



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

AT NAIROBI

ELRC. CAUSE NO. 1806 OF 2016

PHOEBE MASAKE.....CLAIMANT

-VERSUS-

TAIDYS RESTAURANT.....RESPONDENT

JUDGMENT

1. The suit herein arises from an alleged unfair and unlawful termination of the Claimants employment by the Respondent on 24.4.2016. The suit seeks the following reliefs:

- (a) A declaration that the termination of the Claimant's employment on account of poor and less than satisfactory performance was unlawful, unfair and illegal
- (b) Payment of salary for the month of April, 2016 Kshs. 30,000/-
- (c) Payment in lieu of leave not taken Kshs. 222,000/-
- (d) Payment for off days not taken Kshs. 6,000/-
- (e) Payment in lieu of notice Kshs. 90,000
- (f) Transport allowance for the months of July, 2015 to April, 2016 totalling to sums of Kshs. 50,000/-
- (g) Payment for leave on pro rata Kshs. 12,000
- (h) General damages
- (i) Costs of this cause.

2. The Respondent has denied the alleged unfair termination vide its defence filed on 26.10.2016. In its view the termination was lawfully done within the terms of the Claimant's employment contract and prayers for the suit to be dismissed with costs.

3. The suit went to full hearing when both parties gave evidence and thereafter filed written submissions.

SUMMARY OF EVIDENCE

4. The Claimant testified as CW1. She stated that the Respondent employed her as an Accountant on 28.10.2014 for a monthly salary of Kshs. 30000 per month. On 23.4.2016, she was called to a management meeting but she found no one in the meeting and she went back to her desk. Thereafter the Restaurant Manager served her with a termination letter dated 24.4.2016 citing poor performance as the reason for the termination.

5. She denied the alleged poor performance and contended that she had not been served with any warning regarding the same. She explained that any alleged delay in remitting NSSF dues was caused by the closure of the Respondent's bank (Chase bank) and also by the delay in signing cheques by the Respondents manager. She further contended that she was never served with any prior notice or accorded any opportunity to defend herself before the termination. She also contended that she was never paid any salary in lieu of notice plus her terminal dues.

6. In view of the foregoing, she prayed for compensation for unfair termination, salary for April 2016 leave for the period served, offdays not taken and transport allowance for July 2015 to April 2016.

7. On cross-examination she contended that she holds a degree in Accounts and also a CPA2. In her view she was qualified for the job given by the Respondent. She contended that she attended continuous training as an Account to improve her performance.

8. She stated that she used to tabulate NSSF payable and write a cheque and then present to the manager for approval and signing of the cheque. She contended that she was supposed to leave by the 7th day of every month. She admitted that NHIF remittance for March 2016 was done on 16.3.2016. She also contended that she always did accounts reconciliation by 5th day of every month.

9. As regards the sought, she contended that the contract employment entitled her to 3 months notice before terminating. She contended that after signing the contract, the employer retained the same. She further contended that she was given extra work at Ngara and agreed with the Respondent for a monthly allowance of Kshs. 5000 but the same was never paid to him.

10. She further prayed for leave on pro rata basis as calculated for her by the manager when she went for clearance. She contended that the tabulation dated 26.4.2016 is not what she did with the manager. She contended that her annual leave was 24 days.

11. On re-examination, she contended that there is no evidence to prove that she never reconciled accounts. She further contended that there is no evidence to prove that she tabulated NHIF and prepared cheques late. She maintained that the work of approving and signing of cheques for payment was of the manager but he delayed.

12. Mr. Victor Yator, is an Accountant in Taidy School in Nakuru which is the Head office and he testified as RW1. He stated that the Director of school severally complained that she had a problem with the Accountant in Nairobi because in 2016 she had failed to do accounts reconciliation and further failed to pay NHIF. He contended that by March 2016 the Claimant had not reconciled the accounts for 2015 and as such he was personally brought to Nairobi to do the reconciliation. He further contended that the NHIF for March 2016 was paid in time. He contended that the failure to pay NHIF by 9th May of the month attracts penalty. He also contended that NHIF does not accept cheques but only cash.

13. On cross-examination he admitted that he never wrote to the Claimant about the failure to do accounts reconciliation nor did he complain to the employer. He admitted that the payslip for NHIF dated 20.2.2016 was paid by cheque. He explained that the normal procedure includes preparation of budget, directors approve it, signs then signatory signs cheque by 2nd day of the following month then the Accountant withdraws cash and pays out. He contended the claimant's term dues were compiled by the Manager and her successor and it all what is payable. He admitted that no one can access the cash before the Directors sign for it. He further admitted that he had no written evidence from any employee or the Director, of the Claimant's poor performance. He also admitted that he never attended any disciplinary hearing for the Claimant.

14. On re-examination, he clarified that the NHIF payment for February 2016 was done by a bankers cheque and not a personal cheque. He contended that the account has the duty to ensure that NHIF is paid on time whether by cheque or cash.

SUMMARY OF SUBMISSIONS

15. The Claimant submitted that the termination of his employment was unfair because it was substantively and procedurally unfair. She maintained that the alleged poor performance was not true because there was no previous warning nor was she subjected to any prior disciplinary hearing. She relied on **Pamela Nelima Lutta v. Mumias Sugar Co. Ltd. [2017] eKLR; and Alex Wainaina Mbugua v Kenya Airways Limited [2017]eKLR** for emphasis.

16. The Respondent submitted that the reason for the termination was valid because the Claimant failed or neglected to do accounts or to properly do the same which has a potential of damaging the business. It therefore contended that under section 44(4) (c) of the Employment Act the said conduct by the Claimant warranted summary dismissal, but it was lenient to the Claimant by giving her a normal termination with salary in lieu of notice under the termination clause of her contract of service.

17. Consequently, it maintained that the Claimant is only entitled to Kshs. 50808.85 as particularized in the computation produced as exhibits and which she declined to collect.

18. For emphasis, the Respondent relied on **Consolata Kemunto Aming'a v. Milimani High School[2019]eKLR and John Otieno & Another V. Erica Kuhuma t/a Rise & Shine Academy[2013] eKLR**

ISSUES FOR DETERMINATION

19. After considering the pleadings, evidence and submissions, it is common ground that the Respondent employed the Claimant as an accountant from 28.10.2014 to 24.4.2016 when the Respondent terminated the contract of service on account of poor performance. The issues for determination are:

(a) Whether the reason for the termination was valid and fair.

(b) Whether procedure followed was fair

(c) Whether the Claimant is entitled to the reliefs sought.

VALID REASON

20. Under section 43 and 45 of the Employment Act, the employer has the burden of proving that he terminated the employee's employment contract on ground of a valid and fair reason. A reason is fair if it relates to the employees conduct, capacity and compatibility or based on the operational requirements of the employer.

21. In the instant case the reason cited in the termination letter is **"poor and less than satisfactory performance of duties"** Rw1 stated that the Claimant failed to do accounts reconciliation for 2015 until March, 2016 and again she failed to pay NHIF remittances for March 2016 within the required time. However, the Claimant denied the said allegation and averred that no evidence was adduced to prove that indeed she failed to do accounts reconciliation and that she was responsible for the delay in remitting NHIF dues for March 2016. She contended that the delay was to blame on the manager's failure to sign the cheque on time and also the closure of the employer's bank after it was placed under receivership. She contended that she did her part by 7th day every month and blamed the Manager for delaying to sign the cheques.

22. I have carefully considered the evidence and submissions by the parties. The burden of proof is on the Respondent to prove on a balance of probability that the claimant failed to perform her duties as expected under her contract of service. However in my view RW1 did not produce any records of the Respondent's accounts to show that the Claimant did not do reconciliation for 2015 or at all, as required.

23. He also did not produce any NHIF documents drawn by the Claimant to prove that she prepared them after 9th March 2016 and therefore caused the delay in making the remittances for the said month. Again the Respondent's manager did not tender any evidence herein to rebut the Claimant's evidence that he is the one who delayed to sign the cheque for payment of NHIF remittances.

24. Finally, the Respondent did not adduce any evidence to rebut the Claimant's evidence that Chase Bank, was closed down due to receivership and thereby prevented the Claimant from paying the said NHIF remittances on time.

25. The court notes that the Respondent has even failed to corroborate the alleged poor performance by evidence that it served her with warning letters regarding the alleged poor performance but failed to improve. It also failed to produce evidence of some agreed performance targets and the tool it used to measure the Claimants performance. Without such corroborating evidence from the employer it is hard to convince the court that its employee is a poor performer. Consequently, on the basis of the foregoing observations, the court finds that the Respondent has failed to prove on a balance of probability that the reason for terminating the Claimant's employment contract was valid and fair as required under section 45 (2) of the Employment Act.

PROCEDURE FALTERED

24. Under section 45, the employer is required to prove that he terminated his employees contract of service in accordance with a fair procedure. The procedure is fair if it complies with section 41 of the Act which provides that:

"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 shop floor union representative of his choice present during this explanation.

Notwithstanding any other provisions 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.

25. In this case RW1 did not give any evidence to prove that the Claimant was according disciplinary hearing before the termination. Infact he admitted that he did not attend any such disciplinary hearing before the Claimant' services were terminated. Consequently, I find that the Respondent has failed to prove that it followed a fair procedure before terminating the Claimant's employment contract.

RELIEF'S

26. Having found that the Respondent has failed to prove a valid reason for terminating the Claimant's employment, and that a fair procedure was followed, I make declaration that the termination was unfair and unlawful within the meaning of section 45 of the Employment Act. In **Kenfreight (E.A)Ltd v Benson Nguti[2016]eKLR** the Court of Appeal held that:

"The next and more critical question is whether the termination was unfair. It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair that the reason related to the employee's conduct, capacity, and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure section 43 specifically places the burden to prove that the termination was fair on the employer."

27. In view of the foregoing declaration, I find that the Claimant is entitled to salary in lieu of notice plus compensation for the unfair termination. Accordingly, I award the Claimant one month salary in lieu of notice plus three months' salary compensation for the unfair termination. In awarding the said compensation, I have considered that the Claimant worked for less than 2 years, that she never contributed to the termination through misconduct and that she did not secure an alternative employment after the termination.

28. Finally, I grant the claim for 22 leave days, 6 off days, salary for 24 days worked in April 2016 and 11 pro rate leave days earned in his second year of service being the period of 6 completed months from November 2015 to April 2016. The foregoing awards are based on the computation produced by the respondent, which is corroborated by the Claimant's admission that she computed her terminal dues with the Respondent's manager when she went for clearance. The said computation is also the basis of the quantum pleaded by the Claimant which clearly reflect on the figures set out in the tabulation exhibited by the Respondent.

29. The claim for transport allowances is dismissed for lack of supporting evidence.

CONCLUSION AND DISPOSITION

30. I have found that the Claimant's employment was unfairly terminated by the Respondent on 24.4.2016. I have further found that the Claimant is entitled to the reliefs sought. Consequently, I enter judgment for him in the following terms:

(a) Notice	Kshs. 30000
(b) Compensation	Kshs. 90000
(c) Leave days	Kshs. 33000
(d) April 2016 salary	Kshs. 27692.30
(e) 6 off days	<u>Kshs. 6000</u>
Total	<u>Kshs. 186,692.30</u>

The award is subject to statutory deductions. The Claimant will also have costs of the suit plus interest at court rates from the date hereof.

Dated, signed and delivered in Nairobi this 5th day of

February, 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 15th 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