



Amakobe v Sheria Co-operative Savings & Credit Society Limited (Cause 669 of 2017) [2022] KEELRC 3825 (KLR) (18 August 2022) (Judgment)

Neutral citation: [2022] KEELRC 3825 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 669 OF 2017
AN MWAURE, J
AUGUST 18, 2022**

BETWEEN

LILY ANDAYI AMAKOBE CLAIMANT

AND

**SHERIA CO-OPERATIVE SAVINGS & CREDIT SOCIETY
LIMITED RESPONDENT**

JUDGMENT

Introduction

1. The claimant filed a Memorandum of Claim dated April 7, 2017 wherein she claimed that she had been illegally, unfairly and unprocedurally terminated by the respondent. She prayed that she be reinstated or in the alternative judgment be entered against the respondent for:
 - a. One months’ Salary in lieu of notice.....kshs 126,822.75
 - b. 12 months’ salary being compensation for unfair termination.....kshs 1,521,873
 - c. Service pay of 20 days for each year Worked.....kshs 422,742.50
 - d. Unpaid leave for 3 years.....kshs 380,468.25
 - e. General damages (14 years’ salary).....kshs 1,775,518.50
 - f. A declaration that the termination was illegal
 - g. Interests on the above
 - h. Any other relief that the honourable court deems fit.
2. The respondent filed its response/defence and counterclaim on September 25, 2017.



The claimant's case

3. The claimant avers that the respondent advertised the job of a personal assistant to the chief executive officer on April 18, 2017 which position she applied for and was interviewed. Upon the successful interview, the claimant was appointed to the said position vide a letter dated July 19, 2012 for a three year contract.
4. Her starting salary was kshs 83,640 per month. On March 21, 2016 her contract was renewed for a further 5 years and her gross salary reviewed to kshs 126,822.75. She has produced her pay slip for December 2016 as evidence for the same.
5. The claimant avers that on December 19, 2016 as she was proceeding for christmas vacation she received a letter terminating her services without any reason at all. The claimant states that she did not receive a disciplinary Letter neither was she taken before a disciplinary committee.
6. She reiterates that she is not aware of any reasons as to why her services were terminated. She states that the respondent disregarded the set out procedures for termination set out under the respondent's Human Resources Policy and Procedures and the relevant laws.
7. It is the claimant's case that the termination was illegal, unfair and unprocedural and was tailored towards embarrassing her and causing her pain. She claims that she suffered psychological torture, pain and anguish, financial loss, injury of reputation and loss of employment prospects as a result of the termination. The averments on her witness statement are the same as the ones in the Memorandum of Claim.

The respondent's case

8. The respondent admits that the claimant was indeed their employee. As to the claim of illegal termination, the respondent avers that she was terminated as per the Human Resource Policy and Procedures Manual Part IX, Clause 98 and paid one month's salary in lieu of notice.
9. The respondent states that the letter of termination dated December 19, 2016 gave reasons for her termination and that she was issued with a certificate of service. The respondent avers that the HR Policy and Procedures Manual 2015 that governed the claimant's employment provided for general termination and discipline. It was not ignored.
10. It is the respondent's position that the termination was not illegal, unfair and unprocedural. The respondent stated that the claimant was not entitled to reinstatement because her services were no longer needed as stated in the letter. Furthermore, her contract was terminable and renewal was not guaranteed.
11. The respondent states that the claimant assumed powers of the human resource department whereas her job was that of a personal assistant to the chief executive officer whose authority she undermined. It avers that during a strategic plan review retreat while presenting a paper on the CEO's office to the board she digressed and attacked the human resource committee.
12. It is the respondent's case that the claimant was not a team player and lacks the trust and confidence necessary in an employment relationship. The respondent further denied that the claimant is entitled to salary for 14 years as she should not be paid services she has not rendered.
13. In its counterclaim, the respondent avers that the claimant owes it diamond loan worth kshs 545,253.33 and personal loan worth kshs 2,844,829.65. The said amounts continue attracting interest



at the rate of 1.25% per month. The respondent prayed that judgment be entered against the Claimant for the above amounts.

The claimant's response to the defence and Counterclaim

14. The claimant still holds her position that the HR policy and procedures manual was not followed in terminating her. She states that the respondent merely told her that her services were no longer needed yet the respondent appointed someone to act in that position.
15. She states that she did not disrespect the CEO as the CEO had asked her to do a presentation on human resource issues. With regards to the loan, the claimant states that she had not received any money from the respondent as it was all channeled to settle her loan. She says that she is suffering because she went home without any cent. Her name was also sent to the Credit Reference Bureau (CRB) making her life even more miserable as she cannot be employed anywhere, she adds.
16. The claimant states that the counter claim is basically unfounded since she cleared her loan of kshs 545,253 by paying from her benefits amounting to kshs 620,000 but she never got a refund. Additionally, her loan of kshs 2,844, 829.25 was settled as the same was deducted from her two guarantors. She savers that there is no loan or money owed to the respondent at all.

Issues for determination

17. After careful consideration of the pleadings, witness statements and oral testimonies herein, the court has come up with the following as issues for determination:
 - a. Whether the claimant was unfairly terminated
 - b. Whether the claimant is entitled to the reliefs sought

Whether the claimant was unfairly terminated

18. In the letter of termination dated December 19, 2016 the claimant was told that her services are no longer needed and was thus terminated in accordance with clause 8(1) of the local agreement signed by her on January 20, 2013 and subsequently renewed on March 4, 2016. Her termination was also based on clause 98 of the human resource policy. She was told that she will be paid one month salary in lieu of notice.
19. Clause 8(1) of the local agreement on the one hand states as follows:

The society may at any time determine the engagement of the person engaged by giving him one month's notice in writing, or paying him one month's salary in lieu of notice.
20. The respondent, vide a letter titled "Insubordination of the Office of the CEO" dated June 27, 2016 told the claimant that was to be her last letter on insubordination and that a more serious disciplinary action would be taken against her should the same behavior continue. She was allowed to appeal within 48 hours. From the evidence on record herein, the claimant acknowledged receipt of the letters and stated that she will adhere to every detail stated therein.
21. About six months later, however, the claimant received a letter terminating her employment and stating that her services were no longer needed by the society. It is the courts contention that from the correspondence between the two parties the complaint on insubordination had already been settled since there are no further complaints or reference on the same by the society. The claimant had continued serving the respondent on that assumption after her response to the accusation of insubordination.



22. It follows therefore that the reason she was given for her termination in the letter dated December 19, 2016 was not sufficient to terminate her. In fact the respondent gave no reason for terminating claimant employment. It is unlawful according to law related to employment to terminate an employee without a reason. Section 45 (2) of the *Employment Act* 2007 speaks to unfair termination. It states as follows:

A termination of employment by an employer is unfair if – (a) the employer fails to prove that the reason for the termination is valid.

23. The employer has also failed to justify the grounds for the termination as is required by law under Sections 43 and 47(5) of the *Employment Act*. This section requires that an employee establishes that there exists a case of unfair termination after which the evidential burden of disproving the same shifts to the respondent. Section 47(5) quoted verbatim states:

“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.

24. On the requirement for justification of reasons for termination, the court in the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR expressed itself as hereunder:

Indeed the overall design of the law is that the employer has the duty to provide evidence to establish the validity of the termination in terms of sections 43 and 45 of the Act in the absence of which a presumption of fact arises in favour of the unlawfulness of the termination.

25. The respondent contends it complied to the provisions of the contract of employment between then and the claimant as well as their HR policy that provided that each party can terminate the Employment relationship by giving one month notice or payment in lieu of notice. She was offered one month salary in lieu of the notice.

26. In the case of *James Chutha Gathere vs Nation Media Group Limited* (2013]eKLR states:-

“the duty to explain the procedures and processes for termination rest with the employer even where the employer gives notice to terminate an employment contract.”

The employer must still follow the provisions of the employment laws despite giving the employee notice or payment in lieu of notice.

27. The respondent wrote to the claimant severally alleging insubordination but still no disciplinary hearing was conducted and the termination letter did not allude to such insubordination. In fact it did not refer to any reason.

28. The court is inclined to find the claimant was unfairly terminated. This court wishes to rely on the reasoning of learned judges of the Court of Appeal in *Muthaiga Country Club v Kudbeiba Workers* [2017] eKLR where it was held that:

The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the



alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment.'

29. In the present case, the claimant was also not accorded fair hearing as dictated by the Constitution of Kenya and statute law. Her right to natural justice was disregarded in its entirety. The claimant was not invited to any disciplinary meeting before her termination was effected by the respondents. There is no evidence on record showing that the claimant was ever asked to attend any disciplinary hearing by her employer. Section 41 of the Employment Act 2007 provides that an employer ought to explain to an employee reasons for termination and an employee shall have representation accordingly. The said section states:

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.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

30. In the case of *Kenya Plantation and Agricultural Workers Union v Finlay Horticulture Kenya Ltd* [2015] eKLR, on natural justice the court held:

“natural justice has now become entrenched in the employment relationship where an employer is contemplating terminating the services of an employee. That is one of the essentials of the right to fair labour practices which has been given statutory underpinning in section 41 of the Employment 2007. Where an employer contemplating taking a decision to terminate the service of an employee, the statute has provided procedural safeguard. An employee is thus protected from procedurally unfair termination of service. This means that generally the employee will suffer the legal injury or actionable wrong after the employer has made the decision to terminate the employment in disregard of the prerequisite procedures or without valid and fair reasons.”

31. The claimant was not given any reason for her termination and neither was she accorded a hearing. The upshot of it all is that the court finds the termination of the claimant to be both substantively and procedurally unlawful.

Whether the claimant is entitled to the reliefs sought

32. At this point the court wishes to establish whether the claimant is entitled to the reliefs sought in the Memorandum of Claim. It should be noted that the one month payment in lieu of notice prayed for by the claimant had already been offered at the time of termination. If the respondent paid the same it will tabled as proof in court but if not paid then it is due and owing 126,822/=.

33. Guided by the determination that the employment was terminated unlawfully, the claimant is entitled to compensation for the same in line with section 49 (1) (c) of the Employment Act. The claimant is



however not awarded the full 12 months' compensation as prayed for but 4 months' gross salary being kshs 507,288./= considering also the period she served.

34. On payment of service pay the claimant has proved that she was a member of the NSSF through the pay slips she produced before court. The court makes the observation that service pay is only payable under section 35(5) of the *Employment Act*. Respondent had been always remitting the same. The claimant is not entitled to service pay. Under Section 35(6) of the Act an employee who is a member of NSSF is not entitled to service pay. So this prayer is disallowed.
35. The claimant has also not produced any evidence before court showing that she has been denied employment opportunities. Consequently, the court declines her prayer for kshs 1,775,518.50 being her gross salary for 14 years and in any case is not entitled to the same. That prayer is declined.
36. As for the claim for leave the respondent should in the terminal dues calculations that it paid for leave. In absence of any proof from the claimant to prove otherwise I will not grant this prayer.
37. The counterclaim is not part of the employment contract and the court will urge the parties to deal with the loans as per the relevant loan agreement documents so counterclaim is disallowed and the claimant is awarded a total of kshs 634,110/= plus interest at court rates till full payment from the date of judgment. If salary in lieu of notice is paid and there is proof the her award will be kshs 507,288./=.
38. She is also awarded costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH AUGUST, 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 had 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 Civil 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.

ANNA NGIBUINI MWAURE

JUDGE

