



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 74 OF 2016

MARY GATHONI KUNG'U.....CLAIMANT

VERSUS

MURIMI & COMPANY ADVOCATES.....RESPONDENT

JUDGMENT

Introduction

1. Mary Muthoni Kung'u, the Claimant in this case, was an employee of the Respondent, working in the position of Legal Secretary. She brought this claim following the termination of her employment on 29th May 2015.
2. The claim is documented by a Memorandum of Claim dated 4th January 2016 and filed in court on 25th January 2016. The Respondent filed a Statement of Defence on 9th March 2016, to which the Claimant responded on 14th April 2016.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its Managing Partner, Johnson Dedan Murimi, Advocate and a former Conveyancing Clerk, Alex Shakwila. Both parties further filed written submissions.

The Claimant's Case

4. The Claimant was employed by the Respondent on 1st December 2002. She states that on 29th May 2015, she reported on duty as usual, only for her to be handed a termination letter, which required her to hand over to Caroline Murimi and leave the Respondent's premises. At the time, the Claimant earned a monthly salary of Kshs. 40,000.
5. The Claimant terms the termination of her employment as unjustifiable and unfair and therefore claims the following:
 - a) Severance pay @ half month's salary per year.....Kshs. 252,000
 - b) 12 months' salary as damages for wrongful dismissal.....480,000
 - c) Costs plus interest

The Respondent's Case

6. In the Statement of Defence dated and filed in court on 9th March 2016, the Respondent admits having employed the Claimant as a Legal Secretary from 1st December 2002 until 29th May 2015.
7. The Respondent however denies having unlawfully terminated the Claimant's employment and claims having adhered to the agreed terms of the contract of service and paid one month's salary in lieu of notice.
8. The Respondent further denies that the Claimant was summarily dismissed and reiterates that the termination of employment was lawful and contractually executed.
9. The Respondent denies the Claimant's entire claim and puts her to strict proof.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

11. On 29th May 2015, the Respondent wrote to the Claimant as follows:

“Dear Mary,

REF: NOTICE OF TERMINATION OF YOUR CONTRACT

The management has resolved to terminate your contract of working with Murimi & Company Advocates as a Legal Secretary effective immediately. As per the terms of your letter of appointment, you will be paid one month’s salary in lieu of notice.

Kindly ensure that you prepare all the necessary reports and complete all handing over procedures during the course of the day today for Caroline Murimi to take over at the close of business.

On behalf of the management, I wish to extend our appreciation to you for your work and commitment towards serving Murimi & Company Advocates.

We wish you well in your future endeavors.

Yours faithfully

(signed)

MURIMI & COMPANY”

12. This letter does not disclose the reason for termination of the Claimant’s employment. However, in his testimony before the Court, the Respondent’s Managing Partner, Johnson Dedan Murimi stated that the Claimant had failed to include the name of a purchaser’s wife on a transfer, as directed by the instructing client.

13. Mr. Murimi also accused the Claimant of delay in finalising charges for Kenya Commercial Bank and using the wrong email address to communicate to the Bank. The Respondent states that as a result of the Claimant’s actions, the Bank terminated its contract with the Respondent in June 2015.

14. Regarding the events leading to the termination, Mr. Murimi told the Court that a few days prior to the termination, he went to the Claimant’s desk and instructed her to see him in his office. According to Mr. Murimi, the Claimant did not go to his office as instructed and after 10 minutes, he went back to the Claimant’s desk and was informed that she had left for lunch.

15. Gleaning from Mr. Murimi’s testimony, it appears that the Claimant’s employment was terminated on account of misconduct. While this may be a valid ground for termination, it must be established at the shop floor.

16. Section 45(1) and (2) of the Employment Act provides as follows:

- (1) No employer shall terminate the employment of an employee unfairly.***
- (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.***

17. The fair procedure contemplated under Section 45(2)(c) of the Employment Act is codified under Section 41 of the Act as follows:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical 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. The Claimant told the Court that she had no idea why her employment was terminated as no charges were put to her for her response. From the evidence on record, the Respondent did not issue a formal notice of charges to the Claimant and did not afford her an opportunity to be heard as commanded by Section 41 of the Employment Act.

19. The allegations against the Claimant, which she denied before the Court, were therefore untested and unproved.

20. In its decision in *Walter Ogalo Anuro v Teachers Service Commission [2013] eKLR* this Court held that for a termination to pass the fairness test, both substantive justification and procedural fairness ought to be established.

21. Further, as held in *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd [2015] eKLR* the procedural fairness requirements under Section 41 of the Employment Act are an essential part of the right to fair labour practices.

22. Within the current employment law regime, it is not permissible for an employer to terminate the employment of an employee at will, and an employment contract which ignores this basic principle cannot save the employer.

23. In this case, the Respondent broke every rule in the book rendering the termination substantively and procedurally unfair.

Remedies

24. I therefore award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service with the Respondent, coupled with the Respondent's unlawful conduct in the termination transaction.

25. As the Claimant did not leave employment on account of redundancy, the claim for severance pay is misplaced and is consequently disallowed.

26. Finally, I enter judgment in favour of the Claimant in the sum of **Kshs. 480,000** being twelve months' salary in compensation for unlawful and unfair termination of employment.

27. This amount will attract interest at court rates from the date of judgment until payment in full.

28. The Claimant will have the costs of the case.

29. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022

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JUDGE

Appearance:

Mr. Wangira for the Claimant

Miss Guserwa for the Respondent