



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 422 OF 2017

PAULINE STELLA ANYANGO OPONDO.....CLAIMANT

v

WEST KENYA SUGAR CO TDRESPONDENT

JUDGMENT

1. Pauline Stella Anyango Opondo (the Claimant) was offered employment as a Marketing Manager through a letter dated 2 February 2015 by West Kenya Sugar Co Ltd (the Respondent).

2. On 23 September 2017, the Respondent notified the Claimant of the termination of her employment and the ground was given as unsatisfactory performance.

3. The Claimant was aggrieved, and on 15 November 2017, she lodged a Statement of Claim with the Court wherein she stated the Issue in Dispute as:

Unlawful and/or wrongful termination of employment, unlawful/wrongful recovery/retention of terminal dues and compensation.

4. The Respondent filed a Memorandum of Response on 5 December 2017, and the Cause was heard on 1 December 2020 when the Claimant testified and 4 February 2021 when the Respondent's Human Resources Manager testified.

5. The Claimant filed her submissions on 10 February 2021, and she outlined the Issues for adjudication as:

(i) Did the Respondent comply with the statutory requirements of sections 41, 42 and 44 of the Employment Act as regards the procedure leading to the dismissal of the Claimant?

(ii) Was the Claimant accorded a fair chance of being heard in line with Article 40 (sic) of the Constitution of Kenya in relation to fair labour practices?

(iii) Has the Claimant established her claim on a balance of probabilities?

(iv) If the answer to 3 above is in the affirmative, is the Claimant entitled to any award and of so, on what heads and how much per each head?

(v) Who bears the costs of this Cause?

6. The Respondent filed its submissions on 29 March 2021, and it identified the Issues as:

(i) Whether the reasons for the Claimant's termination were valid and fair?

(ii) Whether there was procedural justice before termination of the Claimant; and

(iii) Whether the Claimant is entitled to the prayers sought?

7. The Court has given due consideration to the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

8. Unless it is a case of summary dismissal, section 35(1) of the Employment Act, 2007 requires the employer to give written notice of termination of employment (the converse being that by dint of section 41(2) of the Act, the employer must conduct an oral hearing in cases of summary dismissal).
9. Apart from the notice, section 41(1) of the Employment Act, 2007 contemplates the employer affording the employee an opportunity to make representations, preferably accompanied by a colleague or trade union representative, depending on the circumstances of the case.
10. The case of the Claimant was not one of summary dismissal.
11. The Claimant was served with a show-cause notice dated 7 July 2017, and the allegation was stated as *poor performance*.
12. The Claimant was requested to respond in writing/email on or before 8 July 2017.
13. The Claimant responded to the show-cause on 10 July 2017.
14. The Respondent was dissatisfied with the response, and on 11 July 2017, it informed the Claimant that her salary would be subject to a variable pay system.
15. According to the Respondent, the Claimant's performance did not improve, and on 1 September 2017, the Respondent again asked her to show-cause by 2 September 2017, *why drastic actions should not be taken against you*.
16. The Claimant responded to the show-cause the same day, and on 15 September 2017, the Respondent sent her an email inviting her to attend a disciplinary hearing on 20 September 2017. She was advised of the right to be accompanied.
17. In a reply on 16 September 2017, the Claimant asked the Respondent to itemise the charges she was facing, serve her with the same and give her time to prepare.
18. The Respondent reverted back to the Claimant on 18 September 2017, indicating that the agenda of the hearing was *performance* and that details would be provided at the hearing.
19. On 19 September 2017, the Claimant sent an email to the Respondent requesting to be provided with an air ticket. The ticket was not provided, and the Claimant did not attend the hearing.
20. In challenging the procedural fairness of the disciplinary process, the Claimant contended that she was not afforded an opportunity to be heard because, despite the existence of a policy to be facilitated with an air ticket, the Respondent had declined to provide the air ticket to enable her to travel from Nairobi where she was based to attend the hearing.
21. The Claimant did not produce a copy of the policy or produce corroborative evidence that such a policy existed, and the Court finds the challenge without foundation.
22. The Claimant also contended that she was only given 4-days to attend the hearing and that this was not enough time to prepare for the hearing.
23. The question of the Claimant's *performance* had been simmering before the show-cause dated 7 July 2017 was issued. She was requested to make a written response. She made the response but did not ask for any records or documents.
24. The Court, therefore, finds the claim that the 4-days from invitation to hearing date was not adequate not candid as the Claimant had been aware of the concerns on performance upon being served with a show-cause on 7 July 2017 while the hearing was scheduled for September 2017.
25. The Court is satisfied that the Respondent was in compliance with the statutory procedural fairness dictates as the Claimant was informed of the allegations to confront, was requested to make a written response which she did and was then invited for an oral hearing, an opportunity she snubbed.

Substantive fairness

26. Pursuant to the provisions of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of not only proving the reasons for terminating the Claimant's employment but proving that the reasons were valid and fair.
27. The reason the Respondent had to prove was that the Claimant's performance was wanting.
28. To discharge the burden, the Respondent called its Human Resources Manager.
29. The witness produced a copy of a Sales Performance Targets dated 4 August 2017.

30. The Claimant's daily bales target was set at 2000 (monthly target of 52,000). The Claimant agreed to the targets on 17 August 2017.
31. Considering the date of the Targets, the Court will only examine the performance after that date because the Respondent had reviewed the terms and conditions of service of the Claimant only days earlier.
32. In the Daily Sales Report dated 31 August 2017, the Claimant achieved a target of 1000 bales.
33. On 4 September 2017, the Claimant made sales of 1800 bales, thus overachieving by 800 bales.
34. The Daily Sales Report for 5 September 2017 shows that the Claimant made sales of 400 bales, an underachievement of 600 bales.
35. In her defence, the Claimant had indicated in the response dated 1 September 2017 that the reason for the failure to meet the target(s) was lack of sufficient stocks. She testified that there was irregular supply from the factory occasioned by drought that year.
36. The Claimant also produced communications between herself and her bosses and more so a Mr Sohan asking for the replenishing of stocks.
37. The Respondent did not file in Court or produce any records to show how much stock was in the warehouse in Nairobi (available) or was delivered from the factory during the material time to rebut and or controvert the Claimant's defence of low stock out.
38. The Respondent was aware of the defence by the Claimant long before the Cause came up for trial.
39. Considering the totality of the evidence, the Court finds that the Respondent did not discharge the burden expected of it. Probably, the failure by the Claimant to achieve the target(s) was affected by external factors beyond her control.

Compensation

40. The Claimant served the Respondent for less than 1-year, and in consideration of the length of service, the Court is of the view that the equivalent of 1-months' salary as compensation would be appropriate (monthly salary was Kshs 206,276/-).

Salary in lieu of notice

41. The Claimant was paid a 1-month basic salary in lieu of notice. Relief is declined.

Salary for September 2017

42. The earned salary for September 2017 was part of the dues paid to the Claimant. Further relief is declined.

Outstanding leave

43. The Claimant was paid Kshs 434,627/- in respect of 63 accrued leave days. Relief is declined.

Gratuity

44. The Claimant prayed of Kshs 272,439/-.

45. The copy of the contract produced in the Court did not provide for payment of gratuity.

Deductions to offset liabilities

46. The Claimant alleged that the Respondent deducted Kshs 297,100/- from her dues allegedly to settle outstanding liabilities (sales made by the Claimant but for which payments had not been made).

47. The final dues schedule produced by the Respondent indicated that the Respondent only deducted Pay As You Earn of Kshs 220,986/-.

48. The Claimant did not prove this head of the claim.

Certificate of Service

49. A certificate of service is a statutory entitlement, and the Respondent should issue one to the Claimant within 21-days.

Conclusion and Orders

50. The Court finds and declares that the reasons for the termination of the Claimant's employment were not valid or fair.

51. The Claimant is awarded:

(i) Compensation **Kshs 206,276/-**

52. The Respondent to issue the Claimant with a certificate of service within 21-days.

53. The decretal sum to attract interest at court rates from the date of judgment.

54. Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 19TH DAY OF MAY 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Mr Onsongo instructed by Onsongo & Co. Advocates

For Respondent Mr Andiwo instructed by O & M Law LLP Advocates

Court Assistant Chrispo Aura