



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 599 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

ROSE KORU GICHUNGE

CLAIMANT

VERSUS

TWO FAMILIES LIMITED

RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim dated 23rd March 2017 on 28th March 2017 alleging that she was unfairly terminated by the Respondent on 14th September 2016. The Claimant prays for

- (a) Certificate of service
- (b) Salary for the month of September Kshs.37,302
- (c) One month in lieu of notice Kshs.37,302
- (d) 24 leave days for 2016 Kshs.32,634
- (e) Public holidays for 2008 Kshs.133,644
- (f) Savings for 2016 Kshs.16,000
- (g) 12 months' compensation Kshs.447,624
- (h) Costs of this suit and interest.

2. The Respondent filed its response to the memorandum of claim on 2nd May 2017 stating that the dispute in question had been resolved by the County Labour Office and all dues paid through the Labour Office on 31st October 2016 and prayed that the Claimant's case be dismissed with costs.

Claimant's Case

3. The Claimant avers that she was employed by the Respondent on 5th October 2008 as a Pharmacy Assistant at a consolidated gross salary of Kshs.13,940 subject to statutory deductions effective 1st October 2008. She averred that she performed her duties diligently and earned a promotion to a Senior Pharmacy Assistant on 25th October 2011 with a new consolidated salary of Kshs.22,300 per month effective 1st October 2011. She was entitled to 21 days' annual leave. The contract made no reference to the duration of employment.

4. However the Board of Directors of the Respondent gave her another appointment letter on 23rd March 2013 stating that her appointment as a Senior Pharmacy Assistant would be for 9 months renewable contract at a consolidated gross salary of Kshs.28,529.00 per month from 1st March 2013. The letter had a provision on performance appraisal. The contract was renewed on 20th December 2013 with effect from 1st January 2014 and the Claimant's salary raised to Kshs.31,129.00 per month.

5. The Claimant avers that on 14th September 2016 the Managing Director, Mr. Longino Mucheusi called her and ordered her to leave the job premises. That the Managing Director provided no explanation on request from the Claimant, but directed her to see him in the office on 19th September 2016.

6. That on the said date, the Managing Director asked her to write a resignation letter to faceplate process of her dues since they had parted ways. The Claimant alleges that she declined the request and was terminated without justification.

7. The Claimant reported the dispute to the County Labour Office on 11th October 2016 where she was issued with a letter for the Managing Director of the Respondent dated the same day. The letter summarised the Claimant's demands from the Respondent for the unlawful termination and demanded a response within seven (7) days.

8. The Claimant further avers that on 18th October 2016 she received a call from the Managing Director instructing her to attend a meeting in his office on 19th October 2016, a request the Claimant honoured.

9. On the 19th October 2016, the Mr. Longino issued a termination letter to the Claimant dated 3rd October 2016. The letter stated that she was terminated for misconduct, that on 14th September 2016, she had reported to work at 9.46 am instead of 8.00 am and had not communicated the same to any one which inconvenienced and embarrassed customers and staff.

10. That on 19th October 2016 she reported the issue to the labour office for a second time and was issued with a letter dated 19th October 2016 for the Director of the Respondent. The letter requested the Director to attend a meeting at the County Labour Office on 27th October 2016 at 11.30 am but the Director did not show up but wrote to the Labour Office on 20th October 2016 apologising for the failure to honour the earlier letter and confirmed that the Respondent had in fact terminated the Claimant on 19th September 2016. That she served the Respondent for 8 years.

Respondent's Case

11. The Respondent avers that it employed the Claimant on 5th October 2016 as a Pharmacy Assistant but deny that the Claimant was diligent, hardworking and royal employee. That the Claimant was not terminated on 14th September 2016 and reported to work on 19th September for a disciplinary hearing and denies the allegations of an oral termination by the Managing Director. That the dispute was resolved at the County Labour Office and all the Claimant's dues sent to the labour office on 31st October 2016. The Respondent further avers that the suit by the Claimant is an abuse of the Court process since the dispute had been resolved. That the Claimant was terminated lawfully and that the suit be dismissed with costs.

Evidence

12. The Claimant testified that she was not aware of any stock variance at Karen or KMA Branches as well as the computation on days lost while she worked since the letter dated 29th October 2016 sent to the Labour Office was not copied to her. She told the Court that she was unaware that the Respondent had dispatched a cheque to the County Labour Office and did not agree with the figures tabulated on the document. She denied that she had been subjected to any disciplinary hearing and had nor proceeded on leave in 2016.

13. On cross examination, the Claimant confirmed that she did not appeal against the dismissal yet the right was provided for by the letter of termination. That the leave day forms submitted by the Respondent were factual on the days taken and had worked part of the month of September on had no evidence to prove that she worked in public holidays

and was not paid.

14. RW1, MR. LONGINO confirmed that the Claimant had worked for 14 days in September 2016 and was thus entitled to Kshs.13,533 prorated for the month, that her net salary was Kshs.29,000 and her savings stood at Kshs.16,000 and the Respondent had sent a cheque for Kshs.65,859 to the County Labour Office as the Claimant's terminal due. He further confirmed that since the staff worked on rotation during public holidays, it was not possible for an employee to accumulate the number of days claimed by the Claimant since 2008.

15. That the Claimant had been taken through a disciplinary process and was not remorseful. That the dismissal letter dated 3rd October 2016 was issued to the Claimant on 19th September 2016. That the hours lost were not factored in the computation of the Claimant's dues. That he did not attend any meeting at the County Labour Office.

16. The Witness also confirmed that he called the Claimant on 18th September 2016 for the disciplinary hearing on 19th September 2016 and that the Claimant did not sign the minutes. That he had given the Claimant the option to resign but she declined. He also confirmed that RW2 attended the disciplinary meeting to represent staff. That a certificate of service for the Claimant was sent to the County Labour Office.

17. RW2 M/S TARUS testified that she was the Administrator at the Respondent and confirmed on cross examination that the Respondent had no attendance register at the time. That on 14th September 2016, the Claimant reported to work late but before 10 am.

18. That RW3 MARY KABURU was in on that day and had called her since the Claimant had not reported. That she was invited by RW1 to attend the disciplinary hearing to present staff and finally that Mary Kaburu was serving customers when the M/s Tarus arrived at the work place. She also confirmed that the Claimant had reported late previously.

19. RW3 MARY KABURU told the Court that she is a trained pharmaceutical technologist and had since left the Respondent's employment. On cross examination, she confirmed that she was working as a teller and would report to work at 8.00 am while staff in retail reported at different times. The witness further confirmed that she had been requested to stand in for the Claimant since she was late on that day. That the Respondent had an attendance register.

Claimant's Submissions

20. The Claimant submitted that although the Respondent's witnesses confirmed that there was a system of recording staff attendance, no evidence was adduced to ascertain whether the Claimant reported to work late on 14th September 2016. That the Claimant's termination was unlawful for the following reasons –

- (a) No valid or fair reason for termination was given.
- (b) No notice of was given to the Claimant.
- (c) Claimant was not invited to a disciplinary hearing.
- (d) Claimant was not informed of her right to have a representative of her choice to the hearing.
- (e) Failure to conduct a disciplinary hearing.

21. Counsel relied on Section 45 of the Employment Act, 2007 on unfair termination and submitted that the Claimant was terminated for gross misconduct by reason of having reported to work late on 14th September 2016.

22. Counsel submitted that the Respondent's witnesses testified under oath on varying reporting times thereby leaving the Court to speculate on the facts and no material evidence has been led to show that the Claimant arrived late at the work place on the material day or any other time before.

23. Reliance is also made on the **Halsbury's Laws of England 4th Edition Vol. 16 (IB) paragraph 642** on the question of reasonableness of the employer's conduct. That Courts should rely on the test whether a reasonable employer could have decided to terminate an employee on the alleged facts.

24. The Court of Appeal decision in **Co-operative Bank of Kenya v Banking Insurance Finance Union (2017) eKLR** was also relied upon for the proposition that Courts must assess the context of the misconduct or dishonesty in order to ascertain if the conduct complained of was a ground for termination based on the burden of proof imposed on the employer by Section 47(5) of the Employment Act. That the Respondent provided no evidence to show that there was a valid reason for termination.

25. It was further submitted that although RW1 told the Court that they had issues of lateness with the Claimant since 2012, including on appraisal in 2014, no evidence was led on these concerns or issues.

26. On procedural fairness, Counsel submitted that that Employment Act was clear on the procedure to be adhered to for a summary to be fair and that the procedure is mandatory not mechanical as held in **Co-operative Bank of Kenya v Banking Insurance and Finance Union (supra)**. Further reliance was made on the Court of Appeal decision in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** where the Court observed that –

“The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”

27. Counsel contended that at no time did the Respondent serve the Claimant with notice regarding her preface or behaviour at work and was thus terminated without having been informed the reasons for termination. That the Claimant was not invited to a disciplinary hearing by the Respondent. The decision in **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** was enlisted for support for the proposition that the right to be accorded a fair hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

28. That in the Respondent's view, a disciplinary hearing took place on 19th September 2016 and one ESALYNE TARUS (RW2) represented employees yet she is the Respondent's witness the law is categorical that the employee is entitled to have another employee or a shop floor union representative of his choice, Counsel submitted. That the representative is the employee's choice not employers.

29. Counsel relied on the Court of Appeal decisions in **Standard Group Limited v Jenny Luesby [2018] eKLR** and **CMC Aviation Limited v Mohammed Noor [2015] eKLR** in urging that the right to a hearing before dismissal for cause was mandatory failing which the separation is unfair and unlawful for breach of statutory law.

30. On leave days, Counsel submitted that since the Respondent had not provided evidence on leave days taken in 2015 and public holidays worked since 2008, the same be awarded as prayed.

31. Finally it was the Counsel's contention that the Respondent

did not consult the County Labour Office in the computation of the dues and it is the only party aware of how the sum was arrived at and the Claimant never received the alleged cheque.

Respondent's Submissions

32. The Respondent's Counsel submits that the Claimant's termination was effected in accordance with the law. Counsel further submits that the Claimant's salary for the 14 days worked in September 2016, the sum of Kshs.13,533 was not in dispute as was the claim for one month in lieu of notice at Kshs.29,000 as per the pay slip.

33. On leave days, Counsel submitted that since the Claimant was entitled to 21 leave days in a year, which is 1.75 days per month multiplied by 8 months in 2016 a total of 14 days at Kshs.966 (per day). The total amount due is Kshs.13,524. Relatedly, the Claimant savings amounting to Kshs.16,000 was not in dispute.

34. Counsel submits that the only issues in contention are public holidays worked since 2008 and whether the Claimant's termination was unfair and the remedy of compensation for 12 months.

35. On public holidays worked, Counsel contended that the claim for Kshs.133,644 for the days worked was based on the assumption that the Claimant's gross pay as Kshs.46,620 since her net pay was Kshs.29,000 per month. Similarly, the rate of Kshs.1,554 per day assumes that her salary was the same from 2008 which is not the case.

36. Counsel submitted that the Claimant did not specify which public holidays she worked since not all days fell on workdays. It was further submitted that the claim be dismissed for want of proof since the Claimant led no evidence to prove she worked on any public holiday nor were the particulars of the public holidays given.

37. That since evidence showed that the employees worked on rotational basis for public holidays, the Claimant could not have worked during all the public holidays. At any rate Counsel submitted any public holiday work was compensated by one day off duty.

38. On whether the Claimant's termination was unfair Counsel submitted that the termination was lawful in that the Claimant met the Director and her issues were discussed and the subsequent meeting on the same day 19th September 2016, was disciplinary hearing and the same was confirmed by the termination letter dated 3rd October 2016 and advises the Claimant to appeal the decision and finally that the Respondent produced minutes of the disciplinary hearing. Counsel prays that this and other aspects of the claim contested be dismissed with no order as to costs and without interest.

39. Counsel cited no authority in support of the submissions.

Analysis and Determination

40. Flowing directly from the foregoing, the issues for determination are: -

- (a) Whether the Claimant's termination was fair and lawful;
- (b) Whether the Claimant is entitled to the reliefs sought.

41. The Employment Act provides the parameters to be satisfied for a termination to pass the fairness test. Sections 35, 40, 41, 43, 44, 45 and 47 is the statutory bulwark on fair termination. Courts on the other hand have not only enforced these provisions but have been unequivocal that for a termination to be fair it must pass not only the substantive but the procedural test as well, as was held in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**

"... For that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

42. In this case, the letter of termination dated 3rd October 2016 states that the ground for summary dismissal was gross misconduct, that the Claimant reported to work at 9.46 am as opposed to 8.00 am on 14th September 2016 and did not alert any one occasioning inconvenience and embarrassment to customers.

43. Relatedly, the Claimant showed neither remorse nor talk or explain to anyone. In the Respondent's view this was conduct unbecoming and had to be curtailed.

44. Section 45(2)(a), (b) and (c) of the Employment Act provides that –

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

45. Section 43(1) provides that the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

46. In addition, Section 43(2) provides that the reasons or reason for termination of a contract of service are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

47. RW1 Mr Longino testified that the Claimant was a habitual late comer. That the behaviour was noted sometime in early 2012 and the Claimant was warned by word of mouth and that the issue came up during the evaluation of 2014. That the late reporting continued in 2015. RW2 and RW3 testified that they were both aware of the late reporting of the Claimant on 14th September 2015 since they were on duty and she found them when she reported. From the evidence on record, the Claimant arrived minutes before or after 10.00 am and tendered no explanation or apology to anyone. RW3 also testified on the consistent late coming of the Claimant from as early as 2011 and that on 14th September 2016, attempts to get in touch with her failed because the Claimant did not pick her calls. Instructively, the Claimant makes nominal reference to the 14th September 2016 when she was allegedly suspended by the Managing Director by word of mouth. She does not indicate when she reported to work on that day or when she left.

48. Based on the evidence on record, the Claimant reported to work late on the 14th September 2014 and was unapologetic about it. Her alleged conduct on that day exhibits disregard for authority as well policies and procedures at the work place. The fact that the Claimant made no effort to contact fellow employees or the Managing Director on the lateness or tender an apology or explanation thereafter gave the Respondent a valid reason to terminate her and according to the Respondent the reason was fair in light of her history of late coming. In the Court's view the Respondent genuinely believed that the consistent late coming of the Claimant was a valid and fair reason to terminate the Claimant. The Court finds that the Respondent had a valid and fair reason to terminate the Claimant.

Procedure

49. On procedural fairness, Section 41 of the Employment Act sets forth the methodology of effecting a lawful and fair termination. In **Loice Otieno v Kenya Commercial Bank Ltd (2013) eKLR** Radido J. stated –

“In my view, an employer must demonstrate as a matter of fact that it:

(i) Explained to the employee in a language the employee understood the reasons why it was considering the termination.

(ii) Allowed a representative of the employee being either a fellow employee or shop floor representative to be present during the information/explanation of the reasons.

(iii) Heard and considered any explanations by the employee or his representative.

(iv) Where the employer has more than 50 employees as required by Section 12 of the Employment Act, that it had complied with its own internal disciplinary rules.”

50. See **Standard Group Ltd v Jenny Luesby (2018) eKLR**.

51. In **CMC Aviation Limited v Mohammed Noor [2015] eKLR** the Court of Appeal emphasized that –

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provision of a statute, that still amounts to unfair termination.”

52. To demonstrate that the Respondent had complied with the requirements of Section 41, it provided minutes of the disciplinary hearing dated 19th September 2016 attended by four (4) persons including the Claimant. RW2 testified that she was requested by RW1 to represent employees in the meeting. She did not allege to be a representative of the Claimant.

53. The minutes produced by the Respondent do not explain who stated what, the evidence adduced, questions asked or anything. It would appear that the three member committee adduced the evidence, prosecuted the Claimant and found her culpable though the minutes are silent on the recommendation made. Finally, the minutes have no recommendation to the Board of Directors nor are they signed by all participants.

54. It is unclear when the decision to terminate the Claimant was made because the extract of the minutes of a Board meeting held on 30th September 2016 do not have the deliberations on the Claimant although it is listed as Agenda Item No. 3.

55. Applying the test in Section 41 of the Employment Act as elaborated by Courts over the years, it is evident that the Respondent's disciplinary hearing on 19th September 2016 did not attain the threshold prescribed by law.

56. The Respondent did not give the Claimant any notice of the disciplinary proceedings nor explain to her the reasons why it was considering termination. The notice would have tabulated the reasons and informed her of the right to bring a representative and the time frame. RW1 confirmed that he invited the Claimant for a meeting by a call on 18th September 2016. The Claimant was not informed of its agenda which perhaps explains why she may have been reluctant to participate in the deliberations as confirmed by RW1. The Claimant had no opportunity to appoint a representative to appear with her nor was she informed of this right prior to the meeting. The minutes are silent on what the Claimant did or did not do.

57. In sum, the Court finds that the alleged disciplinary hearing on 19th September 2016 did not conform with the provisions of Section 41 of the Employment Act.

58. The Court further finds that the Respondent has failed to prove that a fair procedure was complied with before termination of the Claimant's employment on account of gross misconduct contrary to the provisions of Section 41 of the Employment Act.

59. The Claimant's termination was unlawful for want of procedural fairness.

RELIEFS

(a) Certificate of Service

The Claimant served the Respondent from 1st October 2008 to 19th September 2016, a period of 7 years, 11¾ months. She is entitled to a certificate of service.

(b) Salary for the month of September 2016

The Respondent computed payment for the 14 days worked in September 2016. The Claimant did not allege that she worked for the entire month nor provide a different computation. The Court awards Kshs.13,533 for the 14 days worked in September 2016.

(c) One month in lieu of notice Kshs.37,302

Having found that the Respondent had a valid reason to terminate the Claimant but employed a flawed procedure, **Kshs.37,302** in lieu of notice is awarded.

(d) 21 leave days for the year 2016 (1,554 x 21) = 32,634

Records show that the Claimant took leave for 2016 but not in 2015 as confirmed on cross examination, that she had taken only 3 days. The Respondent did not avail leave records for 2015 where the Claimant had an outstanding 18 days. As a consequence the Court awards (1,554 x 18) = **Kshs.27,797** for the 18 days.

(e) Public holidays since 2008 (1,554 x 86 days) = 133,644

The Claimant provided no evidence to establish his claim. It is declined for want of proof.

(f) Savings for 2016 = 2,000 x 8 months = 18,000

These are savings for the Claimant as admitted by the Respondent and the Court awards **Kshs.16,000**.

(g) 12 months' compensation for unfair termination 37,302 x 12 = Kshs.447,624

The remedies provided by Section 49 of the Employment Act are discretionary and Courts are enjoined to exercise judicial discretion against the background of the provisions of Section 49(4) of the Act which sets forth the matters to be taken into account as confirmed by the Supreme Court in **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR**. In addition, the Claimant neither appealed the termination as set out in the letter of dismissal nor follow up the matter with the County Labour Officer after registering a complaint and played a role in the termination.

Considering that she had served the Respondent for 7 years and 11¾ months, the equivalent of 2 months compensation is fair in the circumstances (37,302 x 2) = **Kshs.74,604**

60. **In conclusion, judgment is entered for the Claimant in the sum of Kshs.169,236/=.**

61. Interest at court rates from the date of judgment till payment in full.

62. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF OCTOBER 2021

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

DR. JACOB GAKERI

JUDGE