



**REPUBLIC OF KENYA**

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

**NAIROBI**

**CUASE NO.749 OF 2019**

**ANNE WAIRIMU NDUTA.....CLAIMANT**

**VERSUS**

**UKRISTO NA UFANISI WAS ANGLICANA SACCO LTD..... RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent on 19<sup>th</sup> May, 2010 as credit officer and was promoted to Assistant Credit Manager which position she served until 1<sup>st</sup> August, 2019 when employment was terminated.

On 19<sup>th</sup> June, 2019 the respondent issued the claimant with letter requiring her to submit a copy of academic documents and failure to which she would not be eligible for a salary increment. She was also warned that other consequences would follow.

On 4<sup>th</sup> July, 2019 the claimant was issued with letter informing her that the explanation she had given as to why she was unable to produce the academic certificates were unsatisfactory and was required to show cause why action should not be taken against her.

On 1<sup>st</sup> August, 2019 the claimant was issued with letter and notice terminating employment. There was no hearing or an opportunity given for defence hearing. This resulted in unfair termination of employment.

The claimant is seeking damages for unlawful termination of employment at 12 months' pay at ksh.941, 532; leave allowance at 25% of the basic pas ksh.19, 615.25; service pay from 2011 to 2019; costs of the suit.

The claimant testified in support of her claims that she was appointed by the respondent as credit officer and issued with letter dated 19<sup>th</sup> may, 2010 and due to good performance was promoted and issued with letter dated 10<sup>th</sup> February, 2014 as Assistant Credit Manager. Employment was upon a successful interview and completing probation and the respondent being satisfied that she was fit for the job.

The claimant also testified that by letter dated 19<sup>th</sup> June, 2019 the respondent issued her with letter and notice requiring her to produce copy of diploma certificate failure to which she would not be eligible for salary increase. By letter dated 4<sup>th</sup> July, 2019 the respondent noted that the explanation given was not satisfactory and should show cause why action should not be taken. The claimant replied that she was not able to produce her academic certificates as she had delayed in submitting her project and study for marketing and management and pleaded for more time but what followed was letter terminating employment. There was no hearing or time to give her defence. She cleared and was released. The claims made should be awarded.

**Defence**

In response, the respondent's case is that the claimant represented herself to the respondent as a holder of the requisite academic qualifications/certificates for the position of credit officer and subsequently as assistant credit manager. Employment was summarily terminated due to grave misconduct on the part of the claimant following a lawful order issued to her with respect to her employment forming the basis of the summary dismissal.

The defence is also that the respondent decision to dismiss the claimant was premised on the failure to obey lawful orders; the claimant was given a chance to produce the academic certificates which were missing from her personal file and failed to adhere; the certificates was premised on the representations by the claimant at the time of employment that she had obtained a certificate for diploma in marketing management and the respondent retained her on this basis. Employment terminated procedurally and the claims made should be dismissed

with costs.

Lillian Wairimu Maina the chief executive officer for the respondent testified that the claimant was employed as a causal in the year 2010 and following an interview she was issued with letter of appointment as credit officer. She said that she was in school at the time and that she was waiting for her certificate.

The respondent is regulated under the Ministry of Cooperative and was asked to submit staff credentials and in return asked all employees to submit their academic certificates. The claimant was issued with notice to submit her certificates on 19<sup>th</sup> June, 2019 and failed to address; another notice issued on 24<sup>th</sup> June, 2019 and this was not done. Notices to show cause issued on 4<sup>th</sup> July, 2019 and the claimant failed to oblige and as a result employment terminated on 1<sup>st</sup> August, 2019 by summary dismissal for failure to obey a lawful order. There was clearance and handing over on 30<sup>th</sup> August, 2019.

Ms Maina also testified that she joined the respondent in March, 2020 and did not work with the claimant and her evidence is based on the records. She was not present during recruitment and not privy to what the claimant offer of employment was based upon save on the letter of offer of employment dated 24<sup>th</sup> May, 2011 there is no requirement for the production of academic documents. That SUSRA regulates the respondent and staff academic documents were required to be submitted and the claimant failed to do so and leading to her summary dismissal.

After the close of the hearing, the claimant submitted that in the case of **Maxwell Miyawa & 7 others versus Judicial Service Commission [2017] eKLR** the court held that a termination of employment by an employer is unfair if the employer fails to prove that the employment is terminated in accordance with fair procedure as required under section 41 of the Employment Act. Even where the employer relies on summary dismissal and section 44, the fair procedure requirements under section 41 are mandatory.

In the case of **Standard Group limited versus Jenny Luesby [2018] eKLR** it was held that there were no exceptional circumstances given as to why the employee was not given a hearing. The procedure under section 41 of the Employment Act was held to be mandatory.

The claimant also submitted that in the case of **Walter Ogal Anuro versus Teachers Service Commission [2013] eKLR** the court held that before termination of employment there must be fair and valid reasons given to the employee.

In this case, the production of academic certificates was not a job requirement and not a matter for summary dismissal. The application of such grounds leading to summary dismissal was unlawful and unfair and the remedies sought should be issued.

The respondent submitted that the summarily dismissal of the claimant was done in conformity with Section 44 (3)( e) of the Employment Act. She was the author of her misfortune and presented no other option to the Respondent. She confirmed during the cross examination that all her dues had been fully paid at the time of termination and for failure to obey lawful orders and directions. The respondent relied on **Nalichi A K Paul versus Dhl Supply Chain (K) Limited [2020] eKLR** where the court dismissed a claim based on similar grounds as herein.

Determination

By letter dated 19<sup>th</sup> May, 2011 the claimant was offered employment by the respondent as credit officer and which she accepted. Clause on probation provided for three months and notice of 14 days.

By letter dated 9<sup>th</sup> April, 2014 the claimant was promoted to assistant Credit Manager.

By letter dated 19<sup>th</sup> June, 2019 the respondent informed the claimant as follows;

*Re: MISSING CERTIFICATES*

*The executive committee had an opportunity to peruse your file on 18<sup>th</sup> June 2019 and noted that your Certificate for Diploma in Marketing Management was missing.*

*You are therefore requested to submit a copy of the said certificate before 27<sup>th</sup> June 2019. ...*

The subject of the matter was therefore *the missing certificates*. This was noted upon the respondent management going through the claimant's file.

I take it that upon appointment on 19<sup>th</sup> May, 2011 and promotion on 9<sup>th</sup> April, 2014 all was well until management went through the claimant's file on 18<sup>th</sup> June, 2019 and found there was *missing certificates*.

Where were these certificates? Had the claimant removed them and hence required to resubmit copies as directed? Had the management just noticed these documents were missing?

By letter dated 4<sup>th</sup> July, 2019 the claimant was directed to show cause and;

*... your explanation as to why you were unable to submit your academic certificates was unsatisfactory, bearing in mind your transcripts are dated June 2010 and 2011 and it's [it is] not the first time we're asking for the same documents. You have had enough time to complete your subject.*

The claimant replied and noted that her project was not completed and required more time.

This response elicited letter and notice dated 1<sup>st</sup> August, 2019 being termination of employment on the grounds that;

*... we refer to our letters dated 19<sup>th</sup> June 2019 and 4<sup>th</sup> July 2019 in relation to missing certificates and show cause letter, respectively however we did not receive the requested academic certificates. ...*

Termination of employment is regulated in law.

Where there is alleged misconduct, the employer must issue notice to the employee setting out the allegations made with regard to work performance or incapacity as required under section 41(1) of the Employment Act, 2007 (the Act) as follows;

*(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.*

Any alleged misconduct must be addressed within the confines of the law. This is not the case in the claimant's case.

Even where the employee is alleged to be of gross misconduct, the employer is allowed to apply section 44 of the Act and the noted gross misconduct is being absent from work, being drunk, abusive, disobedience and criminal conduct.

Even in such serious misconduct, the employer is bound by the mandatory provisions of section 41(2) of the Act as follows;

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

Where due to the nature of the employer's business other matters comprise gross misconduct, the duty is upon such an employer to form such matters as part of its work regulation policies and bring them to the attention of the employee through memo, agreement such as collective agreement, notice, circular, work regulations or be placed in the employment contract. In this case, there is no such matter or material.

Ms Maina for the respondent testified that the respondent is regulated under the Ministry of Cooperative. That the respondent was required to submit certificates with regard to its employees. No evidence was submitted in this regard.

The employment relationship was between the claimant and the respondent. It was not subject to any third party directions. The claimant was entitled to be protected under her employment by the employer. Where the alleged regulator required any information pertaining to the claimant, the burden was on the respondent to address and where not adequately addressed and found to relate to a question of misconduct or gross misconduct on the part of the claimant, section 41 of the Act required the claimant to be given a hearing at the shop floor.

Nothing exceptional has been submitted that the respondent was unable to hear the claimant in her defences and or that the circumstances leading to termination of employment were so serious and severe that hearing at the shop floor was impossible.

There is no work records filed to demonstrate that the claimant had been directed to submit any certificate and failed to do so. The import of the demand letters that *missing certificates* should be submitted implies that these were in existence and the claimant was to supply copies.

The court finds, termination of employment was contrary to the provisions of section 41 of the Act and therefore unfair pursuant to section 45 of the Act and compensation is due under section 49 of the Act.

The claimant had well served the respondent for 8 years. Compensation is hereby awarded for 8 months gross salary of ksh.78, 461 x 8 total due ksh.627, 688.

The leave allowance claimed was not contested in any material way and is awarded at ksh.19, 615.

Service pay is only due where the provisions of section 34(5) and (6) of the Act are not complied with. The claimant filed her payment statement and therein she was registered with NSSF and NHIF. Service pay is not due.

As the claim is successful, costs are due.

**Accordingly, the claimant is awarded compensation at ksh.627, 688; leave allowance ksh.19, 615; and costs of the suit.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....