



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2112 OF 2015

MANPREET KAUR LUTHRA.....CLAIMANT

VERSUS

IDEAL CERAMICS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent vide a Memorandum of Claim dated 13th November 2015 for her alleged wrongful and unfair termination of his employment. She averred that she entered into a contract with the Respondent with effect from 15th July 2013 as a Showroom Manager at the Respondent's Nairobi Westland's Showroom. She averred that her terms of employment as at July 2013 included a net salary of Kshs. 200,000/- per month and 21 working days paid leave per annum. The Claimant averred that she received a dismissal letter on or about 1st September 2015 with reasons that she was unable to explain how products that were not Ideal Ceramic products gained entrance into the Company premises without proper documentation and for abuse of office by using the Company car to pick the above mentioned products from various places and bringing them to the Company stores and further using the Company staff i.e. the messenger and driver to perform duties that are not part of their daily duties. She averred that there is no evidence she committed the said offences and that she was terminated without being granted a fair hearing as contemplated by the Employment Act and the rules of natural justice. She further averred that she lodged a complaint at the Ministry Labour Office and also wrote to the Respondent through her advocates asking for her requisite compensation and that the Respondent's reply was that she was not on contract terms and they were willing to pay her once the Cash Accounts were cleared and accounts confirmed. The Claimant averred that she eventually received a deposit slip from the Human Resource Manager of a sum of Kshs. 186,299/- but which sum she disputes. She particularly takes issue with the gross salary figure and notes that a bulk of her termination dues has not been included in the slip and further averred that the Respondent has wrongly deducted Kshs. 79,885/- claiming to be the clients outstanding arrears. She therefore prays for judgment against the Respondent for:

- a. Outstanding salary arrears amounting to Kenya Shillings Two Hundred Thousand Only (Kshs 200,000 /- for the month of August 2015.
- b. Payment in lieu of notice of Kshs. 200,000/- . Less the amount of Kshs. 186, 299/- already paid.
- c. Payment for leave days accrued as at 31st August 2015 of Kshs. 115,385/-.
- d. Interest on (1), (2) and (3) above from the date of filing suit until payment in full.
- e. Costs of this suit.
- f. Damages for wrongful dismissal equivalent to 12 Months' salary.

2. The Claimant filed a witness statement dated 11th January 2018 wherein she states that her letter of appointment dated 17th May 2013 shows her net salary as Kshs. 200,000/- per month and the normal retirement age at 60 years. She stated that she received the Deposit Slip on 1st October 2013 and upon enquiry from HR, she was given a breakdown of the payment. She further states that the alleged non-ceramic tile samples were an excuse by the Respondent to get rid of her and is also the reason the Board was not ready to listen to her explanation. She contends that she was summarily dismissed for gross misconduct and that she had expected to attain the said age of 60 years before leaving employment of the Respondent.

3. The Respondent filed its Statement of Defence dated 14th April 2016 averring that the Claimant tendered her resignation on 2nd August 2012 after 1 year of employment by giving it one month's notice and that it accepted her resignation through its letter dated 4th August 2012. The Respondent averred that the Claimant was later appointed the Respondent's Sales Advisor, Sales Department at the Mombasa Road Branch in Nairobi. It averred that the Claimant had in the course of her employment taken a personal loan of Kshs. 2,100,000/- from

Standard Chartered Bank, repayable in 60 months through a check-off system where monthly instalment payments of Kshs. 52,078/- would be deducted from the Claimant's salary by the Respondent and remitted to the Bank. It further averred that the Claimant failed to consistently perform her duties and/or discharge her responsibilities to the required standard and had been issued with several warning and cautionary letters concerning her contravention of several company policies and her failure to deliver her duties. It produced email correspondence between it and the Claimant and a cautionary letter marked as exhibits ICL-5, ICL-6 and ICL-7. The Respondent averred that sometime on or about 28th August 2015, its Senior Manager Mr. Vishal visited the Westlands showroom which was superintended by the Claimant as the showroom manager. It averred that Mr. Vishal found 3 cartons of tiles that had not been ordered, stocked, coded or sold by the Respondent in its store and that further inquiries revealed that:

- a. The 3 cartons of tiles had been brought to the store by the driver, Mathieu, under the instructions of the Claimant but without any instructions or report to the store manager on whose products they were or where they were supposed to be delivered to;
- b. It was not the first time such products were being brought to the premises and that on the numerous occasions it was done, bulk deliveries were made to the company store under the instructions of the Claimant and ordinarily subsequently collected or delivered to third parties at various locations using the company's resources e.g. drivers, messengers and company car etc.; and
- c. Since the items had no codes, any dealings with them amounted to a gross violation of the company's policy and standards and raised a serious integrity and loyalty issue.

4. The Respondent averred that the issue was reported to the Respondent's Human Resources Manager who sent the Claimant a show cause letter on 31st August 2015, setting out the nature of the discovery and inviting her to a meeting to give an explanation and show cause why the management should not take disciplinary action against her. The Respondent averred that the Claimant in her response acknowledged that the said tiles were not the company's stock and therefore not meant to be at the store but alleged the tile samples were sent by an undisclosed client who wanted her to find similar products for him at a good price. Further, that her intention was to buy similar products from other suppliers on behalf of the Respondent and sell them to the said client at a profit, within the client's budget and that she did not see anything wrong in what she was doing. The Respondent averred that the meeting to discuss the Claimant's conduct was held on 31st August 2015 and after deliberations on her representations, it was decided that her unauthorized actions amounted to gross misconduct. The Respondent averred that she was consequently summarily dismissed from her employment on 1st September 2015 with evidence pointing to a scheme put in place by her to trade, from the Respondent's premises, in unauthorized products by other companies for personal profit, and to the detriment of the Respondent. The Respondent further averred that the Claimant was paid all her terminal dues that had lawfully accrued to her as at 1st September 2015 and that she was aware of all the deductions made on her gross salary. It prays that the Claimant's suit be dismissed in its entirety and the Respondent's costs of in the suit, together with interest thereon (from the date of filing suit until payment in full) be borne by the Claimant.

5. The Respondent also filed 4 witness statements in July 2017 from Jacqueline Mwaura, Felix Kilonzo, Joseph Ohuru and Mathiu Domisiano. Ms. Jacqueline who was at the date of her statement the Respondent's HR Manager, stated that one Aloyce Boi was the HR Manager at all material times to the claim and she made her statement in a reporting tone of what transpired with Aloyce as the HR Manager. Felix Kilonzo asserted finding three cartons of tiles at the basement of the Respondent's Westlands branch which were not some of the brands they sold in the company and which said tiles were later picked by Preeti's client without his consent. Joseph Ouru further asserted that Preeti had ordered the casuals to take the carton boxes to a lorry that had come to pick them and paid the casuals Kshs. 200/- each for the work. Mathiu Domisiano, the Respondent's Driver, stated that he at times did the Claimant's personal work and errands such as picking and dropping parcels at security couriers.

6. The Claimant adopted her witness statement filed on 12th January 2018 as part of her testimony and further produced her bundle of documents as evidence. She stated that she was called on 31st August 2015 at around 2.00pm and she went to meet the Human Resource Manager and Showroom Manager who questioned her on the samples found in her showroom. She admitted that the driver used to drop her home after picking her from the gym since it was on the way but denied that the messenger did personal work for her. She further stated that she was asked to leave at 4.00pm and return the next day, 1st September 2015, which day she was told her services were no longer required. She stated under cross-examination that there was no hearing on 31st August 2015 and asserted that all employees were provided with transport. She confirmed she was paid Kshs. 186,299/- but which was not her full salary and further confirmed there being no evidence that the tiles were samples.

7. The Respondent Witnesses relied on their Statements as evidence with Celestine Mbaluka further adopting the Statement of Jacqueline who had left the employ of the Respondent. The first defence witness Mr. Mathew Domisiano (RW1) testified that he worked with the Claimant and being a driver, he would pick her in South B or South C and that the Claimant would at times send him to drop and pick parcels at Coast Bus. That after he had dropped the staff at Westlands at 5.00pm, he would then pick up the Claimant from Parklands and take her to her place in South B and that this was in the years 2015-2016. He confirmed under cross-examination that she drove the Claimant alot as she was his manager and that he did not know what was in the boxes which he severally picked and dropped for the Claimant. He testified that he could tell the errands were personal as they were written from Manpreet to so and so and not being sent to Ideal Ceramics and if there was also no letterhead of Ideal Ceramics. He further confirmed doing many of such errands for a very long time and for various quantities but cannot recall the particular deliveries since he had worked for the Respondent for long and stated that he would at times go with the Claimant. He stated in re-examination that he would at times be sent without a delivery note and they would be told that delivery would follow. The next witness was Mr. Felix Kilonzo (RW2) testified that he was a dispatcher and that he followed up on a vehicle which had come to the Westlands Branch with some tiled that had defect and had been taken to client known to the Claimant and that he noted the tiles were not from the brands they stocked. He confirmed under cross-examination that the 3 carton tiles came in a vehicle that the Claimant used to come with to work and which information he was told since he did not see the tiles being unloaded. The third witness for the defence was Mr. Joseph Ouru (RW3) who testified that he was Supervisor at the Westlands Branch and that he found 3 tiles 60x60 whose brand was not for Ideal Ceramics and when he asked the casual at the store, he said that the tiles had been brought by the Claimant. That he wrote a report to the manager head office about the three pieces and further stated that that the lorry which the casuals loaded the tiles did not belong to the Respondent. He also confirmed that casuals were ordinarily paid monthly. He stated under cross-examination that he did not enquire about the tiles from Manpreet as he had gone to do the work he had been sent to do. He stated in re-examination that he reported to the main branch

along Mombasa Road and asserted that the tile pieces he saw were not from Ideal Ceramics and that he saw the Claimant giving work on the said items. Ms. Celestine Mbaluka (RW4) the Respondent's HR Manager at the time of her testimony was the last witness. She testified that she joined the Respondent on 1st September 2018 and that the previous HR had been Jacqueline Mwaura and that she is well briefed and aware of the matter in court. She referred the Court to exhibit marked ICL-12 being the Minutes of the meeting of 31st August 2015 and the email on the hearing showing the Claimant was informed to carry any documents and witness and which email the Claimant responded with a 'noted'. She stated that the said minutes' document is signed by all present except the Claimant. She further stated that the Claimant was paid Kshs. 266,184/- and that Kshs. 79,885/- was recovered for cash accounts not paid as per company policy. She produced the Respondent's exhibits as evidence in the case and further asserted that as per minutes of the meeting, they did everything by law and that separation was caused by the conduct of staff. She stated under cross-examination that there was no board meeting but a disciplinary hearing by HR Manager, head of Nairobi Sales and 2 directors. She confirmed the Claimant was informed of the 4.00pm meeting at 2.40pm which she confirmed and raised no concerns or issues and that the same was therefore fair. She further confirmed that the cautionary letters before court are not the cause of the hearing and related to a different matter.

8. The Claimant submitted that Section 47(5) of the Employment Act 2007 places upon her the burden of proving that her dismissal is wrongful or unfair while it places upon the Respondent the burden to justify the reasons for her dismissal. She submitted that Section 45(2) of the Act further provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid and fair in that it is related to the employee's conduct, capacity or capability or that the employment was terminated in accordance with fair procedure. The Claimant submitted that while she has given a reasonable explanation on the source of the alleged 3 pieces of non-ceramic tiles, the Respondent has not produced any evidence showing that she sold third party products from its premises, so as to justify the action it took against her. The Claimant submitted that the allegations by the Respondents' witnesses No. 1, 2 and 3 were general and unsubstantiated and are not enough to meet the requirements under Sections 45 and 47 of the Employment Act. She submitted that further, it is clear the 'hearing' held by the Respondent was certainly not a "fair hearing" as provided for in the Employment Act because as averred, she was emailed the show cause letter at 1.31pm, filed her response to the same at 2.00pm, was summoned to the HR Manager's office vide an email at 2.08pm for a meeting at 4.00pm and before the said meeting ended at 4.35pm, she was informed she had been summarily dismissed. The Claimant submitted that it is apparent from the foregoing that the decision to dismiss her may already have been made before the rushed 'hearing'. The Claimant submitted that in the letter dated 23rd September 2015 (*exhibit 5 in the Claimant's Bundle*), the Respondent alleged that the Claimant sold goods and failed to collect cash but did not raise the said issue during her disciplinary hearing to enable her answer to the same or to collect the said debt. Further, that the Respondent has not shown it attempted to collect the debt, which it had authority to do and failed. She submitted that the Respondent penalizing her for its failure amounts to being condemned without a hearing and should not be condoned. She urged the Honourable Court to review the reasons given for her summary dismissal, disregard the Respondent's allegations and find that her summary dismissal was wrongful. In support of the foregoing submissions on valid and fair reasons and a fair procedure before dismissal, the Claimant relied on the authorities of **CMC Aviation Ltd v Captain Mohammed Noor [2015] eKLR Civil Appeal No. 199 of 2003**; **Mary Chemwono Kiptui v Kenya Pipeline [2014] eKLR** and **David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] eKLR**. She also relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** where the Court opined that the adequacy and reasonableness of the time given to an employee to prepare a defence and to be heard is a question of fact to be determined on a case to case basis. The Claimant submitted that the findings in the **Anthony Mkala** case were cited with approval in **Iyego Farmers Co-Operative Society v Kenya Union of Commercial Food & Allied Workers [2015] eKLR, Civil Appeal No. 12 of 2015**. The Claimant submitted that the Court ought to find that she has proved her case on a balance of probabilities and the Respondent has failed to justify the summary dismissal of the Claimant on both procedural and substantive grounds and that the Court further allows her claim as prayed with costs.

9. The Respondent submitted that Section 44(3) of the Employment Act 2007 provides that an employer may dismiss an employee summarily when the employee has by conduct indicated they had fundamentally breached their obligations arising under the contract of service. The Respondent submitted that Section 44(4) specifies matters that may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause including: where an employee knowingly fails, or refuses, to obey a lawful and proper command which was within the scope of their duty to obey and where an employee wilfully neglects to perform any work which was their duty to perform, or if they carelessly and improperly perform any work which from its nature was their duty under the contract to have carefully and properly performed. The Respondent submitted that Section 41 (2) of the Employment Act provides that before terminating the employment of an employee or summarily dismissing an employee, the employer shall hear and consider any representation the employee may make on grounds of misconduct and poor performance. The Respondent submitted that Section 41 of the Act does not make oral hearings mandatory and that the Claimant was given an opportunity to make written representations via email and also appear for a disciplinary meeting. The Respondent submitted that the Claimant was informed of the allegations against her and given an opportunity to defend herself and she did not complain about the timing of the hearing and even confirmed her attendance of the hearing via email. It cited the case of **Judicial Service Commission v Gladys Boss Shollei [2014] eKLR** where the Court stated that in disciplinary proceedings between employer and employee, the standard of proof is on a balance of probabilities. It submitted that it considered the evidence against the Claimant and weighed it against her defence and found her actions were in contravention of company policies and that after it was convinced of the allegations of misuse of company resources that it made a decision to summarily dismiss her. The Respondent submitted that it followed procedure as required by law and produced in court warning letters, a notice to show cause letter, an invitation to disciplinary hearing, the minutes of disciplinary hearing and the termination letter. That it also genuinely believed that reasons existed to justify termination of the Claimant's employment. The Respondent cited the case of **Lawrence Nyamichaba Ondari v National Hospital Insurance Fund [2018] eKLR** where the court stated that:

"The court must in all cases refrain from over analysing the reasons for which an employee's services have been terminated for there exists a danger of the court substituting its opinion on what it considers to be valid reasons for termination of service with that of the management. The test as provided under section 43(2) of the Act is whether the employer at the time of terminating the employee's services genuinely believed that there existed reasons to justify a termination. The standard of proof is of course on a balance of probabilities."

10. The Respondent submitted that further, whether a termination is considered fair depends on whether the reasons for termination and the dismissal procedure were fair, as was held in **Samsung Electronic East Africa Limited v K.M [2017] eKLR**. The Respondent submitted that the Court in the case of **British American Tobacco (K) Limited v Kenya Union of Commercial Food and Allied Workers (KUCFAW) [2019] eKLR** held that if upon appropriate investigations being undertaken by an employer, there are reasonable grounds for terminating one's employment and the statutory procedure is followed, an employer cannot be accused of unlawful dismissal of an employee.

The Respondent submitted that it has shown that the reasons for terminating the Claimant constitute lawful grounds for dismissal and that the evidence by the 4 witnesses for the Respondent confirms the same. The Respondent cited the case of **Kenya Union Commercial, Food & Allied Workers v Kitui Water & Sanitation Co. Ltd & Another [2015] eKLR** where the Court observed that since the claimant expressly responded to the accusations, he must have read and understood the accusations against him in order for him to have responded and that his contention that he was dismissed without hearing is therefore not correct. The Respondent submitted that similarly, the Claimant herein cannot be said to have been dismissed without a fair hearing because she gave her response to the show cause email and further attended a disciplinary hearing thus showing that she understood the accusations against her. The Respondent submitted that even if this Honourable Court opines that some aspect of the hearing appears to be irregular, the Court ought not to invalidate all the remaining aspects of the disciplinary hearing. It further submitted that the authorities cited by the Claimant in her submissions involved complex matters which cannot be compared to the straight forward and specific charges against the Claimant herein. It further noted that the **Mary Chemwono Kiptui v Kenya Pipeline** case referred to by the Claimant provides that the standard of proof in summary dismissal is of a high nature but which decision is at odds with the decision of the Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei**, which provides that the standard of proof is on the balance of probabilities.

11. The Claimant's dismissal was after an allegation of misconduct on her part. She is alleged to have procured and sold items that did not belong to the Respondent using the Respondent's staff. She says that her dismissal was unlawful and unfair as the Respondent emailed the show cause letter at 1.31pm and that she filed her response to the same at 2.00pm, was summoned to the HR Manager's office vide an email at 2.08pm for a meeting at 4.00pm and before the said meeting ended at 4.35pm, she was informed she had been summarily dismissed. She asserts that this cannot have been a fair as it is clear the 'hearing' held by the Respondent was certainly not a "fair hearing" as provided for in the Employment Act. The Respondent on its part asserts that the decision to terminate was arrived at after due process was followed. The Respondent asserts that the Claimant was terminated for gross misconduct and she never at any time complained of the manner or procedure adopted in her dismissal. The Employment Act under Section 41 provides that the employee should be accorded the safeguards under the Section prior to dismissal in the following terms:

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

12. The Respondent gave the Claimant the notification of the matters that it had intention of discussing at the hearing. Under the Employment Act, the hearing an employee is accorded by an employer is not similar to that in a criminal trial. It must however be noted that the dismissal must pass the test of fairness and justification test. The Respondent had to show that the Claimant had been accorded a fair hearing and that it was justified in terminating the services of the employee. As seen from the email correspondence between the Claimant and the Respondent, the Claimant was informed of the reasons the Respondent was contemplating the dismissal. The Claimant actually responded to the show cause letter vide her email reply of the same day. She did not seek additional time to either procure witnesses or even documents. She willingly submitted herself to the process and after hearing was dismissed. Section 43 of the Employment Act concerns itself with the employer's reasons for the termination. In this case, the Respondent had discovered 3 cartons of tiles that were not in the stock profile of the Respondent and which the Claimant had placed in the Respondent's premises. It is apparent the Claimant was engaged in a side 'hustle' where she peddled tiles from other sources to clients. The Claimant was shunted out of a job in a few hours and despite the speed at which the termination took place there was no major infarction as to vitiate the termination. Where the employer complies like the Respondent did with the notice, the hearing and subsequently the termination, the employee cannot be heard to say the process was unfair or unlawful. In the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd (supra)**, the Court opined that the adequacy and reasonableness of the time given to an employee to prepare a defence and to be heard is a question of fact to be determined on a case to case basis. In this particular case I find that there was adequacy and reasonable time given to the Claimant to prepare for the hearing as indeed no documents were necessary to prove that the Claimant had caused the tiles to be placed in the Respondent's show room since the tiles were from outside and were not documented as stock for the Respondent. She actually admitted that these were 'samples' for a customer who had sought them. The evidence of Mr. Mathew Domisiano indicated that the Claimant had sent him to collect similar packages from a courier and which packages had the name of the Claimant and not that of the Respondent. The Claimant did not demonstrate there was any unfair consideration in respect of her termination. As can be gleaned from the foregoing, the suit by the Claimant is fit for dismissal save for the monies deducted from the Claimant. No evidence was adduced by the Respondent to show it was entitled to the Kshs. 79,885/- it deducted from the Claimant. The Respondent must therefore refund this sum to the Claimant within 14 days failing which the Claimant may execute. As the substantial balance of the claim was unproved, I will order each party to bear their own costs for the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2021

Nzioki wa Makau

JUDGE