



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 35 OF 2018

EUNICE IDAMBO MUMIA.....CLAIMANT

VERSUS

HAPPINESS REAL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim filed in court on 19th January 2018, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Statement of Reply on 25th September 2018, to which the Claimant responded on 15th July 2019.
2. The matter went to full trial where the Claimant testified on her own behalf. The Respondent called its Manager, Mark Ochieng Magolo. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent as a Front Office Staff on 1st May 2011. She earned a monthly salary of Kshs. 16,000.
4. The Claimant further states that she worked for the Respondent until 18th June 2016, when her employment was terminated. She claims that the termination of her employment was unlawful and unfair as there was no justification for it and she was not given an opportunity to be heard.
5. The Claimant now claims the following from the Respondent:

- a. 1 month's salary in lieu of notice.....Kshs. 16,000
- b. 12 months' salary in compensation.....192,000
- c. Costs plus interest

The Respondent's Case

6. In its Statement of Reply filed in court on 25th September 2018, the Respondent admits that the Claimant was its employee commencing on 1st May 2011.
7. The Respondent states that the Claimant started off as a House Keeper earning a monthly salary of Kshs. 8,500 until October 2012, when she was appointed to the position of Front Office Staff earning a monthly salary of Kshs. 13,000 which was subsequently increased to Kshs. 16,000.
8. The Respondent denies terminating the Claimant's employment and states that the Claimant deserted duty by refusing to report back to work from maternity leave, deceptively offering a falsehood to justify her absence from work.
9. The Respondent further states that it severally communicated with the Claimant to report to her workplace for the purpose of having a

hearing but the Claimant failed to show up.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a. Whether the Claimant has proved a case of unlawful termination of employment;
- b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

11. The Claimant's employment was terminated by letter dated 18th June 2016 stating:

“Dear Eunice

This is to inform you with immediate effect that you have been dismissed from Happiness Real Limited. This has been decided at (sic) after you decided to absent yourself from your place of appointment for the performance of your work, this although you were supposed to be back to work on the 15th of May 2016 from your 3 month paid maternity leave which you started on 13th February 2016.

After one month and some days without any communication we sent you a short message to your phone informing you of our decision and requiring you to come for your letter, instead you sent a scan copy of medical information sheet addressed from Kinondo Kwetu Health Services, this you said was to confirm that you have been sick and not able to report to work as required. Please note that you told us through the phone that you had several operations on your stomach to remove a growth which had developed on you. Since some of this (sic) stories were not adding up on 18.06.2016 we (Mark Magolo & Joachim Morgenstern) decided to visit the Hospital where you had your medical information sheet, luckily we had a very cooperating staff who took the initiative of (sic) confirm to us the story behind the Medical Information Sheet. A health officer Miss Naomi Muye of tel. 0713-228739 stated that she was the one who attended to you, she said the reason for your visit to the hospital was to bring the baby for regular clinic checks (sic) up. It was during this checks (sic) up that you told her of your intention to have a letter drafted to your employee (sic) to informing (sic) them on how sick you were and could not go back to work, she declined the issuance (sic) this letter as it was against her professional ethics/conduct she instead gave you a basic information sheet drafted in your own word to justify your lie, she cautioned you informing you that in any case the lie would come to light she would state the truth as the phone number of the hospital was on the medical information sheet, Miss Naomi Muye has also confirmed that you are in the right state of health to resume your duties considering you work as a reception (sic).

Please note that the company understands when one get (sic) sick and avail permission in such situation in any case you are a big testament to this. The company will pay you all your benefits and any pending dues. You will be required to return all the company property assigned to you. We wish you all the best.

Sincerely

(signed)

Joachim Morgenstern

Managing Director

Happiness Real Ltd”

12. This letter accuses the Claimant of two offences being; unauthorised absenteeism and falsification of medical records. Both offences were serious enough to lead to termination of employment but the question remains whether they were proved at the shop floor.

13. It was common cause that the Claimant had proceeded on maternity leave which was to run from 13th February 2016 until 15th May 2016. The Claimant testified that she was unable to resume duty as scheduled because she was unwell. She claimed to have communicated this information to the Respondent's Managing Director, Joachim Morgenstern.

14. Joachim was not called as a witness but the Respondent's Manager, Mark Ochieng Magolo testified that sometime in June 2016 he himself sent a short text message to the Claimant, inquiring why she had not reported back to work. Magolo further testified that the Claimant responded to the text message by sending a scanned copy of Medical Information Sheet issued at Kinondo Kwetu Health Services on 17th June 2016.

15. Magolo went on to testify that the following day on 18th June 2016, he and the Managing Director, Joachim Morgenstern visited Kinondo Kwetu Health Services to verify the authenticity of the Medical Information Sheet sent by the Claimant the previous day.

16. Magolo went on to narrate details of their meeting with one Naomi Muye, who is said to have refuted the Claimant's account regarding her illness. Muye was not called as a witness nor was the Claimant given an opportunity to encounter Muye at the shop floor.

17. Overall, the Claimant was not given an opportunity to respond to the allegations made against her before the decision to terminate her employment was made.

18. At any rate, from the termination letter itself, it is evident that the decision to terminate the Claimant's employment had been made way before the inquiries by Magolo and Morgenstern. The relevant part of the letter states:

“After one month and some days without any communication we sent you a short message to your phone informing you of our decision and requiring you to come for your letter, instead you sent a scan copy of medical information sheet addressed from Kinondo Kwetu Health Services, this you said was to confirm that you have been sick and not able to report to work as required.”

19. The conclusion that the decision to terminate the Claimant's employment had been made ahead of any investigation or inquiry is further bolstered by the speed with which the Claimant's termination was processed, complete with payment of terminal dues, in a record one day.

20. Section 43 of the Employment Act requires an employer to establish a valid reason for terminating the employment of an employee and this is done at the shop floor, prior to disciplinary action, not in the termination letter or before the Court. The details contained in the termination letter should therefore have been availed to the Claimant for her response prior to termination as required by Section 41 of the Act.

21. This did not happen and the charges made against the Claimant were therefore unverified and unproved. As a consequence, the only conclusion to draw is that the termination of the Claimant's employment was unlawful and unfair and she is entitled to compensation.

Remedies

22. I therefore award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service plus the Respondent's unlawful conduct in terminating the employment.

23. I further award the Claimant one (1) month's salary in lieu of notice.

24. Cumulatively, I enter judgment in favour of the Claimant in the following terms:

| | |
|--|----------------|
| a. 8 months' salary in compensation..... | Kshs. 128,000 |
| b. 1 month's salary in lieu of notice..... | <u>16,000</u> |
| Total..... | 144,000 |

25. This amount will attract interest at court rates from the date of judgment until payment in full.

26. The Claimant will have the costs of the case.

27. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY JULY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Onduso for the Claimant

Miss Matara for the Respondent