



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2397 OF 2016

SALOME GATHONI NJIRU.....CLAIMANT

VERSUS

MISKY INVESTMENT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Salome Gathoni Njiru has sued her former employer, Misky investment Limited. Her claim is contained in a Memorandum of Claim dated 11th November 2016 and later amended on 22nd February 2017. The Respondent filed an amended Defence dated 2nd February 2020.
2. At the trial, the Claimant testified on her own behalf and the Respondent called its Managing Director, Hindira Santur Ali. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent on 23rd September 2015, at a monthly salary of Kshs. 12,000. She claims to have worked until 31st August 2016, when her employment was terminated without justifiable cause and in violation of due procedure.
4. The Claimant therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 12,000
- b) Unpaid leave.....8,400
- c) Unpaid overtime.....36,000
- d) Unpaid house allowance.....18,000
- e) Unpaid holidays.....7,680
- f) 12 months' salary in compensation.....144,000
- g) Punitive and aggravated damages for breach of constitutional rights.
- h) Costs of the suit.

The Respondent's Case

5. In its Statement of Response dated 13th December 2016 and filed in court on 14th December 2016, the Respondent states that the Claimant's Memorandum of Claim discloses no reasonable cause of action.

6. The Respondent states that the Claimant had previously been employed by Meezan Oil until 22nd April 2016, when the Respondent, Misky Investments Limited took over the business as an operator.

7. The Respondent states that when it took over the business, it informed the staff of Meezan Oil, including the Claimant, to re-apply for positions; the applications were to reach the management of Misky Investments Limited by 15th June 2016.

8. The Respondent further states that the Claimant re-applied and was employed as a cashier, on probation for 6 months, during which period Misky Investments Limited was also on probation as an operator of the station.

9. The Respondent avers that during the probation period, its management conducted an Mpesa audit and noted that Kshs. 150,000 was missing. In addition, the Respondent states that it was established that airtime scratch cards worth Kshs. 50,000 were missing from the shop. The Respondent issued a show cause letter dated 14th June 2016 to the shop supervisor, Lydia Wangechi and the Claimant, requiring them to show cause why disciplinary measures should not be taken against them.

10. The Respondent states that Lydia Wangechi and the Claimant responded to the show cause letter, taking responsibility for the missing money and scratch cards. The Claimant further admitted that she had failed to report this issue to the management.

11. The Respondent terms this as an act of gross misconduct, on the part of the Claimant, calling for summary dismissal. The Respondent further accuses the Claimant of influencing and sanctioning several underhand deals which exposed the Respondent to losses.

12. The Respondent's case is that the Claimant's summary dismissal was lawful and fair.

Findings and Determination

13. There are three (3) issues for determination in this case:

- a) Whether the Claimant is entitled to bring a claim of unlawful termination in light of her period of service;
- b) Whether the Claimant's dismissal was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

The Right to Bring a Claim of Unlawful Termination of Employment

14. In its final submissions, the Respondent challenges the Claimant's right to bring a claim of unlawful termination of employment on two grounds; first, that at the time of dismissal, the Claimant was on probation and second, that she had not served for a period of at least thirteen months.

15. I will first deal with the issue of probation. Section 42(1) of the Employment Act provides as follows:

(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

16. Section 2 of the Act defines a probationary contract as:

“a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.”

The Respondent produced an appointment letter dated 30th October 2015, engaging the Claimant from 1st November 2015 and stating that she would be on probation for a period of six (6) months. A simple tabulation reveals that by the time the Claimant's employment was terminated on 31st August 2016, she had served her probation period and whether or not she had re-applied for her position did not alter this fact.

17. In any event, in a recent three-judge bench decision of this Court (**Mbaru, Abuodha and Ndolo JJ**) in **Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR** Section 42(1) was declared unconstitutional.

18. The second limb of the Respondent's objection to the Claimant's right to bring this claim is premised on Section 45(3) of the Employment Act, which provides as follows:

(3) An employee who has been continuously employed by his employer for a period of not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

19. The Respondent acknowledges the decision in **Samuel G. Momanyi v Attorney General & another [2012] eKLR** in which **Lenaola J** (as he then was) declared the foregoing provision unconstitutional. The Respondent however takes the view that the position taken in this case has since been reversed by the Court of Appeal in **Nation Media Group Limited v Onesmus Kilonzo [2017] eKLR**. Looking at the Court of Appeal decision however, there is no evidence that the holding in **Samuel G. Momanyi** (supra) to the effect that Section 45(3) is unconstitutional was actually reversed.

20. The High Court decision therefore retains its persuasive force and this Court is duly persuaded that Section 45(3) of the Employment Act is unconstitutional, for the simple reason that it discriminates against a certain category of employees, by locking them out of the constitutional safeguards of due process.

The Dismissal

21. The Claimant was dismissed by letter dated 31st August 2016 stating thus:

“SALOME NJIRI

SHOP ATTENDANT

RE: TERMINATION LETTER

After carefully examining and evaluating your response to the show cause letter dated 14th June, 2016, the company concluded that you have breached the contractual agreement between you and Misky Investment.

This is therefore meant to serve you as a termination of your service immediately. Any dues owed will be paid to you.

Regards

(signed)

SANTUR”

22. The Respondent states that prior to the dismissal, the Claimant was issued with a show cause letter dated 14th June 2016 in the following terms:

“SALOME NJIRI

SHOP ATTENDANT

RE: SHOW CAUSE LETTER

An audit of Mpesa has revealed that a total cash of KSH 150000 is missing. This money has been under your custody. Your recent absenteeism from work and failure by you to come for an Mpesa audit has raised suspicion.

It's also noted by the management that, airtime scratch cards amounting to KSH. 50000 are lost/stolen from the shop.

The management requires you to show cause within 3 days as to why disciplinary measure is not taken against you.

Regards

(signed)

SANTUR”

23. Although the Claimant denies receipt of the show cause letter, she herself wrote to the Respondent on 15th June 2016, as follows:

“DIRECTOR,

MISKY INVESTMENT LTD

PEPONI PETROL STATION

Dear Madam,

The Ksh. 150000 Mpesa cash was under the custody of Lydia. I only worked with the amount she gave me daily. I have no idea where Lydia has taken the money. Whenever, I ask for cash so as to get float she says she will do it herself.

Am sorry I didn't report this matter quickly to you but I knew something was not right.

Thanks

(signed)

Salome Gathoni Njiri”

24. In her letter, the Claimant admits that although she was aware that there was something wrong in her area of work, she did not escalate the matter to the Respondent’s management. By this failure, the Claimant contributed to the loss incurred by the Respondent and I find that there was substantive justification for her dismissal as required by Section 43 of the Employment.

25. In scrutinising a termination of employment, the Court is concerned with both substantive justification and procedural fairness (see *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR* and *Pamela Nelima v Mumias Sugar Co. Ltd [2017] eKLR*).

26. The procedural fairness requirements are set out in Section 41 of the Employment Act which states:

(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.

27. Apart from the show cause letter dated 14th June 2016 and the Claimant’s response of 15th June 2016, the Respondent did not allow the Claimant an opportunity to be heard, as required under Section 41 of the Employment Act. What is more, it would appear that between the show cause letter and the termination letter, the Claimant was placed on suspension, again without recourse to due process.

28. Overall, I find and hold that in terminating the Claimant’s employment, the Respondent did not adhere to the mandatory procedural fairness requirements of Section 41 of the Employment Act. The termination was therefore procedurally unfair.

Remedies

29. Consequently, I award the Claimant three (3) months’ salary in compensation. In making this award, I have taken into account the short employment stint and the Claimant’s contribution to the termination.

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

31. In the absence of leave records to the contrary, the Claimant is entitled to prorata leave for the period of service.

32. The Claimant claims house allowance. However, according to the appointment letter dated 30th October 2015, she was paid a consolidated salary of Kshs. 13,440 inclusive of house allowance. This claim therefore fails and is disallowed.

33. The claims for overtime and holidays were not proved and are dismissed. No basis was established for the claim for punitive and aggravated damages which also fails and is disallowed.

34. In the end, I enter judgment in favour of the Claimant as follows:

- a) 3 months’ salary in compensation.....Kshs. 40,320
- b) 1 month’s salary in lieu of notice.....13,440
- c) Prorata leave for 9 months (13,440/30*1.75*9).....7,056
- Total.....60,816**

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

36. Each party will bear their own costs.

37. Pursuant to an order made on 20th February 2017, this judgment will apply to *Causes No 2398 of 2016, 2399 of 2016 and 2407 of 2016*.

38. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH 2022

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JUDGE

Appearance:

Mr. Waiganjo for the Claimant

Miss Jiseve for the Respondent