



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 461 OF 2015

FLORENCE ATIENO OMINDE.....CLAIMANT

VERSUS

TECHNO SERVICE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant, Florence Atieno Ominde instituted this suit vide a Memorandum of Claim dated 20th March 2015. She sought to recover from the Respondent for unlawful and unfair dismissal and non-payment of terminal benefits. She avers that she was employed by the Respondent as an Accountant from 23rd November 2011 and that her last salary was Kshs. 55,000/- per month. The Claimant averred that when she reported on duty as usual on or about 9th September 2013, the Respondent's Managing Director issued her with a summary dismissal letter dated 9th September 2013.

2. She avers that her summary dismissal was based on false allegations of lateness and absenteeism and avers that she used to report for duty at 8.30am and work until 6pm, thus working for 1½ extra hours daily. She further avers that her dismissal from employment was unlawful because due process was thrown out of the window in a haste to dismiss her and no compensation was given to her. Further, that the decision to dismiss her was extremely harsh considering she had served the Respondent without blemish for a period of almost 2 years. She thus seeks salary for 9 days worked in September 2013, one month's salary in lieu of notice, unpaid and untaken leave for 2 years, security deducted for 20 months and overtime. The Claimant averred that she has as a result of the illegal and unfair dismissal suffered abrupt loss of income and trauma and is unable to meet her continuing obligations and consequently prays for the maximum compensation at 12 months' salary. The prayers in the claim the Claimant prays for are a judgment against the Respondent for:

- a. A declaration that the Claimant's summary dismissal from employment was unlawful and unfair.
- b. A declaration that the Claimant is entitled to payment of terminal benefits and compensatory damages as pleaded.
- c. An order for the Respondent to pay the Claimant her due terminal benefits and compensatory damages totalling Kshs. 1,184,568/-
- d. Interest on (c) above from the date of filing suit till payment in full.
- e. Cost of this suit plus interest thereon.

3. The Respondent filed a Reply to Claim dated 27th May 2015 averring that the Claimant was dismissed because she was constantly late for work and for absenteeism without reason. It averred that the Claimant worked for 52 hours as provided for under the Regulation of Wages (General) Order and is therefore not entitled to overtime. The Respondent averred that while her working hours were 8.30am to 6.30pm on weekdays and 8.30pm to 4.00pm on Saturdays, she has admitted that she rarely worked up to 6.30pm as per her contract of service. The Respondent averred that the Claimant was given an opportunity to explain her lateness in writing but did not advance any sufficient reason which culminated in the termination of her contract. The Respondent avers that it was willing to pay the Claimant's dues upon her handing over of the books of accounts to its auditors and that the Claimant is yet to be paid as she has refused and/ or failed to do the handover. It further averred that the Claimant was not entitled to leave as she chose to forfeit her leave days in view of her constant absenteeism and lateness. The Respondent averred that the Claim does not raise any reasonable cause of action and should be dismissed with costs.

4. The Respondent also filed a Witness Statement made by its Director, Bulent Gulbahar on 16th July 2020. He states that the Claimant has on multiple occasions admitted to her absenteeism, lateness to work and not working the hours required as shown in email correspondence adduced in the Respondent's Further Bundle of Documents dated 16th July 2020 at pages 2 to 7. He also referred the Court to the Attendance Log in the Respondent's Further Bundle of Documents at pages 8 to 17 confirming the allegations of lateness against the Claimant. He states that the Respondent indeed issued the Claimant with a one-month notice of termination of her employment and the allegation that she was

summarily dismissed is thus a lie in the face of the facts on record. He stated that the log books adduced in court also confirm the leave days taken by the Claimant and asserted that the Claimant's constant lateness and absenteeism caused great disruption at the workplace of the Respondent.

5. In her testimony before court, the Claimant adopted her witness statement dated and signed on 11th May 2018 as her evidence in the case and further tendered the filed documents as evidence. She testified that she was terminated without a notice to show cause or being given any warning letter. She confirmed under cross-examination that the termination letter did indeed indicate one-month notice but denied that she used to leave 30 minutes earlier as indicated in the Respondent's witness statement. In re-examination, she stated that the day she was given the termination letter is the day she left the premises and that she was not given payment in lieu of notice. She testified that she worked for 5½ hours a week being 9 hours a day on weekdays and 8½ hours for Saturdays.

6. The Respondent's witness Bulent Gulbahar produced his witness statement as evidence and further adopted the Respondent's documents as exhibits. In cross-examination he confirmed that the Claimant was asked not to report to work after being issued with the termination letter on 9th September and she was required to explain the circumstances. He stated he could not recall whether the Claimant was paid salary for September but stated that if she says she did not receive it he would believe it. He further stated that the Claimant always had an excuse for coming late to work and never substantiated in terms of evidence for her lateness and that on the day the Claimant was dismissed she was 2 hours late with no excuse.

7. The parties filed written submission. The Claimant submits that the summary dismissal failed both the procedural and reasonable tests. She relies on the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v Mombasa Sports Club [2014] eKLR Cause No. 440 of 2013** where Radido J. observed that termination of employment is unfair if the employer fails to prove that the reason for termination is valid and for a fair reason. She further relies on the case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR Cause No. 1998 of 2011** where the Court held that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. The Claimant submitted that the Court further held that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is unfair. The Claimant further submitted that she has proved her case to the required standards and is thus entitled to an award of 12 months' gross salary in compensation as under Section 49 of the Employment Act. In support of this claim, she submits that she was dismissed in the most inhumane way and is yet to find a befitting job owing to the hard economic times.

8. The Respondent submitted that the Claimant's contract was terminated in accordance with the terms of the employment contract and was further for valid reason. The Respondent submitted that summary dismissal as prescribed by Section 44 of the Employment Act takes place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled to. The Respondent cited the decision in **Manuel Anidos v Kinangop Wind Park Limited (In Receivership) [2019] eKLR Cause No. 273 of 2013** where the court found that a contract of employment could be terminated pursuant to the terms of the contract. The Respondent submitted that the Respondent that without prejudice, in the event this Court finds that the Claimant is entitled to relief, it should be noted that she had worked for the Respondent for 1 year 10 months. The Respondent submitted that this Court should further take into account that the termination was for a valid reason being the Claimant's constant lateness, leaving work early and absenting herself from work. The Respondent further submits that the Claimant ought to bear the costs of the suit as she has brought an unsubstantiated claim and has also completely failed to demonstrate that the termination of her employment contract was unfair.

9. The termination of employment is unfair if the employer fails to prove that the reason for termination is valid and for a fair reason. This was aptly stated by my brother Radido J. in the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v Mombasa Sports Club [2014] eKLR Cause No. 440 of 2013**. An employee facing the allegations the Claimant faced is entitled to the full range of rights under Section 41 of the Employment Act. In her case, it was alleged that she was 2 hours late. She was immediately dismissed by being notified that she was not to come to work except to handover. As was held in the case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR Cause No. 1998 of 2011**, an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. It was held in that case that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is *ipso facto* unfair. The termination herein is therefore unfair within the meaning of the law and under Section 45 of the Employment Act an employer ought to justify the reasons for dismissal. The Claimant did not have on record any warning and therefore the lateness said to have occurred on 9th September 2013 should have led to a warning being issued and appropriate sanctions being given. The Claimant was not paid for the month of September 2013 as confirmed by the Respondent's witness. The Claimant failed to prove she was entitled to leave pay as evidence availed by the Respondent showed that she went on leave regularly. The time logs did not show the Claimant working extra hours and as such her claim on overtime fail. The Claimant proved that she was also entitled to a security deposit which was even mentioned on the dismissal letter. In the premises having proved her dismissal was unfair in the circumstances, the Claimant is entitled to the following reliefs:-

- a. Salary for September 2013 – Kshs. 55,000/-
- b. Security deposit – Kshs. 55,000/-
- c. 6 months salary as compensation for unlawful dismissal – Kshs. 330,000/-
- d. Costs of the suit
- e. Interest at Court rates on the sums in a) and b) above from the date of filing suit till payment in full
- f. Interest at Court rates on the sums in c) above from the date of this judgment till payment in full
- g. Certificate of service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2021

NZIOKI WA MAKAU

JUDGE