

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2302 OF 2015

ELIZABETH MUKUHI KIMONDO.....CLAIMANT

VERSUS

KARANGI COFTEA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide a Statement of Claim filed on 23rd December 2015 against Karangi Coftea Limited for unfair and wrongful termination of her employment. She seeks maximum compensation for the wrongful termination, payment of her terminal benefits totalling Kshs. 301,173.70 as well as costs of the suit together with interest thereon at court rates. She avers that on or about 1st May 2010, the Respondent offered her employment as a Room Steward at its hotel with a starting salary of Kshs. 7,500/- which was later increased to Kshs. 12,500/= exclusive of house allowance. She averred that she diligently and faithfully worked for the Respondent until 30th September 2015 when the Respondent terminated her employment without any reasons, notice or letter to show cause why she should not be terminated. She asserts that when the Respondent refused to pay her salary and other terminal dues, she instructed her advocates to write a demand letter for payment of the said dues. The terminal dues as set out in the claim include one month's salary in lieu of notice, 12 months' salary compensation, house allowance, service gratuity and a Certificate of Service. The Claimant further avers that the Respondent did not have a valid reason for terminating her employment and that it never used to pay her house allowance as required by statute. In her witness statement dated 30th January 2018 the Claimant states that she had private and personal reasons and would have explained her situation to the company had they called for a meeting. She asserts that her employment at the Respondent company was the sole source of income she depended on and thus suffered immense loss as she could not fend for herself or her children.

2. The Respondent filed its Memorandum of Response dated 25th February 2016 averring that it was a material term of the contract that the Claimant would earn a consolidated salary and she was thus not entitled to a separate payment of house allowance. Consequently, the monthly payment of Kshs. 12,500/- was consolidated salary. The Respondent asserts that the Claimant was often absent from her work place at Parkside Hotel without any explanation and was further repeatedly late to work and thus unable to perform her duties in time. That it severally verbally warned her on the absenteeism and lateness but she did not improve. The Respondent averred that the letter of termination explained to the Claimant the reason for the termination which was her repeated absenteeism and lateness without any explanation. The Respondent further asserts that the Claimant was given a chance to put in a written explanation for her lateness and absenteeism but the Respondent considered and found her explanation unsatisfactory and proceeded to terminate her employment. It avers that it paid the Claimant all her terminal dues being: one month's salary in lieu of notice, service gratuity, leave days earned but not taken and wages for public holidays worked. The Respondent averred that the Claimant is further not entitled to compensation for unlawful termination since it gave her a fair hearing and reasons for the termination in accordance with the law. The Respondent contends that this Court has no jurisdiction to hear this suit which should have been instituted at the Magistrates' Court pursuant to the provisions of the Magistrates' Courts Act 2015. It prays that the Claim be dismissed with costs.

3. The Respondent also filed a Witness Statement made by the Manager of its Parkside Hotel, Abel Omare who asserts that he warned the Claimants on several occasions about her absenteeism and lateness but she did not improve and that he at times had to outsource someone else to cover her duties. He further states that the Claimant wrote an apology on 25th September 2015 acknowledging her lateness on several occasions and owing the same to unavoidable circumstances. He states that the termination notice dated 30th September 2015 issued to the Claimant also explained to the Claimant that the reason she had advanced was unjustified and unsatisfactory. He affirms that the Respondent gave the Claimant a normal termination despite her gross misconduct attracting summary dismissal with no terminal benefits and the Respondent further paid to her final dues of Kshs. 39,319/-. It is his assertion that the Respondent had a valid and justifiable reason to dismiss the Claimant from employment and she is therefore not entitled to the reliefs sought.

4. The Claimant testified that she was paid Kshs. 39,319/- through cheque and denied that her salary included house allowance. She stated that there was no disciplinary hearing before dismissal and neither was she given a verbal warning on 27th September 2015. Under cross-examination, she stated that she signed a contract that provided for consolidated basic pay and denied that she was reporting to work late. She further confirmed that a reason was given in the dismissal letter and stated that she gave her apology letter to the Supervisor so as not to lose her job.

5. The Respondent's witness, Mr. Omare relied his filed witness statement as evidence. He stated under cross-examination that they wrote the letter of 30th September 2015 as a warning to the Claimant and which date was the same day the Claimant was terminated. He also stated he did not have anything before Court to show there was a hearing. In re-examination, he stated that the Claimant admitted to being absent and apologised and that the Claimant was not summarily dismissed but was terminated normally and paid.

6. The Claimant filed written submission and the first point he took was on the preliminary objection raised by the Respondent. He submits that the same should be rejected as the Respondent's advocates have not cited any provision of the Magistrates' Court Act 2015 which was offended by filing this suit before this Honourable Court. The Claimant submitted that on the contrary, the Employment and Labour

Relations Court at the time of filing the suit herein – 23rd December 2015, had exclusive jurisdiction to hear and determine cases by virtue of the provisions of Section 12 of the Employment and Labour Relations Act as read with Section 87 of the Employment Act, 2007. Noteworthy, the Magistrate’s Courts were vested with jurisdiction to hear and determine employment and labour relations matters in June 2018 following a Gazette notice issued by the Chief Justice Honourable Mr. David K. Maraga. The Claimant submitted that the purported preliminary objection should therefore be dismissed with costs. On her termination, the Claimant submits that the termination was unfair and unlawful as it was done abruptly and without following procedure. She asserted that for instance, her termination letter dated 30th September 2015 states that the termination is to take effect from 28th September 2015 which was two days before the letter was drafted and issued to her. She submits that the Respondent contravened the provisions of Section 41 of the Employment Act 2007 since she was not notified of the intended termination and accorded any chance of a fair hearing. She submitted that Section 47(5) of the Employment Act vests on her as the employee the burden of proving that unfair termination of employment or wrongful dismissal has occurred. She cited the case of **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2015] eKLR** where the Court stated that Sections 43(1) and 47(5) of the Employment Act must be construed so as not to nullify the conventional and accepted law on the burden of proof. The Claimant submits that the Respondent herein did not rebut or give evidence of following any fair procedure in effecting her termination including not responding to her apology letter. She relied on the case of **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (K) [20]** where the Court appreciated the Court of Appeal decision in **Samsung Electronics East Africa Limited v K. M [2017] eKLR** and observed that the right to a fair hearing which is encapsulated in the *audi alteram partem* (no person should be condemned unheard) rule and founded on the well-established principles of natural justice, is the right that is delineated under Section 41 of the Employment Act. She further relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR** where the Court held that whatever reason (or reasons) that would cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Act; both in termination of employment and in summary dismissal. The Claimant submitted that having established on a balance of probabilities that her termination was procedurally unfair and unlawful, she is entitled to the reliefs sought in the Claim. She asserts that the figure of Kshs. 14,375/= is the monthly salary she ought to have been earning according to the Regulation of Wages (General) Order and prays the same be granted to her as her one month notice pay. She further submits that under Section 49 as read with Section 50 of the Employment Act, 2007 once it is demonstrated that dismissal of an employee is wrongful or that termination of the employee is unfair, the Honourable Court may then award compensation to a maximum of twelve months gross salary. The Claimant submitted that the Court should direct that she be unconditionally issued with a certificate of service by the Respondent as required under Section 51 of Employment Act.

7. The Respondent submits that the burden it has before this Court is to prove it had a valid and justified reason and that it further followed a fair procedure in terminating the services of the Claimant, which burden of proof it asserts it has discharged. It submits that Section 43 of the Employment Act further places a burden on an employer to establish a valid reason for terminating the employment of an employee. The Respondent relied on the Court of Appeal case of **Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another [2017] eKLR** and the case of **Michael Dowling v Workplace Safety & Insurance Board [2004] CAN LII 436 92** cited by the Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** as follows:

“It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.” (emphasis theirs)

8. The Respondent further submitted that the Claimant's habitual lateness and absconding of duty was fundamentally inconsistent with her obligations to her employer and a replacement had to be sourced to perform her duties at the Motel. The Respondent submitted that it is evident the Claimant failed to perform her duties as required in the employment relationship thus making her explanation untenable. The Respondent invited this Court to consider the Claimant’s explanation for her misconduct and see that she had no regard for her job and has solely filed this Claim to disparage the good reputation of the Respondent. The Respondent also urged the Court to examine the evidence on record which shows that the Respondent did what any reasonable employer would do in the circumstances. The Respondent submitted that if the Claimant knew she had private and personal reasons that would prevent her from reporting to work, she would have stated those reasons in her apology letter but instead chose to say that it was due to unavoidable circumstances. The Respondent submitted that this statement did not sound like an employee who was keen to keep her job but rather one who cared less about the consequences of her actions. The Respondent submitted that it has demonstrated that the reasons for termination of the Claimant’s employment were valid, lawful, and fair and has also shown that the termination was procedurally done in accordance with the terms of the Claimant’s contract, the law, and the rules of natural justice. Consequently, the reliefs sought cannot be granted against the Respondent.

9. The Court has considered the pleadings of parties, the evidence on record, the testimony adduced and the submissions together with authorities cited as well as the law in reaching this determination. Claimant’s claim for unfair termination was against the backdrop of alleged unfairness in the process. She asserts the dismissal was without basis and without any safeguards as required in law. She reported to work late and the employer asserts that this was a habit for which it gave her a notice to explain and her response on 25th September 2015 found wanting culminating in her dismissal on 30th September 2015. She was paid Kshs. 39,319/- as her terminal dues vide a cheque dated 18th November 2015. In the sum was included 1 month notice pay – Kshs. 12,500/-, service gratuity – Kshs. 31,250/-, leave (pro-rata) – Kshs. 3,333/-, public holiday worked – Kshs. 417/- making a total of Kshs. 47,500/- and after tax paid was Kshs. 39,319/-. The Claimant was heard prior to her dismissal as conceded in evidence. The Claimant was asked to give an explanation and the dismissal followed that explanation which was not found to be satisfactory. The Respondent thus accorded the Claimant an opportunity to defend herself and she failed to explain her chronic absenteeism. Having failed to show the dismissal was unlawful or unfair, the Claimant is not entitled to any of the reliefs she sought save for the Certificate of Service which was not issued. A certificate of service in terms of Section 51 of the Employment Act be issued within 14 days of this Judgment. Suit is on the whole without merit and is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE