



**IN THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC. CAUSE NO. 1257 OF 2015**

**SUSAN NANJALA WANJALA.....CLAIMANT**

**-VERSUS-**

**NEATCARE CLEANING SERVICES.....RESPONDENT**

**JUDGEMENT**

1. The Claimant's suit is contained in the Amended Statement of Claim filed on 7.5.2018. It seeks the following reliefs.

(a) A declaration that the termination was unlawful, untimely and an order that the Claimant be paid her dues and benefits of Ksh. 169,003/- as aforesaid.

(b) Costs of the claim plus interest therein.

2. The brief facts of the case are that the Claimant was employed by the Respondent as a cleaner on 17.3.2012 and continued until 8.4.2014 when she was summarily dismissed. As at the time of the dismissal her salary was Kshs. 6500 per month.

3. The Claimant avers that her summary dismissal was unfair and unlawful because she was not accorded any prior hearing and also because there was no justifiable cause to warrant the dismissal. Therefore, she contended that the dismissal violated section 45 of the Employment Act and prayed for the aforesaid reliefs.

4. Despite service of summons and the pleadings, the Respondent failed to enter appearance and file defence and as such the suit proceeded ex parte on 22.6.2020.

5. The Claimant's evidence is contained in her written statement filed on 7.5.2018 and a bundle of documents filed on the same date. In brief she states that in April 2014 she was 5 months pregnant and she sought permission to attend prenatal clinic but the employer declined to approve the same. Nevertheless, she attended the clinic but when she reported back on 4.4.2014, she was told that her services had been terminated.

6. She contended that the dismissal was abrupt without any hearing and she was not paid her salary for April 2014 plus terminal benefits. She contended that she had worked diligently and at no time was she served with any warning letter. Therefore she prayed or compensation for the unfair dismissal plus terminal dues in full.

**ISSUES FOR DETERMINATION**

7. The issues for determination are:

(a) Whether the summary dismissal was unfair and unlawful.

(b) Whether the claimant is entitled to the reliefs sought.

**UNFAIR AND UNLAWFUL DISMISSAL**

8. Under section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if the employer fails to prove that termination is grounded on a valid and fair reason and that it was done in accordance with a fair procedure. In this case, the Claimant has admitted that she absented herself from work without permission. Under section 44(4) (a) of the Act, an employer is entitled to dismiss

summarily, an employee, who absents herself from work without permission or a lawful cause. Consequently, the court is satisfied that the employer had a valid reason for dismissing the Claimant.

9. However, as regards the procedure followed, the Respondent has not rebutted the Claimant's evidence that she was not accorded any disciplinary hearing before the dismissal. It is now trite law that even where the misconduct by an employee is obvious, under section 41 of the Act, the employee is entitled to fair hearing in the presence of another employee before dismissal under section 44 of the Act. Failure to comply with the said mandatory provisions of the statute law renders the dismissal unfair, as in this case, and it is so held.

#### **RELIEFS**

10. In view of the foraging holding, I make declaration that the summary dismissal of the Claimant was unfair and unlawful. Accordingly, I award the Claimant one month salary in lieu of notice plus 3 months' salary as compensation for the unfair dismissal. In awarding the said compensation, I have considered that the Claimant contributed to the dismissal through misconduct. I have also considered that she worked for Respondent for only 2 years.

11. The Claim for days worked has not been denied and it is allowed just like the claim for 42 days leave. However, the claim for service gratuity is dismissed for want of evidence. Such a claim can only arise if it is expressly stipulated in a contract of service or employer's policy or the law.

12. In conclusion, I enter judgment for the claimant against the Respondent in the following terms.

**(a) Notice .....Kshs. 6,500.00**

**(b) Compensation .....Kshs. 19,500.00**

**(c) Unpaid Salary .....Kshs. 200.00**

**(d) Leave ..... Kshs. 10500.00**

**TOTAL .....Kshs. 38,500.00**

The award is subject to statutory deductions but the Claimant will have costs plus interest.

**Dated, signed and delivered in Nairobi this 22nd day of January, 2021.**

**ONESMUS N. MAKAU**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**