



**REPUBLIC OF KENYA**

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

**CAUSE NO. 86 OF 2018**

**CHARITY WAMBUI NYAMBURA.....CLAIMANT**

**VERSUS**

**MAYFAIR HOLDINGS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant lodged a claim against the Respondent by way of a Memorandum of Claim dated 4<sup>th</sup> April, 2018 and filed on similar date. She seeks payment of 12 months' salary for unlawful dismissal, unpaid leave allowance, one-month salary in lieu of notice, unpaid off days and unpaid bonus.
2. The Respondent entered appearance on 12<sup>th</sup> April, 2018 through the Firm of Otieno, Yogo and Ojuro Advocates, and thereafter filed a response to the Claimant's claim on 30<sup>th</sup> April, 2018.
3. The Claimant testified in support of her case. She adopted her witness statement and produced the bundle of documents filed in the matter in support of her case.
4. The Respondent presented one Mr. Francis Mbanda, the Finance Manager of the Respondent to testify on her behalf. Mr. Mbanda adopted his witness and produced the list of documents filed in the matter in support of the Respondent's case.
5. Submissions were filed for both parties.

**The Claimant's Case**

6. The Claimant's case is that she was employed by the Respondent as a Sales and Marketing Manager from August, 2016, earning a monthly salary of Kshs. 80,000/-. It is her case that she performed her duties with due diligence and competence.
7. It is the Claimant's case that she was entitled to a monthly bonus payment based on her performance, and on achieving targets agreed between her and the Respondent. It is her further case that she at all material times, worked hard and achieved the required targets, which qualified her for the bonus payment, and which payment was always included in her monthly salary.
8. The Claimant states that she was not paid her July, 2017, bonus of Kshs. 30,000 and was not given any reason(s) for the non-payment.
9. The Claimant's further case is that she took her annual leave in August, 2017 and resumed on 15<sup>th</sup> September, 2017. She states that on resuming duty, she was served with a letter of termination dated 30<sup>th</sup> August, 2017, which letter was to also serve as termination notice to take effect on 30<sup>th</sup> September, 2017.
10. It is the Claimant's case that she was terminated while she was away on leave. The Claimant further states that she was terminated without being accorded a hearing nor being given reasons for the termination.
11. On cross-examination, the Claimant admitted being issued with a one month notice of termination. She further admitted receipt of a certificate of service.
12. The Claimant further states that she was not paid her terminal dues which she prays that she is awarded a listed in her statement of claim

## **The Respondent's Case**

13. The Respondent's case is that she employed the Claimant as a Sales Office Manager, which position the Claimant held for one year. It is the Respondent's case that she terminated the Claimant on 30<sup>th</sup> August, 2017, after the General Manager of the Respondent explained to her that the Company was not doing well, and that it was in the interest of both parties that she be terminated.

14. The Respondent states that the Claimant was given a one month's termination notice which she accepted and signed for. The Respondent further states that the Claimant was paid all her dues and that she had utilized all her leave days.

15. On cross-examination, the witness (RW1) told the court that he was not present when the General Manager discussed the termination with the Claimant, and neither had he anything in writing on the discussion, or an agreement on the separation.

16. The witness further told the court that the reasons for the Claimant's termination was that the company was not doing well. He further admitted that the reasons for the termination were not given in the termination letter.

## **The Claimant's Submissions**

17. It is submitted for the Claimant that her termination was unlawful for failure by the Respondent to comply with the provisions of Section 45 of the Employment Act, 2007, when effecting the termination. It is further submitted that no notice to show cause nor reasons were given prior to the termination. The Claimant cited the case of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* for the holding that for termination to pass the fairness test, there must be substantive justification and procedural fairness.

18. It is submitted that the Respondent is estopped from denying the Claimant her bonus pay for reason that the Respondent did not prove that the company did not make profit and/or sales in the month in issue (July, 2017). The Claimant cited the case of *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd (2006) EWCA Civ. 386* to buttress this position.

19. It is further submitted that the Claimant has proved a case of unfair termination, which prove entitles her to payment of her terminal dues as listed in her statement of claim.

## **The Respondent's Submissions**

20. It is submitted for the Respondent that the Claimant was fairly and lawfully terminated for reason that the termination was based purely on her failure to meet her targets. It is further submitted that the reasons for the Claimant's termination were given in the letter dated 30<sup>th</sup> August, 2017. The Respondent had reliance on the holding in *Muchiri v Rev. Bishop Henry Kath & Another* and the dictum of Lord Denning in *British Leyland u/c Ltd v Swift (1981) KLR 91*.

21. It is further submitted that the Claimant was requested to take all her leave days before 30/9/2017, when the letter of termination was to take effect.

## **Analysis and Determination**

22. I have carefully considered the pleadings herein, the Claimant's and the RW1's oral testimonies and the submissions filled in the matter. The issues for determination are:

- i. Whether the Claimant was unfairly and unlawfully terminated
- ii. Whether the Claimant is entitled to the reliefs sought

## **Whether the Claimant was unfairly and unlawfully terminated**

23. A determination of whether or not an employee's termination is unfair, is depended on the twin issues of procedural fairness and substantive justification. These aspects are determinable by examining the employer's adherence or lack thereof to Sections 41, 43, 45 and 47 of the Employment Act, 2007.

24. The Claimant's case is that she took 25 days of her leave in August, 2017 and on resumption of duty on 15<sup>th</sup> September, 2017, she was issued a termination letter dated 30<sup>th</sup> August, 2017. The letter of termination which doubled up as notice of termination states:

***"As discussed with you by the General Manager on 30<sup>th</sup> August, 2017 and agreed by you, we hereby terminate your services by giving you one (1) month notice from the date of this letter. Your last working day is 30<sup>th</sup> September, 2017.***

***You are required to take your pending leave days before then."***

25. The question for this court is whether the letter of termination gave reasons for the termination and whether there is prove of the discussion referred to in the letter, indicating that the termination was by mutual agreement.

26. The letter of termination does not mention or list the reasons upon which the termination is premised. The Respondent's witness told the

court that the reason the Claimant was terminated is because the company was not doing well. The Respondent's statement of response to the claim and the submissions filed for the Respondent, stated that the claimant was terminated for failing to meet her set targets.

27. Section 41 of the Employment Act provides as follows:

**“41. (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.”**

28. The provisions of Section 41 of the Employment Act, require that the employer explains to an employee the reasons for which termination is being considered. The employer by this provision is required to issue an employee with a show cause letter and give him/her an opportunity to respond on the charges leveled against her, in addition to being accompanied by either a shop floor steward or a fellow employee.

29. The Claimant took her leave and on resuming duty, she was issued a letter of termination. The letter though dated 30<sup>th</sup> August, 2017, was evidently received by the Claimant on 15<sup>th</sup> September, 2017, being the day she resumed duty from her leave.

30. Further, no evidence has been adduced to show that the General Manager had had a discussion with the Claimant on her impending termination, and in any event, termination procedure is well articulated under Sections 41, 43, 45 and 47 of the Employment Act. In the case of *Mary Mutanu Mwendwa v Ayuda [2013] eKLR* the Court held that the Employment Act has made it mandatory by virtue of section 41 for an employer to notify, and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present. In a further case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR* the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

31. The reasons given for the Claimant's termination do not meet the threshold set by Lord Denning in *British Leyland u/c Ltd v Swift (1981) KLR 91*. The Respondent has given varying reasons for terminating the claimant. At one point, the reason for termination was given as failing to meet targets, while at another, the court was told that the company was not doing well. The Respondent did not state in the termination letter the reasons informing the termination and the different reasons given at different stages of the hearing, confirm that the Respondent herself did not know why it terminated the Claimant.

32. The employer has a legal and evidential burden of proof of reasons for termination, where an employee alleges that termination lacked sound legal justification per Sections 43, 45(2) and 47(5) of the employment Act, 2007. The Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR* held:

**“..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”** By these provisions, the employer is required to establish the validity or correctness of the reasons for termination and this is a requirement that never shifts to an employee.

33. I find and hold that the termination of the Claimant failed both the procedural and the substantive justification test. The termination is unfair.

#### **Whether the Claimant is entitled to the reliefs sought**

34. The Claimant seeks payment of 12 months' salary for unlawful termination, unpaid leave allowance, one-month salary in lieu of notice, unpaid off days and unpaid bonus.

#### **Compensation for Unfair Termination**

35. The Claimant's termination having been found to be both procedurally and substantively unfair, entitles her to compensation as envisaged under Section 49 and 50 of the Employment Act.

36. The Claimant was first appointed to the service of the Respondent on 14<sup>th</sup> April, 2016, and thereafter confirmed to the position of Sales office Manager, in August, 2016, where she served until 30<sup>th</sup> September, 2017.

37. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act (*See Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR*)

38. There is no prove that the Claimant contributed in any way to her termination. However, considering the opportunities available for her to secure comparable employment, the fact that she was only in the service of the Respondent for one year, and further that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but to redress economic injuries in a proportionate way (*See Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR*), I find and hold that the Claimant has not proved a case for maximum compensation, and instead, is hereby awarded seven (7) months' salary as compensation for unfair termination.

#### **Unpaid Leave Allowance**

39. There is no prove that the Claimant was owed on account of leave. The claim fails and is dismissed.

**One-Month Salary In Lieu Of Notice**

40. The Respondent's letter terminating the services of the Claimant, was dated 30<sup>th</sup> August, 2017, and the termination was to take effect on 30<sup>th</sup> September, 2017. The letter was however served on the Claimant on 15<sup>th</sup> September, 2017, and which is indicated by the Claimant's signature acknowledging receipt. The notice period given was therefore 15 days and not 30 as required under the Claimant's employment contract and Section 35 of the Employment Act, 2007.

41. Consequently, the Claimant is awarded 15 days salary in lieu of termination notice.

**Unpaid Off Days**

42. The evidence produced in this respect, indicates that the Claimant had a total of 52 off days, and further that the off days were all utilized. Nothing justifies this claim and it fails and is dismissed.

**Unpaid Bonus.**

43. The Respondent indicated that failure to pay the Claimant's bonuses for the month of July,2017, was for reason that she failed to meet her targets. No evidence was given as to what constituted the Claimant's targets, nor was there prove that the targets were not met.

44. The Claimant is hereby awarded bonus for the month of July, 2017 at Kshs. 30,000/-

45. In whole, Judgment is entered for the Claimant against the Respondent in the following terms:

- i. 7 month's salary equivalent as compensation for unfair termination at Kshs. 560,000/=
- ii. 15 days salary in lieu of termination notice at Kshs. 40,000/-
- iii. Bonus payment at Kshs. 30,000
- iv. Costs of the suit and interest until payment in full.

46. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21<sup>ST</sup> DAY OF APRIL, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Kagoya Present for the Claimant

Mr. Ojuro Present for the Respondent

Christine Omollo- C/A