratuity is computed at Kshs.103,782/-.

34. On unpaid leave, it is submitted that leave is statutory and the Claimant was entitled to it, and since she did not proceed on leave from 2001 to 2006, she was entitled to Kshs.44,125.00

35. Compensation for wrongful termination is justified on Section 49(1)(c) of the Employment Act and the decisions in **Tom Otieno Midianga v William Kenya [2021] eKLR**, **Moses Kaunda Moro v CMC Motors Group Limited [2013] eKLR** and **Loice Rose Obengo v Nyanza Reproductive Health Society [2013] eKLR** are cited in support.

36. The Respondent did not file its submissions.

Determination

37. From the pleadings, evidence on record and the submissions, the issues for determination are: -

- a) Whether the Claimant's termination was fair and lawful;
- b) Whether the Claimant is entitled to the reliefs sought.

38. As to whether the termination was fair, the Court is in agreement with the Claimant's submissions that the starting point is Section 45(2) of the Employment Act which provides that –

(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—

(i) related to the employee's 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.

39. The words of Onyango J. in **Pamela Nelima Lutta v Mumias Sugar Company Limited (supra)** are instructive. The Learned Judge stated that –

“What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.”

40. The essence of substantive and procedural fairness in termination of employment contracts was underscored in **Walter Ogal Anuro v Teachers Service Commission (supra)** and other decisions of the Court of Appeal.

41. A termination must be substantively and procedurally fair as provided by Section 45(2) of the Act and other enabling provisions. Each party must discharge its burden of proof as ordained by Sections 43 and 47(5) of the Employment Act.

Reason for Termination

42. The termination letter dated 18th March 2015 stated that –

“Following investigations on the disappearance of school purchased bread in the kitchen, it was established that you were the culprit and that these stealing episodes have continued for some time. Based on the outcome of the investigations, you acknowledged your wrong doing and apologised to the school. In light of the above, the IMS is left with no other option but to summarily dismiss your services as a Tea Lady with immediate effect and loss of all your employment benefit. You are expected to hand over all the school property to your immediate Supervisor, vacate the school premises immediately and not expected to visit and or soon within the school vicinity.”

43. The letter was served upon and received by the Claimant though she had initially denied having seen the letter. The letter states of the reason for termination and adverts to the Claimant’s acknowledgement of wrongdoing and apology. RW1 confirmed on cross examination that the admission was oral and that the Claimant was apologetic. The Claimant admitted that she was suspended for one week on 18th February 2015 to pave way for an investigation concerning the bread supplied by one Karithi Cyprian Akwalu to the nursery school and the suspension was subsequently extended on 2nd March 2015. The Claimant did not contest the suspension.

44. Being the Tea lady for the nursery school, the Claimant, it was testified that the Claimant received bread and milk every day from Monday to Thursday, a fact she did not contest. Although the Respondent led no evidence on the findings of the investigation and did not summon the Investigator to testify in Court.

45. In the totality of the evidence adduced, the Court is satisfied that the Respondent had a justifiable reason to terminate the Claimant on 18th March 2015 as provided by Sections 43, 45(2) and 47(5) of the Employment Act.

46. Consequently, it is the finding of the Court that the summary dismissal of the Claimant was substantively fair.

Procedure

47. Judicial authority is categorical on the procedural precepts of a fair termination of a contract of employment are prescribed by Section 41 of the Employment Act. The elements have been laid bare in several decisions. Radido J. did it elaborately in **Loice Otieno v Kenya Commercial Bank [2013] eKLR**. The core issue is whether the Claimant was taken through the tenets of procedural fairness as provided by the Employment Act. The Claimant submitted that she was not issued with a notice to show cause nor was she subjected to any form of disciplinary hearing. The Claimant testified as much.

48. RW1 on the other hand testified that she called the Claimant and the hearing was oral but could not recall the date of the hearing.

49. It is noteworthy that the Respondent did not aver that it had taken the Claimant through any form of disciplinary hearing and if any hearing took place. The witness RW1 could not recall the date.

50. The Respondent provided neither evidence nor particulars of the members who participated in the hearing or minutes or recommendations of the Committee. Relatedly, it led no evidence of notice to the Claimant inviting her for the hearing.

51. For the foregoing reasons, the Court is satisfied that the Respondent has not, on a balance of probabilities established that it complied with the provisions of Section 41 of the Employment Act.

52. It is finding of the Court that the Claimant’s termination on 18th March 2015 was procedurally unfair.

Reliefs

(a) A declaration that the Claimant was wrongfully and unfairly terminated from her employment

53. Having found that the Claimant’s termination was procedurally flawed, a declaration that the termination of employment was unfair is hereby issued.

(b) Unpaid dues Kshs.190,607.50

54. The Claimant was unable to unpackage this prayer in Court.

It is unclear what it comprises of. On leave, for example, the Claimant's allegation was denied by the Respondent and records produced show that the Claimant had no pending leave days in 2007. In addition, the Claimant's oral evidence in Court on leave from 2001 – 2006 was too contradictory and unsafe to rely upon.

55. The Court is satisfied that the evidence on leave days from 2001 and 2006 has no probative value. Consequently, the **claim for unpaid leave is disallowed.**

56. On gratuity, under paragraph 20.1 of the contract dated 10th July 2001 as submitted by the Respondent, gratuity was only payable where termination was by notice of either party. The instant case involved summary dismissal. But more importantly gratuity was not pleaded and the Claimant led no evidence to establish the claim. It is trite law that parties are bound by their pleadings and cannot plead through submissions. The claim is **disallowed.**

(c) Payment in lieu of notice

57. Having found that the Claimant was unfairly terminated the Court awards **Kshs.11,825/-**, the equivalent of one month's notice.

(d) 12 months' salary compensation for unlawful termination of employment

58. Section 49(1)(c) of the Employment Act provides the discretionary remedy of compensation in cases of summary dismissal or termination of a contract of an employee where the same is unjustified. Having found that the Claimant's termination was unjustified, the Claimant is eligible for compensation within the parameters prescribed by Section 49(4) of the Act.

59. In making the compensatory award under Section 49(1)(c) of the Act, the Court has taken into account the following factors: –

- i) The Claimant served the Respondent from 2001 – 2015 which is reasonably long and wished to continue.
- ii) The Respondent survived a suspension in 2010 and apologised in writing for wrongdoing and was welcomed back by the Respondent.
- iii) The Respondent treated the Claimant fairly well and she had no specific allegation against the employer before the events of February and March 2015 unfolded.
- iv) The Claimant substantially contributed to the termination.

60. The Court is satisfied that the equivalent of five months' salary is fair, the sum of **Kshs.59,125/-**.

(e) Punitive and aggravated damages for breach of the Claimant's constitutional rights

61. Neither the particulars of the claim nor the relevant Articles of the Constitution of Kenya, 2010 were set out as required by law. Relatedly, the Claimant led no evidence to establish this claim. The claim is **disallowed.**

62. **In the final analysis, judgment is entered for the Claimant for the sum of Kshs.70,950/- with costs.**

63. Interest at Court rates from the date of judgment till payment in full.

64. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF JANUARY 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE