



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E018 OF 2021

(Before D.K.N.Marete)

MARGARET GAKENIA KINYUA.....CLAIMANT

VERSUS

NEWFORTIS SACCO SOCIETY LIMITED.....RESPONDENT

J U D G M E N T

This matter was brought to court vide a Statement of Claim dated 31st March, 2021. The issue in dispute are therein cited as;

Unfair/unlawful termination of employment and dismissal of Margaret Gakenia Kinyua.

The Respondent in a Respondent's Response dated 27th April, 2021 denies the claim and prays that it be dismissed with costs.

The Claimant's case is that the Respondent employed her as a Marketing Executive with effect from 7th March, 2017. The appointment letter dated 6th March, 2017 dubbed her an Accounts Clerk.

The Claimant's further case is that in addition to the offer of employment, she was issued with a letter of contract commencing 1st July, 2020 to 30th June, 2023. This was on the terms of contract at a gross salary of Kshs.94,136.00.

The Claimant's other case comes out thus;

- That she applied for leave from 7th September, 2020 to 12th October, 2020.
- She was enrolled back from 18th September, 2020.
- She participated in the opening of a new branch at Nanyuki on the 18th September, 2020.
- On 21st September, 2021, she requested for a day off which her immediate supervisor declined.
- On 23rd September, 2020, the Respondent Nanyuki Branch Manager issued her with a letter of unbecoming behaviour to which she replied to on the same day.
- She was issued with a letter of insubordination by the Respondent's CEO, revoking her annual leave and suspending her from 24th September, 2020 to 24th November 2020.
- On reporting back, she was instructed that the suspension had been extended to 16th January, 2021 without pay.
- On reporting back on due date, she was issued with a letter instructing her to clear outstanding loan arrears before reinstatement, which she did instantaneously
- Termination of the contract ensued effective on 2nd February, by a letter of even date.

It is the Claimant's further case that her purported termination was null and void *ab initio*. It was also unfair, unprocedural and unlawful in that she was not offered an opportunity to be heard before termination.

She now claims compensation for ambiguous termination of contract and prays as follows;

a) *Remainder of the contract period from 01.10.2020 up to 30.06.2023 at Kshs.94,336/- x 33 months = Kshs.3,113,088/-*

b) *Maximum compensation for unfair and unlawful termination of employment @ Kshs.94,336/- x 12 months = Kshs.1,132,032/-*

c) Gratuity for three (3) years. ($15 \times \text{Kshs.}94,336/- \times 3 \text{ yrs} = \text{Kshs.}141,504$)

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d) Accumulated shares worth Kshs.764,818.32/-

e) Punitive/exemplary damages

f) Any other lawful allowances and dues that continue to accrue under the contract of service.

g) Recommendation letter and/or Certificate of Service.

h) Costs of the suit.

The Respondent admits and denies the claim in equal measure. The denial is as follows;

- She avers that the claim and or prayer for accumulated shares worth Kshs.768,818.32 is misconceived.
- She avers that the claim and/or prayer for accumulated shares worth Kshs.764,818.32 is misconceived, incompetent and bad in law as the Claimant is a member of the Respondent and there are well laid down procedures which she ought to follow in withdrawing from the membership of the society which the Claimant has not complied with.
- That in view of bullet one, above, this court lacks jurisdiction to entertain the claim and prayer for accumulated shares as sought and this should fail.
- The prayer for recommendation and or certificate of services is unfounded as these were prepared and offered to herself.
- Her contact was summarily terminated vide pursuant to clause 16 (iii) of the Employment contract dated 27th June, 2020.
- That this suit is misconceived, incompetent, bad in law and nonsuited.
- She owes Kshs.1,039,835.54 as at April 2021 on account of due loans from the Respondent who reserves the right to claim the same.
- Her claim for gratuity is misconceived and unfounded.

The Respondent's further case and testimony as expressed in the witness statement of John Mathinji comes out as follows;

In March 2017 she did not work as she was trained or instructed. She was wrongly filling members' documents in the files of other members. The matter was taken up by the Accounts Supervisor vide a letter dated 27th day of March, 2017.

Again,

The Claimant responded to the show cause vide her letter dated 27th day of March 2017 and was not even remorseful for the misfiling of members documents. She further wrote a letter dated 28th day of March, 2017 and still did not personally accept the mistake.

Further,

The Claimant, on the 21st day of September reported to the Branch Manager's office in Nanyuki but demanded that she be released to go back to her home citing unfinished business. She threatened the Branch Manager that she was not going to report on duty.

In further pursuit of her case, the Respondent testifies as follows;

Recalling of the Claimant leave was a right reserved for the Respondent under staff policy and/or Human Resource Rules. The Branch Manager upon noticing several aspects of misbehaviour which included the following;

- Constantly talking on phone when clients are waiting to be served at her cubicle.*
- Leaving office and/or work station leaving clients with no teller to attend to them as she was the only teller in the Branch.*
- Leaving the office without permission.*
- Basking in the sun and laughing with guards outside office but during office hours.*
- Being rude to her superiors.*

Moreover,

On 24th day of September, I wrote a letter formally cancelling her annual leave and suspending her from work to enable the Board of the Society make a decision about the complaints against her and her response to the complaints in the background of Covid 19

protocols. The Board finally made a decision to terminate the claimant's employment and issued a letter to her dated 2nd day of February, 2021.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful. The claimant in her written submissions dated 27th July, 2021 submits a case of unlawful termination of employment. This is denied by the respondent.

The Claimant's case and submission was that she was not afforded due process or even reason for termination of her employment as is required of Section 41(1) and 43 (1) of the Employment Act, 2007. On this she sought to rely on the authority of **Shadrack Mwaniki vs Aegis Construction; Nyeri ELRC No.312 of 2017**, where the court made the following observations;

Paragraph (6) "The letter aforesaid was one which the provisions of Section 41 of the Employment Act applied. Section 41 of the Employment Act provides;

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)." Emphasis added.

Paragraph (7) "The claimant was stated to be incompetent, rude arrogant and lacked respect for the site management. Before the dismissal he was entitled to the safeguards under the law. The employer must not only have a manifestly valid and proper reason for termination but must also exercise due process in effecting the termination. Put another way, there must be both substantive and procedural fairness. In this case the claimant was not accorded any such hearing, as envisaged under Section 41. The site manager thanked the Respondent's head office for the usual co-operation in relation to the reference of the claimant to the head office. The respondent never filed any pleadings or offered testimony to rebut the averments of the claimant or his testimony. It stands as uncontested. He proved his case on a balance of probabilities and in the final result I will enter judgment for the claimant as follows"

The Respondent in her written submissions dated 27th July, 2021 reiterates the case of unlawful termination of employment. She seeks to rely on Section 41 (1) of the Employment Act, 2007 and comes out as follows;

11. The Claimant's gravamen with the Respondent is that she was not accorded due process before the termination of her contract of employment aforesaid as per Section 41 (1) of the Employment Act which is a show cause letter why her contract of services should not be terminated and/or disciplinary hearing of her case hence the mandatory statutory procedural and substantive steps to be undertaken by the employer under Section 41 (1) of the Employment Act were not followed by the Respondent with the result that the Claimant's termination of employment immediately after the second suspension without being afforded an opportunity to defend herself against the charges of basking out in the sun on 23.09.2020 and using unprofessional language on 22.09.2020 when she objected being recalled from her annual leave as communicated in the first letter of suspension dated 24.09.2020 titled as "insubordination".

12. Additionally, we submit for and on behalf of the Claimant that the Respondent did not discharge the statutory burden of proof under Section 43 (1) of the Employment Act that there were fair reasons to terminate the Claimant's contract of service as the Claimant was not invited to the Board's meeting said to have been held on 28.01.2021 in which the decision to terminate her contract of service was made as it is during the said Respondent's Board meeting that the said Board would have proved the allegations made against the Claimant of sneaking out of office to bask in the sun while laughing with security guards and the other allegation that the claimant had used unprofessional language while expressing her bitterness for being recalled while on her annual leave. In any event, the particulars of the "unprofessional language" were not availed to the claimant to respond to and/or defend herself and to add salt to an injury, the Claimant was not accorded a chance during the Board's meeting on 28.01.2021 to defend herself against the said charges as contemplated under Section 41 (1) of the Employment Act.

13. This Honourable court in the case of Shadrack Mwaniki vs Aegis Construction; Nyeri ELRC No.312 of 2017, held as follows in reference to the application of Section 41 (1) in due process and Section 43 (1) on the need for the employer to prove valid reasons for terminating an employee's employment.

Paragraph (6) "The letter aforesaid was one which the provisions of Section 41 of the Employment Act applied. Section 41 of the Employment Act provides

(in pare material)

The Respondent in her written submissions dated 27th July, 2021 submits a case of lawful, termination of employment. It is her case and submission that;

The claimant was later issued with a letter dated 24.9.2020 on insubordination which captures the complaints raised in the letter of 23.9.2020 and raised additional charges of use of unprofessional language and reminded her of misfiling of members documents which happened in 2017.

The letter revoked her annual leave and put her on suspension, which was later extended. The claimant had been accorded opportunity to be heard as per the contents of line four (4) of the letter dated 20.9.2020.

The claimant responded to the accusations vide her two (2) letters dated 21.9.2020 and 23.9.2020, and in the two (2) letters, she was apologetic. The claimant's case was submitted to the Board which later made decision to terminate her employment.

The claimant was therefore given opportunity to be heard and she responded and/or made communication apologizing vide her letters aforesated.

The complaints against the claimant were all valid as the same were accepted and apology tended tended by the claimant. The lines of complaints were with regard to the conduct of the claimant. She breached professional conduct and discipline in the list of Respondent's documents number five (5) including staff policy document number six (6) in the list.

The totality of the accusations and/ of complaints against the claimant is that, she was guilty of misconduct and insubordination. She apologized and therefore estopped from challenging the same before the Honourable Court.

The Respondent's case overwhelms that of the claimant, she has adduced ample evidence to justify the dismissal of the claimant. The claimant has not ably controverted the case of the Respondent. In the circumstances, a case of lawful termination of employment ensues and I find as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost a case of unlawful termination of employment she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the claim.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Warutere instructed by Warutere & Associates Advocates for the Claimant.
2. Mr.Modi instructed by Modi & Company Advocates for the Respondent.