



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 909 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

FRIDAH NYABONYI ABUYA..... CLAIMANT

VERSUS

VIRTUAL HR SERVICES LIMITED.....RESPONDENT

JUDGMENT

The claim herein was filed by the claimant against her former employer, the Respondent, on 27th May 2015. She avers that she was employed by the Respondent sometime in February 2014 at a basic salary of Kshs.40,000 per month. That the position was confirmed on the 28th September 2014. That the Respondent orally terminated her services on or about 11th March 2015 without any justifiable cause upon the Claimant’s request for maternity leave. The Claimant also states that the Respondent purported to suspend the Claimant vide a show cause letter dated 18th March 2015 upon receipt of a demand letter from her advocates dated 15th March 2015.

That the Respondent had not paid the Claimant all her severance benefits that had accrued to her by virtue of the Employment Act. She also intimates that the Respondent discriminated against her due to her pregnancy contrary to the provisions under the Employment Act which amounts to an offence under the same Act.

She prays for orders against the Respondent as follows-

a) A declaration that the Claimant’s termination was unlawful, untimely and an order that the Claimant be paid her dues and benefits of Kshs.727,007.66 as tabulated below

- i. One month’s salary in lieu of notice..... Kshs.40,000.00
- ii. Days worked..... Kshs.16,923.07
- iii..... Loss of future earnings
40,000 x 12..... Kshs.480,000.00
- iv. Maternity Leave..... Kshs.120,000.00
- v. Service pay for 1 year..... Kshs.23,076.90
- vi. Leave on pro rata..... Kshs.32,307.69
- vii. Commissions unpaid (Sabic Ltd)..... Kshs.12,600.00
- viii. Commissions unpaid (Pentair K Ltd)..... Kshs.2,100.00
- Total..... Kshs.727,007.66**

b) Costs of the claim plus interest therein.

On 25th July 2018, the Claimant filed a Reply to the Respondent’s Memorandum of Response in which she denied the allegations that her

termination was due to her misconduct and reiterated that she was entitled to all her dues and benefits and costs plus interest as initially claimed.

The Claimant further filed a Witness Statement dated 4th November 2019 in support of her claim. She averred that prior to her dismissal she had faced harassment from her employer on a number of occasions upon realisation of her pregnancy. She also claimed that upon recommendation for bed rest by her doctor, she received half salary and had her computer was taken away. Her roles were also greatly diminished and she was asked not to interact with clients.

Respondent's Case

The Respondent filed a Memorandum of Response on 19th August 2015 in which it states that the Claimant's dismissal and/or termination was fair and within the law. That she was dismissed from employment for a reasonable cause and within the provisions of the Employment Act. The Respondent further stated that the Claimant's dismissal was not on the basis of her pregnancy but because of her misconduct.

It avers that the Claimant's responsibility was to take instructions from her superior, the Managing Director, who in this capacity called upon her to advise her on her area of work that needed improvement. During this meeting, the Claimant allegedly shouted and hurled insults at her superior and stormed out of the office. She neither reported to work from that day nor explained her absence.

The Respondent wrote a show cause letter dated 18th March 2015 to the claimant in regards to her misconduct which amounted to breach of company policy. She was further invited to appear before the company disciplinary committee so that she could defend herself but she did not attend. Following this hearing, a letter dated 27th March 2015 was sent to her informing her of the decision to terminate her services. On this basis, the Respondent denied acting in bad faith when terminating the Claimant's employment and further averred that it adhered to the rules of natural justice and the provisions of the Employment Act 2007.

The Respondent also avers that the Claimant's acts and omissions fall under the actions prescribed in Section 44(a)(d) and 45(2) of the Employment Act and amount to a fundamental breach of employment and the employment contract. The Respondent was therefore right and justified in dismissing the Claimant summarily from employment.

The Respondent filed 4 witness statements made by the colleagues of the Claimant namely: Kevin Riungu, Mercy Makewa, John Kabala and Everest Bulinda. All the four statements reiterate the averments made by the Respondent in its Memorandum of Response.

A further witness statement by Gladys Ogallo, the Managing Director, dated 10th April 2018 states that the claim that she was being discriminated because she was pregnant was untrue. That they had two staff members – Carol Muga, who had just come back from a 4-month maternity leave and Susan Munene, who was on bed rest since January 2018 and was expected to deliver in May 2018 Susan was still receiving a percentage of her salary and would still go on a 4-month maternity leave.

Evidence

The Claimant testified as CW1 and reiterated the averments made in her Memorandum of Claim and witness statement. Through her advocates, the Claimant adopted all the documents on record. On cross-examination, the claimant indicated that despite being aware of the grievance handling procedure, she did not make any complaint on the discrimination and harassment. She had however made an application for maternity leave in accordance with the manual.

The Respondent's advocates called two witnesses: EVEREST BULINDA as RW1 and KELVIN RIUNGU as RW2. They both reiterated the averments made in their witness statements. Mr. Bulinda testified that as the immediate supervisor of the Claimant, he received a call from her stating: "*Mnanitafuta na midomo bila barua? Tukutane Kotini.*"

On cross-examination, Mr Bulinda stated that his relationship with his subordinates was friendly and that the Claimant had an opportunity to speak to him at a personal level but she did not do so. She only called him to tell him she was fired verbally even though the procedure of termination at the Respondent's company was different. He also stated that he was absent during the alleged altercation and only relied on evidence from his staff.

Upon re-examination, Mr Mulinda concluded that he thought that the Claimant's failure to comply to the show cause letter amounted to admission of guilt.

RW2 during his examination in chief stated that while he could not hear the exchange going on in the Managing Director's office, he heard the Claimant as she walked out of the office saying that this was not the only company she could work in and "*you are a stupid woman*".

Parties thereafter filed and exchanged their written submissions.

Claimant's Submissions

The claimant's advocate relied on the oral evidence rendered in court by the Claimant. The prayer made is for judgement to be entered as prayed for by the claimant.

Respondent's Submissions

The respondent in its submissions maintained that the Claimant's termination was valid, procedural, and done in compliance with the

provisions of Section 44 of the Employment Act as read with clause 4.7.1 of the policy and procedures manual.

The Respondent relied on the decisions of the court in **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd (2014) eKLR**, and **Gideon Akwera v Board of Governors Church on the Rock Academy (2105) eKLR** respectively, which stated that summary dismissal for failure to attend disciplinary hearing with no justifiable cause was valid.

On matters, gross misconduct, the Respondent relied on the case of **Benjamin Maundu Syanda v Telkom Limited (2020) eKLR** that stated that failure to obey lawful instructions by the employer and failure to attend at disciplinary hearing as required by the employer amounted to gross misconduct and hence summary dismissal is a lawful and justifiable sanction.

The Respondent concluded that the Claimant had failed to prove any case against the Respondent and urged the court to dismiss the Claimant's case with costs to the Respondent.

Analysis and Determination

Having carefully considered the claim, the parties' evidence together with the submissions, and the authorities cited; the issues for determination before this Court are:

1. Whether termination of the Claimant's employment was valid and lawful.
2. Whether the Claimant is entitled to the reliefs sought

Whether termination of the Claimant's employment was valid and lawful

For termination to be valid and lawful, the Respondent must prove that there was valid reason in terms of Section 43 of the Employment Act and fair procedure in terms of Section 41 of the Act. Where there is an internal disciplinary process, the employer must in addition prove that it complied with its own internal disciplinary process.

The Claimant averred that she was terminated orally upon asking for maternity leave on 11th March 2015 when the altercation between herself and the Respondent's Managing Director occurred. The Respondent has denied this allegation and claimed that there was a procedure to be followed before the decision to terminate was arrived at.

In addition to the provisions of the law the Claimant's contract of employment on termination states:

"28. Termination

28.1 Your employment may be terminated by the Company forthwith at any time after due compliance by the Company with the then prevailing requirements of the law governing employment in Kenya, without notice or payment in lieu of notice if you:-

28.1.1.....

28.1.2. are guilty of an act of gross misconduct as provided for under the Employment Act (as amended from time to time) which would entitle the Company to summarily dismiss you."

It is confirmed by both parties that upon departure from work on 11th March 2015, the Claimant did not come back to work. While the Claimant averred that she was terminated on the above date, the Respondent expected the Claimant to report to work but she did not. The Claimant argued that a demand letter from her advocates dated 15th March 2015 prompted the show cause letter, which stated:

"On the 10th March I called you to my office to discuss your tasks. Being a consultancy company, this is a normal procedure. I had previously held a meeting with two of your colleagues on the same day.

In the course of the meeting, as I was pointing out the areas that require improvement, you stood up, shouted at me and said that your work us up to standard. You said that I have been picking on you and "unanitafuta". You raised your voice, threatened me and stormed out of my office, and continued shouting at me in the open plan office-saying things like "this is not your company". You proceeded to pick your bags, stormed out and shouted "Foolish Woman", there are staff who heard all these and ready to testify.

On 13th March, one of our clients Saudi Arabia Basic Industries (SABIC) called you to enquire about a staff matter. You told them that you no longer work at Virtual HR"

.....

From the above incidences, there are four charges:

1. *Rude conduct to superior – insubordination*

2. *Storming out of office and absenting yourself from work without authorisation from employer*
3. *Use of abusive and insulting language*
4. *Refusal to attend to a client by stating no longer working with Virtual HR. neglect of duties*

Please note that if your explanation is not received by the date

specified herein above, appropriate disciplinary action will be taken against you, which may include summary dismissal.”

The Respondent’s argument is that the Claimant had absented herself from her place of work which amounted to gross misconduct warranting the decision to dismiss summarily.

In **Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd (2014) eKLR**, Mbaru J. states:

“...further being away from work without authorisation or sharing information as to where the employee was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer.

..... Absence from work without a justifiable reason or permission and or authorisation and notice to the employer is a subject for summary dismissal under section 44 of the Act.

.....Despite these efforts, the grievant still failed to attend to his disciplinary hearing when his case came up to give an explanation as to what condition he suffered from. There is no explanation as to why the grievant or his representatives were not at the disciplinary hearing.

..... I therefore find the summary dismissal of the grievant delivered on 12th July 2012 was valid to the extent that upon compliance with section 30 and 34 of the Act, the grievant failed to attend at his disciplinary hearing with no justifiable cause”

Additionally, the issues of the Claimant’s failure to respond to the show cause letter and suspension, which led to her subsequent dismissal was addressed by Ndolo J in **Mathew Lucy Cherusa v Poverelle Sisters of Belgamo T/A Blessed Louis Palazzalo Health Centre [2013] eKLR** stated:

“The Claimant did not respond to the Respondent's letters because according to her she had already been dismissed and a demand letter had been sent by her Advocates to the Respondent. No further evidence was adduced in this regard..... There were real grievances between the parties needing to be addressed and the Respondent was well within its right to summon the Claimant.

..... From the evidence on record, I find that the Claimant failed to avail herself of the internal grievance handling procedure provided by the Respondent and cannot therefore complain that she was not heard. For this reason, the claims for unfair termination and one month's salary in lieu of notice fail and are hereby dismissed.”

In the case of **Jackson Butiya v Eastern Produce Kenya Limited (Industrial Court Cause No 335 of 2011)** the Court stated that:

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law”

From the foregoing, it is clear that the Claimant’s allegation of oral dismissal upon asking for maternity leave is not true. The Respondent did conduct the disciplinary procedure in accordance with the law and its internal guidelines. The Claimant’s allegation that the demand letter prompted the show cause and suspension letter is irrelevant as she chose not to show up for her disciplinary hearing.

The insults made to her superiors, and consequent failure to report to work after 11th March and refusal to attend to a client all amount to gross misconduct, which in turn warranted her summary dismissal.

From the above, it is my finding that the Claimant’s termination was lawful and valid.

Whether the Claimant is entitled to the reliefs sought

From the foregoing, the Claimant’s prayer for reliefs fails, as the Claimant was not unfairly terminated.

In conclusion, the entire claim fails and dismissed with no orders for costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2021

MAUREEN ONYANGO

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 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.

MAUREEN ONYANGO

JUDGE