



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO.2206 OF 2016**

***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**PERIS MURIITHI.....CLAIMANT**

**VERSUS**

**BOULANGERIE AND COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. The Claimant brought her claim to this honourable court vide her statement of claim dated 27<sup>th</sup> October, 2016.

The Respondent put a response dated 7<sup>th</sup> June, 2018.

**CLAIMANT'S EVIDENCE**

2. The Claimant stays she was offered employment as an Assistant Manager and it commenced on 15<sup>th</sup> February, 2016. She says she served diligently but on 5<sup>th</sup> July, 2016 her employment was terminated with effect from the same day.

3. She says that there was no termination meeting which took place between her and the Respondent on 5<sup>th</sup> July, 2016 contrary to the assertion by the Respondent.

4. She says that on that material day the Respondent called her to his office and demanded the cash box keys, company cellphones and any other property belonging to the company and she obliged.

She was then given a termination letter dated 5<sup>th</sup> July, 2016 and asked to leave the Respondent's premises.

She says she was not afforded an opportunity to be heard and was not given a reason for the termination of her employment.

5. She says she was unfairly terminated from employment and as a result suffered depression and health challenges.

She claims for compensation of 12 months' worth gross salary amounting to Kshs.1,500,000/= plus costs and interests.

**RESPONDENT'S EVIDENCE**

6. The Respondent says that the Claimant served the Respondent for 4 ½ months. He says he gave her an opportunity to be heard on 5<sup>th</sup> July, 2016.

7. The Respondent further says that the Claimant was in breach of the employment contract clause 9.5 as she was engaged in her own business during working hours and in the Respondent's premises.

8. He says that the Claimant was not supposed to directly or indirectly engage in any other employment or business except that of the company.

The Respondent says the Claimant was engaged in her own business and was even storing glassware at the Respondent's premises. She

furthermore attempted to market the glassware to the Respondent's Managing Director via a text message which reads;-

*“.....I actually have cups we can use in office,  
for staff as well as industry visits. They are  
just 3000/= per dozen and they are  
simple nothing fancy”.*

9. The Respondent says when the Claimant was asked about it she said she was helping her mother in her business. The Respondent says he gave the Claimant time to be heard on 5<sup>th</sup> July, 2016. The Respondent also says there are valid and verifiable grounds to terminate the Claimant's employment. He says that the Claimant is therefore not entitled to the prayers sought and her case should be dismissed with costs.

10. The Claimant filed her submissions as directed by this honourable court dated 26<sup>th</sup> October, 2021. The Respondent did not file its submissions.

### **DETERMINATION**

The issues of determination are:-

1. Has the Claimant made a case for unlawful termination of employment.
2. Is Claimant entitled to the remedies sought.

11. The court critically considered the submissions by the respective parties, the law referred thereto and the authorities cited.

### **DETERMINATION**

12. Section 45 (1) of the Employment Act provide that no employer shall terminate the employment of an employee unfairly.

Section 45 (2) further provide that termination of employment of an employee is unfair if the employer fails to prove that the reason for the termination is valid”.

In the case of **WALTER OGAL ONURO VS TEACHERS SERVICE COMMISSION CAUSE NO.955 OF 2011** it was held that for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for termination but also procedural fairness. Furthermore Section 43 of Employment Act obligated an employer to prove reasons for termination of employment and where the employer failed to do so the termination was deemed to have been unfair.

13. The reason given by the Respondent for terminating the Claimant's employment was that she was storing glassware and selling on her own behalf in contravention of companies policies. The proof of that was an SMS print out allegedly sent by the Claimant on 20<sup>th</sup> May, 2016 to the Respondent's Managing Director. The print out read;

*“.....I actually have cups we can use in office,  
for staff as well as industry visits. They are  
just 3000/= per dozen and they  
are simple nothing fancy”.*

14. The message was meant to have been sent from the telephone line of the office. There was no telephone number captured on the print out. There is no evidence either in pleadings or during the trial to directly connect the Claimant to that SMS text. I will not even address the unavailability of certificate of electronic evidence which was referred by the Claimant's advocate in their submissions but was not produced in court.

The Respondent in his submissions says they produced the electronic certificate but the court did not see the said electronic certificate.

15. Even if for the sake of argument, she sent the message there was no proof that she was selling the products. The message suggested she could provide the cups and since the same was sent to the Managing Director the Managing Director could just have warned her and informed her the proposed activity could amount to conflict of interest.

16. From the date of alleged “SMS” being 20<sup>th</sup> May, 2016 till the day she was dismissed on 5<sup>th</sup> July, 2016 the court was not supplied with any documents to prove she received a warning or a notice to show cause. The evidence on record was that she was summoned by the

Managing Director for a hearing on 5<sup>th</sup> July, 2016 and was asked to hand over office keys and office phone. She was then given a termination letter dated the same day (5<sup>th</sup> July, 2016).

17. The Respondent avers the Claimant was hawking the cups to the other employees. There is no evidence that any staff member confirmed the Claimant attempted to sell the said cups to them.

18. The letter of termination does not give the reasons for termination. In fact the Claimant was not informed the reasons for her termination and was not called for a disciplinary hearing. The Respondent in their submissions states they invited the Claimant for a disciplinary meeting but in fact there is no evidence that such an invitation was sent and such a meeting took place. The Respondent gave no reason for terminating the Claimant's employment.

19. In **LOICE OTIENO VS KENYA COMMERCIAL BANK LIMITED CAUSE NO.1050 OF 2011** it was held that in a claim of unlawful termination the question is "whether an employee has been given warnings in the past or not, when an employer is contemplating terminating the services of the employee, it has to expressly and unambiguously inform the employee of the contemplated action and further that fundamental breach of the employment contract/obligations or gross misconduct could not result to termination without complying with procedural fairness/natural justice. An employer who summarily dismissed an employee without a hearing runs a foul of Section 41 (2) of the Employment Act.

20. Having considered critically the pleadings, the testimonies of the respective parties and the Claimant's submissions and Respondents submissions, I find that the Respondent did not convince the court that it had a valid reason to terminate the Claimant for gross misconduct. The authorities cited by the Respondent did not as well support the specific circumstances of this case.

The text message alleged that she sent her boss is not proved it is her who sent it. And even if she sent it, it does not amount to a conflict of interest because there is no proof she was undertaking a parallel business or undertaking for her gain.

21. The court finds that the Respondent failed to give a valid reason for terminating the Claimant's employment.

22. At the same time, the Respondent did not follow the procedure well laid down in Section 41 of the Employment Act.

They did not explain to her the reasons for her termination and they did not call her for a disciplinary hearing.

23. Actually it is mandatory that an employee is invited to a disciplinary hearing and be informed upfront of his transgressions. He should also be advised to invite a fellow employee or a shop steward representative as his witness in such a hearing.

Obviously the Respondent did not comply with this process and so the court can only find that where the procedure is not followed the process of termination is illegal and unprocedural.

In summary the Respondent failed the fairness test in dismissing the Claimant and so declares the termination wrongful and unlawful.

#### **RELIEFS AWARDED**

24. The Claimant prays for compensation equivalent to 12 months worthy of salary.

The claimant only worked for less than 5 months for the Respondent.

I am convinced that two months worthy of salary is fair compensation for unlawful termination.

The Claimant is awarded therefore Kshs.250,000/=.

25. Costs follow the event and so Claimant is awarded costs.

The above amount accrue interest from the date of judgement until full payment.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**