



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2481 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

LUCY NDUNGU.....CLAIMANT

VERSUS

NEW WIDE GARMENTS KENYA EPZ LTD.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The claimant's claim is contained in the statement of claim dated the 7th December, 2017 and filed on the same date.
2. The claimant avers that she was employed by the respondent as a shipping clerk vide a contract of employment dated the 23rd March, 2011.
3. The claimant avers that she received a Notice to Show cause letter dated the 21st September, 2016 which alleged that she was involved in fraudulent activities including demanding for a bribe in order to issue work to transporters on the respondent's panel. She says that she comprehensively answered the allegations levelled against her, but was later on taken through disciplinary hearing without being given documentations concerning the allegations against her. She says that she had denied the allegations against her and that her further request to have the documents supplied to her was not heeded by the respondent.
4. Before receiving the notice to show cause letter the claimant states she was sent on compulsory leave of fourteen (14) days by a letter dated 1st September, 2016. She was informed that she was involved in fraudulent activities and investigations would be done during her leave.
5. That two (2) months after the disciplinary meeting of 17th October, 2017 she was recalled to work and vide a letter dated the 7th November, 2016 the claimant was summarily dismissed with immediate effect.
6. The claimant avers that the respondent's actions amount to wrongful and unfair termination and contravenes the Employment Act.
7. The respondent admits employing the claimant. It says that there were reports of some of its employees' receiving kickbacks from transporters in return for transport business allocations. That there were investigations carried out with the help of the police that showed the claimant had received payments from the transporters leading to the disciplinary process.

EVIDENCE

8. The claimant testified that she worked for the respondent for six years. She says that in the month of August, 2016 she did not receive her salary and demanded the same from the administration manager who served her with a compulsory leave letter for 14 days. She says she was asked to report on the 13th September, 2016. She said that there were 2 foreigners they were asked to train, one Akash and Vishal. That they trained them on what they used to do.
9. She was informed investigations were still ongoing and informed to extend the leave until further communication. She says she was later on given a notice to show cause which she received on the 24th September, 2016.

10. She says she was then served with a letter of notice to show cause dated 21st September, 2016. That she responded to the letter on 30th September, 2016.
11. She says she thereafter received a letter summoning her for a disciplinary hearing and it was dated 7th October, 2016.
12. She says she was questioned on the mpesa and bank statements during the said meeting.
13. She avers that she was informed the documents (the said Bank statements and mpesa statements) were from CID and that they could not give them to her without permission from the CID. She says that she did a letter on the 14th October, 2016 requesting for the said documents again but they were not supplied.
14. The claimant says that she attended the disciplinary meeting on 17th October, 2016 but since she did not have the mpesa and bank statements, she could not defend herself.
15. The claimant says that she was unfairly dismissed and asked the court for the prayers set out in her statement of claim.
16. Upon cross-examination, she said that she was not in a business relationship with one Vishal.
17. In re-examination, claimant said that she is not the one who used to select transporters for the company.
18. On behalf of the respondent, Mr. Rudolf Isinga testified that he is the administration manager for the respondent. He confirmed he knew the claimant was an employee of the respondent.
19. He also stated that claimant used to work in the bookings for exports and would book the containers with the transporters from Mombasa to Nairobi.
20. Upon being cross examined he said that the claimant was earning a monthly salary of Kshs.41,827/= and an house allowance of Kshs.6,274/=. He stated that she also used to get an allowance of Kshs.10,000/=.
21. He said that the claimant's duties were to select transporters according to allocation of duties by the manager and that as a shipping clerk she was mandated to choose transporters.

CLAIMANT'S SUBMISSIONS

22. In submissions, the claimant avers that as per the employment contract dated the 23rd March, 2011, she was supposed to report to the administration manager who was to assign her duties. She argues that it is the role of the Manager to issue contracts, and that this was stated in evidence by the respondent witness.
23. The claimant submits that the respondent violated Article 50(2) of the Constitution on the need, inter alia, to have the claimant informed of the charge in advance and also her request to be supplied with documents relating to the disciplinary proceedings went unheeded. She argued that she was not supplied with the results of the investigations and that too was in contravention of her rights.
24. The claimant argues that the allegation of fraudulent dealings was not proven as a no occurrence book was produced and that no report of the investigators showing results of the investigations was filed to show the allegations made by the respondent. The respondent states that the matter was investigated by Athi River Police and yet no investigation reports were produced as evidence.
25. The claimant further submits that there was no fair and valid reason for the termination and the Section 45(1) of the Employment Act was not complied with. The claimant argued that she is entitled to the prayers sought and reiterated in her statement of claim.

RESPONDENT'S SUBMISSIONS

26. The respondent submits that the claimant was well aware of the allegation against her as evidenced by her detailed letter in response to the notice to show cause. The respondent submits that the letter to the claimant disclosed the allegations against her and that ample opportunity was given to her to get her own documents from the bank and from mpesa for the comparison purposes. The respondent argued that the procedure relating to the dismissal was followed and relied on the case of *Lyndah Ajiambo versus Smeep Microfinance Bank Limited (2017) Eklr* to buttress their argument.

This is a case where claimant was given opportunity to defend herself and failed to do so.

27. The respondent relied on among others, the decision of *Jackson Butiya versus Eastern Produce Kenya Limited, Industrial Court Case No.335 of 2011* to the effect that 'An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to this court and say I refused to talk with those people and therefore I was not heard, order them to pay me. It is not for the court to supervise the internal grievance handling process between the employer and employees. The role of the court is to ensure that such process is undertaken within the law'.

28. The respondent in making submissions that the termination was valid relied, inter alia, on the case of **Rose Akoth Ogowang versus**

General Insurance Limited 2018 Eklr where it says the court relied on the fact that the claimant was unable to explain why she received multiple payments from the service providers or the purposes of payments she received through her phone. The respondent submitted that no satisfactory response was given in relation to the transactions which warranted the dismissal.

29. On the reliefs sought, the respondent argued that the claimant is not entitled to the prayers sought and relied on the case of **Merindah Lyndah Ajiambo Case Supra** where the court said the *'on a finding of a case for lawful termination of employment, the claimant is disentitled to the reliefs sought'*.

30. The respondent submits that the claimant secured a similar job with Hela Clothing EPZ Limited and as such is not entitled to compensation for wrongful termination. It says the claimant's employment was not terminated but summarily dismissed. It says that no evidence was tendered for the claim of unpaid leave but that the respondent on its part had adduced salary pay slip indicating that she was paid her salary. It says that no basis was laid for the claim for gratuity. It asks that the claim before court be dismissed.

DECISION

31. Having gone through the pleadings, the evidence and the rival submissions of the parties, the following issues in my view falls for determination;

- a. Whether the respondent proved a valid reason to dismiss the claimant.
- b. Whether the right procedure for dismissal of the claimant was followed within the meaning of Employment Act 2007.
- c. If the answer to (a) and (b) above is in the affirmative, whether the claimant is entitled to the remedies sought.

Section 44 of the Employment Act 2007 provides that

Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

32. Section 44(4) provides;-

Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable of lawful grounds for the dismissal if, inter alia, (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or the substantial detriment of his employer or his employer's property.

33. **In Civil Appeal No.3 of 2014 CFC Stanbic Bank Limited versus Danson Mwashiko Mwakuwon (2015) Eklr** the Court of Appeal referred with approval to **Edition 4 of the Halsbury's Laws of England** which provides as follows: "in adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on the facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another, the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair.

34. Issue No.1 **"did the respondent prove a valid reason to dismiss the claimant"**.

35. The allegation by the respondent was on complaints by certain transporters that some selected companies were favoured with transport business by respondent's shipping department due to bribery.

36. The respondent allege they conducted investigations which showed employees in the shipping department including the claimant were receiving kickbacks from certain transporters.

37. The respondent said they involved Athi River Police Station who obtained claimant's mpesa and bank statements as well as statements of other employees. According to Mr. Rudolf the respondent's witness the investigations showed claimant received payments from certain transporters.

38. The respondent did not give evidence to support who the transporters were who were receiving favours from the shipping clerk. In fact in the respondent's response there is only reference of *"certain transporters"* who paid the claimant some money according to the claimant's bank statements and mpesa statement.

39. The other pertinent point is whether claimant had a duty to assign contracts to the transporters. Indeed during cross examination of the respondent's witness he admitted that the duty of assigning contracts to the transporters was by the manager. However he admitted the manager could delegate the same to the clerk. But there is no records to confirm the duties of assigning the duties of giving out transport

business was assigned to the claimant.

40. Furthermore the respondent referred the matter to Athi River Police Station to investigate the case. Apart from producing copies of mpesa statements and bank statements bearing the claimant's names there was no other evidence tendered by the police to prove the money in the statements was given as bribes.

41. The Respondent also admitted that some transactions of moneys alleged to have been obtained illegally from people like one Mary Ndungu and Mary Nyakeru Ndungu and Brian Okello Kangetta are not know to him. He suspected Mary Ndungu was a sister of the claimant. The respondent did not explain why he had circled the names in the statements.

The respondent has not convinced the court that the transactions in the claimant's statements were necessarily from kickbacks by their transporters.

At the very least there is no evidence to necessarily connect the transactions in the mpesa statements and bank statements to allegations of bribery.

42. The claimant is accused of fraudulent activities and conflict of interest in her letter of compulsory leave dated 1st September 2016. During the cross examination, the respondent said claimant's offence was theft. It is not clear in my view that the respondent were certain what offences they are raising against the claimant.

43. Finally in the dismissal letter of the claimant dated 7th November, 2016 she was alleged to have forced drivers to pay extra money in order get transport business. There is no proof of all these allegations. In her defence the claimant stated she had other business with her family members. That may be the case or not but there is no evidence by the respondent to refute the same either.

44. Incidentally in the meeting held on 17th October, 2016 the allegation was that the claimant had received Kshs.3,600,000/= from transporters. In the evidence in court the witness referred to Kshs.6,000,000/= received as bribes.

It is clear that the respondents do not have authentic evidence of the allegations or reasons to warrant the claimant's summary dismissal.

45. In that case the respondent has failed the test of Section 45 (1)(a) of the Employment Act which provides;

1. No employer shall terminate the employment of an employee unfairly.
2. A termination of employment of an employee is unfair if the employer fails to prove.
 - a. That the reason for termination is valid.

46. Section 47(5) for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred will rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer. The court finding is that the employer has not proved sound grounds exist for summary dismissal of the claimant.

47. In **Lawrence Lien Shum versus East Africa Portland Cement Company Limited (2018) eKLR ELRC 1018 of 2017** where claimant was suspended from employment. He was also not availed the audit report and other documents to enable him to respond.

48. The court found his right to fair labour practices under Article 41 of the Employment Act were violated on the ground that there was no valid reason to termination. In the case of **Fredrick Saundu Amolo versus Principal Namanya Mixed Day Secondary School and 2 others** the court ruled that the purpose of removal of an employee temporarily from a workplace must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee defend himself in a meaningful way.

49. The claimant in her response to notice to show cause of 29th September, 2016 clarified that she did not know what questionable dealings she was being accused of or what favours were being referred to and also which transporters she was accused of granting favours.

She alleged that the allegations were unfounded, unsubstantiated and perpetuated with ill motives.

50. In the absence of any solid proof the court tends to agree with the claimant that the reasons given for terminating the claimant's employment are mere witch hunting and cannot pass the test of being valid.

51. Issue No.2: Whether the right procedure for dismissal of the claimant was followed within the meaning of the Employment Act.

Section 41 (1) of the Employment Act provides

“that an employer shall before terminating the employment of an employee, on 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 representative of his choice”.

52. The procedure followed in terminating the employment of the claimant in this case was flawed. The claimant received a letter asking her to go on compulsory leave while investigations would be conducted for fraudulent dealings and conflict of interest. This was on 1st September, 2016.

53. On 1st September, 2016 the claimant was served with notice to show cause and she responded on 29th September, 2016. She was then summoned to a meeting on 11th October, 2016 by a letter dated 7th October, 2016. She was asked to attend in person and she was not given an opportunity to take a shop steward or any other person of her choice.

54. The final meeting took place on 17th October, 2016 where the claimant was obviously not with her representative. She requested for her bank statements and mpesa statements. The meeting did not proceed to completion as she did not have the benefit of those documents and clear statement of her allegations against her.

On 7th November, 2016 she was given a letter of summary dismissal. In **Loice Otieno versus Kenya Commercial Bank Limited cause No.1050 of 2011** the court held that the doctrine of natural justice or procedural fairness is now an essential part of the employment relationship and therefore an employer had to comply with the procedures set out in Section 41 of the Employment Act even in circumstances where summary dismissal or “**instant dismissal**” was contemplated.

55. The court finds the termination of the claimant was not carried out in compliance with the perimeters set out in Section 41 of the Employment Act and is therefore procedurally flawed.

56. The court finds the termination of the claimant is unlawful due to lack of valid reason for the termination and failure to follow the sacrosanct procedure laid down in Section 41 of Employment Act.

57. Issue No.3 is the claimant entitled to the reliefs sought.

Having found that the claimant was unlawfully terminated, I now award her the following reliefs:

1. Fair compensation for unlawful termination

@ Kshs.41,827 x 5 months = 209,135/=.

(Basic salary per the payslip will be taken to be kshs.41,827).

2. One month salary in lieu of notice 41,827/=.

3. On unpaid salary claimant admitted she received 110,000/= so I award salary for August, September, October and 7 days upto 7th November, 2016 less kshs.110,000/= . Kshs.131,481 – 110,000 = 21,481/=

4. Gratuity is not provided in the claimant’s letter of appointment and I see no proof that she is entitled to the same and so is declined.

5. Unpaid leave annual allowance is also not provided and is not proved and so is declined.

Furthermore she has not clarified if she is praying for leave days or leave allowance.

The claimant having been successful in her claim the respondent shall pay her costs.

CONCLUSION

The claimant is awarded a total of Kshs.272,443/= as well as costs of the suit less any statutory deductions.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 21ST DAY OF OCTOBER, 2021

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE