



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

EMPLOYMENT APPEAL NO. 31 OF 2020

SHEILA KHAOYA AKALICHE.....CLAIMANT

VERSUS

ARTCAFFE COFFEE AND BAKERY LIMITED.....RESPONDENT

JUDGMENT

1. The Appellant, **Sheila Khaoya Akaliche**, aggrieved by the decision of Honourable Senior Principal Magistrate A.M. Obura(Mrs) in her judgment delivered on 30/4/2020 in Nairobi CMCC No. 1107 of 2019 at Milimani filed a Memorandum of Appeal dated 26/5/2020 in which the following grounds of Appeal *inter alia*, are set out: -

(a) The learned trial magistrate erred in law and fact in holding that the appellant's dismissal was fair, lawful and in accordance with the law which holding was totally against the weight of evidence placed on record by the parties and therefore erroneous.

(b) The learned magistrate erred in law and fact in failing to hold that the respondents failed to follow its own internal dispute resolution procedure and Human Resource Manual by failing to grant the appellant sufficient time to respond to the Notice to Show cause and defend herself.

(c) The learned magistrate erred in law and fact in failing to find that the Appellant was entitled to pension and accrued service pay, the respondent having failed to make the requisite statutory contribution to the National Social Security Fund nor did it maintain a separate pension scheme for the Appellant.

(d) The learned magistrate erred in law and fact in failing to find that the Appellant was discriminated against by being underpaid as compared to her counterpart and therefore entitled to compensation

and

(e) The learned magistrate erred in law and fact in failing to find that the Appellant was entitled to the reliefs sought.

2. The court has considered the appeal record and the submissions filed by both parties and proceeds to determine the appeal as below: -

3. This being a first appeal the Court places reliance on the case of **Peter Ngigi Kuria and Another (suing as the Legal representative of the Estate of Joan Wambui Ngigi) -vs- Thomas Ondiri Oduol and Another [2019] eKLR** where the Hon. Justice Richard Mwangi quoted with approval the case of **Oluoch Eric Gogo -vs- Universal Corporation Limited [2015] eKLR**, where the Court restated the duty of a first appellate Court as follows:-

“As a first appellate Court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind as was espoused in the Court of Appeal case of *Selle and Another -vs- Associated Motor Boat Company Limited and Another (1968) E.A. 123*” as “**my duty is to evaluate and re-examine the evidence adduced in the trial Court in order to reach a finding, taking into account the fact that this Court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect.**”

4. In this regard the Court has carefully considered the Court record and in particular the testimony by the Appellant at page 7 to 9 of the Appeal record and that by R.W.1, Benjamin Otieno, who testified for the respondent as found at page 10 to 11 of the record and that by

RW2, Virginia Wambui at page 12 to 17 of the record.

5. The testimony by the Appellant was to the effect that she had worked for the respondent as Restaurant Manager and had started as a waitress in the year 2009. That she served the respondent for a period of 9 years and 5 months until the date of her summary dismissal from employment on account of stealing in that she had taken food from the dustbin and packed it to take away contrary to company policy.

6. The Appellant told the Court that leftovers were food stuffs not sold to customers or which remained. That the staff would return them to the main kitchen at Baba Dogo to give it to staff at the mall who would then dispose of it as leftover.

7. The Appellant testified that she had been trained in food and beverage handling and was experienced. The Appellant admitted that she had taken food remains from the bin. The Appellant also admitted that as a manager it was her duty to ensure compliance with company rules. The appellant testified that she was given one hour to attend a disciplinary hearing with a witness and that she had responded to the show cause letter on 20/5/2019. That she could not bring a witness within the one hour given to her. The Appellant stated that the summary dismissal was very severe. That she had looked forward to an amicable solution. That at the meeting, Joseph just read her response to the show cause letter and spoke to someone on the phone and then told the appellant that it had been decided that she proceeds on leave. The Appellant denied that she had stolen the leftovers.

8. The appellant also testified that her colleague by the name Ann was paid more than herself. The appellant testified that she paid National Social Security Fund Kshs.10,000 and that she now sought service pay. The appellant testified that on 17/5/2019, she was verbally informed that she had been summarily dismissed upon resuming her duties from leave,

9. The appellant testified that the dismissal was unlawful and unfair. That she did not appeal the decision but filed the suit before Court.

10. Benjamin Otieno R.W.1, testified that he worked as a Chef for the respondent and was a shop steward at the time. That the leftover policy of the respondent applied to every company staff and what had happened was within the policy in that staff are not allowed to carry away leftovers.

11. Under cross-examination Benjamin told the Court that he had worked for the respondent for about two years and was aware of the company policies. That new policies are communicated to staff. Benjamin stated that the Appellant brought the leftover food in a container and said it was for her dog. Benjamin stated that the company does not sell leftover food and he did not know if the company suffered any loss from the leftover food taken by the Appellant. Benjamin said that if an employee bought food from the respondent and it remained, the employee could take that leftover away. Benjamin said that he was not aware if the appellant had asked for forgiveness.

12. That if an employee is caught eating leftover, the manager issued a warning letter to the employee.

13. R.W.2, Virginia Wambui testified that she was the Human Resource Manager of the Respondent. She said that she received a message from the Branch Manager reporting that the Appellant had taken leftover food contrary to company policy. That she issued the show cause letter to the Appellant. That the appellant was invited to a disciplinary hearing and was informed of her right to bring a witness but she had waived the right. That in terms of the leftover policy, no staff is supposed to take leftovers. That the policy was in place for the last 3 years and was documented. That the appellant was an employee when the policy was put in place. R.W.2 stated that leftovers are food remains which are cleared from the table for disposal. R.W.2 stated that the Appellant was entitled to one-month termination notice. That the appellant had not collected her final dues including payment in lieu of leave days not taken. R.W.1 was not aware if the Appellant had cleared with the respondent so as to collect her final dues.

14. R.W.2 stated that the respondent contributed National Social Security Fund (NSSF) dues for the Appellant and so she was not entitled to payment of service pay. That all National Social Security Fund deductions were remitted except for the period when the Appellant was not working for the respondent between January to March, 2009. That the last contribution was in May, 2019. That the Appellant stopped working in June, 2019.

15. Under cross-examination R.W.2 stated that the Showcause letter was dated 3/5/2019 and she was to respond to it by 11.45 am on 3/5/2019. R.W.2 stated that she was not part of the disciplinary committee. R.W.2 stated that a committee is not constituted by one person. R.W.2 admitted that only two persons, the Appellant and one manager attended the hearing. R.W.2 confirmed that the Appellant rose from a waiter to a manager. That promotions are based on an employee meeting their work objectives. R.W.2 stated that there are different options with regard to misconduct by employees. That the punishment given depends on the severity of the offence. R.W.2 stated that warning letters may be issued but it was not issued in this case. R.W.2 insisted that the Appellant was aware of the food disposal policy.

16. R.W.2 stated she could not confirm if one Ann Owuor, a former manager of the respondent earned Kshs.100,000 per month. R.W.2 confirmed that the Appellant earned Kshs.75,000 per month and Ann and the Appellant were both managers, and could exchange shifts. R.W.2 said the managers did the same work

17. R.W.2 said that the Appellant was informed verbally of her right of appeal at the end of the hearing and that the Appellant was dismissed immediately after the hearing on 17/5/2019. R.W.2 stated that all terminations were to be done in writing but the appellant did not receive letter of dismissal.

18. R.W.2 stated that the Appellant was entitled to the 14 days leave and she was supposed to collect her dues. R.W.2 admitted that only Mr. Muite attended the disciplinary hearing though at least two persons constitute a disciplinary committee. R.W.2 said that the offence committed was serious and so no warning letter was issued to the Appellant but she was summarily dismissed because her conduct amounted to theft and therefore there was lack of trust by the respondent on the employee. R.W.2 stated that Disciplinary committee consisted of a

Regional Manager and Joseph Muite, but the Regional manager, Leah Nduta was not available for the hearing as she was sick. Joseph Muite conducted the hearing alone therefore.

19. R.W.2 explained that the rationale of the leftover policy was to stop employees from stealing food under the guise that it was leftover food when it was not.

20. In her judgment, the learned trial magistrate framed the issues for determination as follows: -

(a) Whether the reasons for termination of the claimant were valid, was termination fair and lawful?

(b) Whether the claimant is entitled to the prayers sought in the statement of claim.

21. The learned magistrate upon an analysis of the evidence adduced before Court came to the conclusion that the offence committed by the Appellant was within the scope of Section 44(e) of the Employment Act, 2007 and therefore the employer was justified to terminate the employment of the Appellant.

22. Section 44(4) e provides: -

“(e) an employee knowingly fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer”

Constitute justifiable or lawful grounds for dismissal.

23. The learned trial magistrate stated: -

“In this case, the employer was justified in terminating her services for contravening the company policy with regard to taking away leftover food. R.W.1 and R.W.2 well-articulated this policy and the reasoning behind it. As a manager the claimant was well aware of this policy and appears to have been dishonest.”

24. Upon a careful re-evaluation of the testimony by the Appellant and that by R.W.1 and R.W.2 this Court cannot fault the finding by the learned trial magistrate.

25. The respondent had sufficiently demonstrated that it had a valid reason in terms of Section 43(1) and (2) read with Section 45 of the Employment Act, 2007 to summarily dismiss the Appellant.

26. Furthermore, the Appellant failed to discharge the onus placed on her in terms of Section 45(7) of the Act, to show that the summary dismissal was unlawful.

27. With regard to the procedure followed, the Court is satisfied that the Appellant had admitted the offence committed in her response to the show cause letter and had sought for forgiveness.

28. Clearly, the Appellant was aware of the company policy regarding leftover food and had willfully elected to disregard it to her loss and detriment.

29. Granted, the respondent did not fully adhere to its internal disciplinary procedure in that it had abridged the time frame within which the Appellant was to attend the disciplinary hearing. However, this violation did not negate the validity of the finding by the respondent on the basis of her own admission that indeed she had violated company policy by packing leftover food to take away despite being a manager of the respondent who ought to know better and in fact as a matter of fact knew that this conduct was prohibited by the respondent.

30. The appeal fails in that respect.

31. With regard to the claim for discrimination, the Appellant did not discharge the onus placed on her to prove discrimination by the respondent in terms of Section 5(3) of the Employment Act, 2007 which provides: -

“No employee shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee.

(a)

(b) In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment” (*emphasis mine*)

32. The evidence adduced by the Appellant fell short of explaining the time of employment between her and the other manager; their relative qualifications; their relative experience; and any other matters that would tend to show that they were employees of the same calibre; employed at the same time by the respondent; did equal work and of the same value but were remunerated differently by the respondent.

33. The onus to prove these aspects of the claim based on discrimination on a balance of probabilities fall squarely on the Appellant as was held by this Court in the case of V.M.K -vs- C.U.E.A [2013] eKLR.

34. The Court accepts the submissions by the respondent that the Appellant had freely and willingly entered into a contract of employment with the respondent which on the face of it does not appear to contain any unlawful and unfair clauses.

35. The Court of Appeal in Nduta Mbile -vs- John Gachau Gitonga [2017] eKLR upheld this position.

36. The Court finds that the claim of underpayment by the Appellant lacks merit and is dismissed.

37. With regard to the claim for payment in lieu of notice, the Court is satisfied that the short time frames applied by the respondent processing the disciplinary action against the Appellant amounted to a violation of internal procedure which however did not vitiate the decision by the respondent with regard to the reason for termination.

38. The Court finds however that the Appellant is entitled to payment of one-month salary in lieu of notice upon commutation of the summary dismissal by the respondent to a normal termination considering the procedural transgression committed by the respondent.

39. Accordingly, and in terms of clause 18 of the Contract of Employment between the Appellant and the respondent the Court awards the Appellant one month salary in lieu of notice in the sum of Kshs.75,000.

40. Furthermore, the respondent admitted that the Appellant was entitled to payment in lieu of leave days not taken. The Appellant sought payment in lieu of three years leave, being Kshs.225,000 but she did not adduce evidence to substantiate that claim. However, R.W.2 admitted that the Appellant was entitled to payment in lieu of 14 days leave which money had been processed but was not paid to the Appellant. Accordingly, the Court awards the Appellant Kshs.35,000 being payment in lieu of 14 days untaken leave.

41. The Appellant also sought payment of service pay for the number of years served. The claim was premised on her testimony that the respondent did not fully pay the requisite National Social Security Fund dues on behalf of the Appellant. That the respondent underpaid its contribution. R.W.2 in her testimony testified that the respondent paid National Social Security Fund deductions without stating the amount the respondent paid monthly on behalf of the Appellant.

42. The Appellant produced National Social Security Fund statement dated 19.9.2019 indicating total payment of National Social Security Fund contribution for the period 2009 until the year 2019. The respondent paid Kshs.400 monthly in respect of the Appellant.

43. The onus of proving underpayment of National Social Security Fund contribution lay on the Appellant. She did not discharge that onus and the trial Court was entitled as it did to find that the claim for payment of service pay in terms of Section 35 (1) of the Employment Act, was unmerited.

44. The Appellant had sought award of Certificate of Service. The trial magistrate did not address this issue at all.

45. The Court finds that the Appellant was entitled to grant of Certificate of Service and directs the respondent to do so.

46. In the final analysis, the appeal only succeeds in respect of the following claims: -

- (a) One month salary in lieu of notice in the sum of Kshs.75,000.
- (b) Kshs.35,000 in lieu of 14 days untaken leave.
- (c) Grant of Certificate of Service to the Appellant within 30 days of this judgment.
- (d) Interest at court rates from date of filing suit till payment in full.

47. For the avoidance of doubt, the respondent to pay the aforesaid terminal benefits and grant the Certificate of Service to the Appellant, only if it has not done so to date.

48. The Court considers this an appropriate case for each party to bear their own costs of the Appeal and the trial below.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Omboko of Omboko & Company Advocates for Appellant

Mr. Kwakwa of Oraro & Co. Advocates for the Respondent

Ekale – Court Assistant