



REPUBLIC OF KENYA



KENYA LAW
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**Kisongochi v Fortcom Holdings Limited (Cause 2337 of 2017)
[2022] KEELRC 113 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2337 OF 2017
AN MWAURE, J
JUNE 16, 2022**

BETWEEN

PHOEBE NASAMBU KISONGOCHI CLAIMANT

AND

FORTCOM HOLDINGS LIMITED RESPONDENT

JUDGMENT

1. By the memorandum of claim dated the 22nd day of November 2017 and filed on the same date, the Claimant seeks the following remedies as against the Respondent;
 - a. A declaration that the constructive dismissal of the Claimant from employment was unfair and unlawful.
 - b. A declaration that the Claimant is entitled to payment of her terminal dues and compensatory damages.
 - c. An order for the Respondent to pay the Claimant her terminal benefits and compensatory damages amounting to Kshs. 384,000/=
 - d. Costs of the suit plus interests thereon.

Claimant's case

2. The Claimant avers that she was employed by the Respondent as a cashier in the year 2011 whereat she worked continuously, diligently and to the satisfaction of the Respondent until her constructive dismissal on the 1st September, 2017. Her last salary was computed at Kshs. 24,000/= per month.
3. On the 5th July 2017, she was issued with a suspension letter of an even date alleging that a disciplinary case has been brought to the attention of the Respondent's Director. The said letter did not disclose the details of the disciplinary case but only went further to suspend the Claimant's salary until the



- 1st October 2017 when the purported suspension was to lapse. The Claimant through her advocates protested the suspension vide a letter dated the 20th day of July 2017 as the Respondent's actions were illegal, malicious, farfetched and unreasonable.
4. Upon receipt of the Claimant's letter dated the 20th day of July 2017, the Respondent through the letter dated the 1st August 2017 invited her to return to her place of work on the 1st of September 2017. That upon returning to her place of work on the 1st of September 2017 in compliance with the directive she was kept waiting by the Respondent's human resource officer one Leah Nduta Kinyanjui who later told her to go away and await further report from the Respondent. To date she has never received any communication from the Respondent and neither has she been called back to her place of work.
 5. The Claimant says the manner in which the Respondent dismissed her was unlawful and clearly offended the express provisions of *the constitution*, the *Employment Act* 2007, the principles of natural justice, the tenets of good labour relations and practice as she had done nothing wrong to warrant a dismissal. The decision to dismiss the Claimant from employment was harsh and unjustified considering that she had served the Respondent with dedication and without blemish for 6 years.
 6. The Claimant claims the Respondent did not follow the due process and that the Respondent's action to dismiss her was unwarranted and unjustified considering that she had served the Respondent diligently for more than 6 years.
 7. The Claimant as a result of the illegal and unfair dismissal complained of she suffered abrupt loss of income and trauma and the inability to meet her continuing obligations as a result of which she suffered damages for which she seeks compensation at 12 months equivalent of her salary.

Respondent's Case

8. The Respondent entered an appearance through the firm of Paul Anderson and filed the replying memorandum on the 3rd day of January 2018.
9. The Respondent denies having constructively dismissed the Claimant and says that the Claimant was asked time and again to carry out her usual duties of managing the clientele rent payment receipts in chronological and sequential manner which she failed to do and sparingly would not come to work without any justifiable reason.
10. Due to the Claimant's gross misconduct which included disrespecting her superiors, not heeding lawful demands as required, failing to report to work and failing to perform her duties as per the company policy and willingly doing the misfiling of receipts and misplacing vital document the Respondent deferred her services pending hearing of her case. The Claimant was well aware of what was expected of her following numerous discussions between her and the Human Resource Manager and warnings from the General Manager.
11. The Respondent says it required time to peruse and sift through the documents that were messed up by the Claimant during her tenure as a cashier as the same caused bad and wrong book keeping due to misfiling and missing bank rent payments receipts that are crucial in the Respondent's business. He says the Claimant then decided not to resume her duties knowing the mess she had caused and deserted employment.
12. The Respondent says that the Claimant was not dismissed from employment but was informed to resume work in a different office which she did not and instead instructed her advocates to bring the



suit to Court. The Respondent further says this suit was filed as a means of unjust enrichment as can be seen from Claimant's prayers.

13. Further the Respondent avers that he did not dismiss the Claimant, the terminal benefits and compensatory damages are intended to rip off the company for the Claimant's own misdoings, gross misconduct and disobedience at the work place for purposes of unjust enrichment.

Claimant's evidence

14. Claimant witness Phoebe Nasambu Kisongochi gave sworn testimony and adopted her witness statement dated the 22/11/2017 as her evidence in chief. She also adopted the documents contained in the list of documents dated 22nd November 2017 filed together with the memorandum of claim as exhibits 1-5.
15. It is her evidence that on the 5/7/2017 she was terminated from employment but was not told why she was terminated. She was the cashier for the Respondent and she says that the Respondent's Manager terminated her employment for no cause. She was served with a suspension letter and was suspended for 3 months without pay.
16. She further says she was not issued with Notice to Show Cause before the suspension and was never invited for the disciplinary hearing.

Respondent's evidence

17. The Respondent never tendered evidence in the case.

Claimant's submissions

18. The Claimant in her submission submits that there was no cogent reason put forward to support the termination of the employment relationship between her and the Respondent. The effect of the Respondent's failure to appear in Court to defend their case is that there is no evidence adduced in support of the defence case. The Claimant's testimony thus remains uncontroverted. The Claimant relies on the case of *Stanley Mwangi Gachungu versus Barclays Bank of Kenya Ltd* (2019) eKLR.
19. The Claimant further relied on the case of Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited Cause No. 74 of 2013 for the proposition that section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee is not accorded hearing in the presence of her representative. In the present case the Claimant submits she was never given the hearing contemplated under Section 41 of the *Employment Act* 2007.
20. The Claimant contends that Section 43 of the *Employment Act, 2007* provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act.
21. The reason or reasons for the termination of a contract are the matters that the employer at the termination genuinely believed to exist, and which caused the employer to terminate the services of the employee. The Claimant submits that in the present circumstances no reason has been adduced that informed the Claimant's dismissal.
22. Section 45 of the *Employment Act* 2007 further emphasizes that the employer must not only prove that the reason for termination is valid and fair but also that the termination was done in accordance



with fair procedure. The Claimant was never given any reason for her dismissal or issued with a show cause letter. Contents of the suspension letter dated 5th July, 2017 only says that the Claimant had a disciplinary case but does not disclose the contents of the disciplinary case or charges that the Claimant is facing.

23. The Claimant submits that where an employee is not heard the process is ipso facto unfair. Reliance has been placed on the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Ltd* [2014] eKLR for the proposition that the duty was on the Respondent to demonstrate to Court that there existed grounds to justify the termination of the contract.
24. Reliance has also been placed on the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where it was held that for termination to pass the fairness test, there must be both substantive and procedural justification. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination. The Claimant submits that the fairness test in this case was never achieved as there was no justification for the Respondent to dismiss the Claimant. Due process was also aborted in the process to summarily dismiss the Claimant in a hurry.
25. Issues for Determination
 - a. Whether the Claimant was constructively dismissed
 - b. The remedies, if any, the Court should grant
26. Section 45 (1) and (2) of the *Employment Act* 2007 provides that—
 - “(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.”
27. Section 47(1) (5) of the *Employment Act* 2007 provides that:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
28. In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal set out the legal principles relevant to determining constructive dismissal to include the following:
 - a. What are the fundamental or essential terms of the contract of employment”



- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer"
- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee."
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.

29. The Respondent did not offer the Claimant the job on 1st September 2017 and there is no record of any other communication from the Respondent after they wrote to her on 1st August 2017 recalling her back to work come 1st September 2017. The Claimant's uncontroverted testimony is to the effect that she was late with filing of records for two days. She was asked why she did not file the same on time and she explained. She was issued with a suspension letter dated the 5th July 2017 that did not disclose why she was being terminated.

The facts adduced are to the effect that the Respondent, however, went ahead and called the Claimant back to employment vide the two letters dated the 1st August 2017. Upon going back to the work place Claimant says she was told by the Respondent's human Resource Officer, one Leah Nduta Kinyanjui to just go away and await a further report. She says she has never been called back to work and hence she filed this suit.

30. The Court has considered the pleadings as well as the evidence given in Court as well as the submissions. The Court finds that the Respondent did not give a valid reason as to why he put the Claimant on suspension for three months. A general statement that "a disciplinary case has been brought" can never suffice to be a valid reason to terminate an employee's employment. That is all what is written in her suspension letter.

31. The Court is in agreement with the observation in the case of *Mary Chemweno Kiptui v Kenya Pipeline company Limited* [2014] eKLR whereby Court held that:-

"The duty was on the respondent to demonstrate to the Court that there existed grounds to justify termination of the Claimant."



32. Further to this is the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the Court held that:-

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination”

33. It follows that there was no valid and fair reason to terminate the Claimant as per section 45 of the *Employment Act* 2007. The Respondent did not adduce evidence in Court and so in essence did not controvert the Claimant’s evidence. There is therefore no evidence on record that the Claimant was taken through the disciplinary process as provided in Section 41 of the *Employment Act* 2007. Accordingly, the procedure used to terminate the Claimant was procedurally flawed for non-compliance with section 41 of the *Employment Act* 2007.

34. The decision to terminate the Claimant’s employment having been found irregular due to the foregoing, the Court now declares there was constructive dismissal of the Claimant from employment and hence was unfair and unlawful.

35. Awards

The Claimant is awarded the following:-

1. One month salary in lieu of notice Kshs. 24,000/-.
2. Salary during the 3 months suspension Kshs. 72,000/- period.
3. 6 months’ salary equivalent being compensation Kshs 144,000/-.
4. Costs of the suit.
5. Interest at Court rates from the date of judgment till full payment.

The impact of the total award amounts to Kshs. 240,000/-

Orders Accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 16TH DAY OF JUNE, 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 15th March 2020 and subsequent directions of 21st 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

