



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.314 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

MERCY MWENDWA KAUME.....CLAIMANT

VERSUS

THE METHODIST CHURCH IN

KENYA REGISTERED TRUSTEESRESPONDENT

JUDGEMENT

INTRODUCTION

1. The claim was filed herein and is dated 26th February, 2016.

The Respondent filed a response as well dated 6th February, 2017.

CLAIMANT'S EVIDENCE

2. As per the memorandum of claim the Claimant avers she was employed by the Respondent as Personal Assistant to the Presiding Bishop at a salary of Kshs.189,000/= per month.

Her appointment probationary letter is dated 28th August, 2013.

3. She says from October, 2013 to October, 2014 she was assigned duties of Finance Manager. She says she worked for the Respondent for over 15 months and received good or excellent performance during that period.

4. She states that on 24th September, 2014 her services were terminated without specifying the reason for termination except they alleged poor performance.

She says that the Respondent then clarified that her termination was to be effective from 1st November, 2014.

5. The Claimant says that as a result of her unlawful termination she has continued to suffer loss.

6. She prays that the court declares her termination unlawful and be awarded damages as particularized in the memorandum of claim subsections i – vii.

RESPONDENT'S EVIDENCE

7. The Respondent admits that the Claimant was employed by the Respondent for 15 months but denies she received excellent performance evaluation.

8. He also states the Claimant was redeployed from her position as a Personal Assistant to acting Finance Manager upon her application but failed to deliver and was relieved of her duty.

9. The Respondent prays that the Claimant be compelled to officially hand over church materials and further that her claim be dismissed with costs to the Respondent.

ISSUES FOR DETERMINATION

10.

(i) Was Claimant unlawfully terminated from

Her employment.

(ii) Is she entitled to the reliefs prayed.

DECISION

11. The Respondent in his pleadings and testimony in court and submissions states he terminated the Claimant's employment due to poor performance.

He says that due to the Claimant's poor performance the Respondent lost money through fraud, she failed to maintain proper record of receipt books and failed to do proper reconciliation.

He is relying on the case of **BRITISH LEYLAND U.K. LIMITED VS SWIFT (1981) IRLR 91** that if a reasonable employer might have reasonably dismissed the employee then the dismissal was fair.

12. The Claimant on the other hand in her pleadings, evidence in court and submissions avers she performed her job skillfully as a Personal Assistant to the Presiding duty and was added other responsibilities as Finance Manager.

13. She says on 24th September, 2014 while on annual leave she received a letter from the Respondent terminating her employment.

Her termination letter of 24th September, 2014 simply provide that her services as Acting Finance Manager were terminated with effect of 1st October, 2014. She was informed that her dues would be paid in due course and basic salary in lieu of notice.

14. The employment law of Kenya is mandatory that an employer must present a valid reason to terminate the employment of an employee.

Section 45 (2) of the Employment Act states;-

“Termination of employment by an employee is unfair if the employer fails to prove:-

- (a) That the reason for termination is valid.
- (b) That the reason for termination is a fair reason.
- (c) Related to the employee's conduct, capacity and compatibility or
- (d) Based on the operational requirements of the employer and
- (e) That the employment was terminated in accordance with fair procedure.

15. The case before me the Respondent has listed a good number of issues which he claims the Claimant failed to perform as required in the course of her employment as a Finance Officer.

16. First of all she was employed as a Personal Assistant to

The Presiding Bishop.

17. She was then assigned the role of the Finance Manager Acting. There is no evidence adduced as to whether she was fit for that role and whether there was any orientation done at least to prepare her for the role. The Respondent quoted poor performance by the Claimant as a Finance Manager. But the court was not presented with the job description or performance indicators of what the duties of the Claimant were to be as the Finance Manager.

18. In the **CASE OF JANE SAMBA MUKALA VS OLTUKAI LODGE LIMITED (2013) eKLR** it was noted that where poor performance is indicated to be the reason for termination, the employer is placed at a high level of proof to demonstrate that arriving at his decision of noting poor performance of an employee they had put in place employment policy or practice on the measurement of good performance.

It was further noted that it does not suffice to just say that one has been terminated for poor performance.

19. The court went further to say “apart from having such an evaluation measure, before an employee is terminated on the grounds of poor

performance an employee must be called and explanation on their poor performance showed where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.”

20. The case before me seems to have been in all fairness an ambush to the Claimant. There is no indicators that in the year of her employment with the Respondent that she received a performance evaluation.

The court is not informed that the Claimant was informed in writing of the specific areas of poor performance and given an opportunity to explain herself.

21. According to Section 41 of the Employment Act such an explanation should be accorded to the Claimant. She should be advised by the employer to call a fellow workmate as her witness during the explanation or a shop floor union representation.

22. It is clear the Respondent did not follow the procedure provided in the Employment Act Sections 45 (2) and Section 41.

He did not inform the Claimant the reason for her termination before the said termination. And he did not accord her an opportunity to defend herself.

23. There are numerous authorities now that if the employer does not accord the employee a valid reason to terminate her employment and does not follow fair procedure such termination will be unfair and unlawful.

24. The case before me is such a case where the Claimant was just served with a termination notice while she was on leave.

In conclusion the procedure was flawed and the termination was unfair and unlawful.

REMEDIES

The court has found the termination of the Claimant was unfair. She is praying for the following:-

- (i) 3 months' salary in lieu of notice. Since her employment contract did provide that each party would give 3 months' notice or 3 months' salary in lieu of notice, I will grant one month's salary instead Kshs.170, 000/=.
- (ii) Second prayer is service gratuity which is provided in her contract at 25% of her basic salary Kshs.637,500/=.
- (iii) Acting allowance as Finance Manager is not proved and there is no letter to show how she was appointed to that position. She should in all fairness have pursued that before she consented to take over the position. I am inclined to decline that prayer. The same is declined in totality.
- (iv) Damages for wrongful dismissal. I will award two months Kshs.340, 000/=.
- (v) Costs are awarded to the Claimant.
- (vi) Interest is also awarded at court rates from date of judgment until final payment.

CONCLUSION

The total award to the Claimant therefore is Kshs.1,147,000/= plus interests and costs.

Any amount paid so far to be deducted from the above sum.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24TH DAY OF FEBRUARY, 2022.

ANNA NGIBUINI 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE