



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 1466 OF 2016

MARTINA OKOTH HELLEN.....CLAIMANT

-VERSUS-

POSTAL CORPORATION OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Postal Officer on 9.7.2012 and worked until 8.4.2016 when she was dismissed from service the respondent. Thereafter she brought this suit on 27.7.2016 alleging that her dismissal was unlawful, wrongful and malicious. The suit basically seeks the following reliefs:

- (a) Declaration that the termination of claimant's employment was unfair, unlawful and wrongful;
- (b) An order directing the respondent to pay the claimant the following
 - i. Salary in lieu of notice Kshs.33,480;
 - ii. Leave allowance for 2016 Kshs. 10,600
 - iii. Pension contribution Kshs.68,216;
 - iv. Damages for breach of employment contract.
- (c) Interest on prayer (b) above;
- (d) An order directing the respondent to
 - (i) Issue the claimant with certificate of service;
 - (ii) Write a letter to the Posta Pensions Scheme to facilitate payment of the claimant's pension.
- (e) Costs.

2. The Respondent filed defence on 15.9.2016 admitting that it employed the claimant from 2008 and dismissed her on the dates stated in the Statement of Claim. However it denied that the dismissal was unfair and wrongful and averred that the termination was lawful because the claimant performed her work negligently. It further averred that a fair procedure was followed because the claimant was given an opportunity to defend herself and ended up admitting the offence. It further averred that the claimant was given a right of appeal but she refused to attend the hearing of her appeal. It further averred that it paid the claimant all her terminal dues and prayed for the suit to be dismissed with costs.

3. The suit went to full hearing, both parties gave evidence and thereafter filed written submissions.

Claimant's Evidence

4. The Claimant testified as CW1 and basically adopted her written statement on 27.7.2016. She explained that in February 2015 she was working at the Local dispatch Section at the Express Mail Services (EMS) an arm of the respondent; that the dispatch section had 4 Cages number A, B, C and D for items destined to Coast, Western & Nyanza, Central and Rift Valley regions respectively manned one person; and

that the items for the dispatch came from the EMS Acceptance counter number 5 and were collected on rotational basis by the 4 officers manning the cages and placed at the Dispatch Table for sorting and collection by the respective officers who were working in the various destination cages.

5. The claimant explained that on 18.2.2015, she was manning Cage B the Supervisor in charge of local dispatch to collect items from the EMS Acceptance Counter 5; that she collected 22 items with an EMS service number, checked them against the EMS services Register number 5 and signed for them; and that thereafter she took the 22 items to the Dispatch table for sorting and collection by the respective officers for the various destination cages as it was the norm.

6. On 13.3.2015, she was informed by a Staffing Officer, Ms Esther Wachira that item No.0206254 which was destined for Gilgil was never delivered. She was further informed that the item was a cheque for Kshs.40, 000. She also was required to explain what transpired on the material day and she admitted to collecting the item and signing for it from EMS Acceptance Counter and left at the Dispatch Table among other 21 items for sorting as it was the procedure. She denied any wrong doing on her part contending that she did not open the parcel to know what was inside.

7. She further stated that she was never accorded any hearing as promised in the letter dated 3.9.2015 which charged her with gross negligence of duty. She further stated that she was also denied hearing of her appeal against the dismissal. Therefore she prayed for the reliefs sought in her pleadings.

8. On cross examination, she denied that collection of EMS mails was part of her official duties. She admitted that upon collection of the mails she used to sign for the same at the Register. She admitted that after collecting item 0206254, she did not hand it over to Cage D but she left at the dispatch table together with the other items for sorting and collection bet the respective officers working in the destination Cages. She denied further that it was her duty to ensure that the item was dispatched to its destination.

9. She admitted that she was served with letter of charge dated 3.9.2015 and she responded on 17.9.2015 and thereafter she was dismissed on 8.4.2015 while she was on leave. She lodged an appeal on 11.5.2015 but it was never heard immediately and she instructed a lawyer to serve demand. She admitted that after demand she was invited for the appeal hearing and referred the employer to her lawyer. She admitted that in her appeal she named Mr. Langat of Cage D as the one who collected the item in issue from the table, and further begged for a second chance because the material incidence was her first shortcoming. She admitted that after

Defence evidence

10. The Respondent's HR Manager Mr.Zakaria Ondegi testified as RW1 and like the Claimant he also adopted his written statements dated 28.10.2016 and 11.11.2016 as his evidence in chief. He confirmed that the Claimant was employed by the Respondent on from November 2008 on casual basis before being appointed to the post of Postal Officer III with effect from 23.7.2012.

11. Rw1 stated that on 18.2.2015, while performing the duties at the respondent's EMS Centre in Nairobi, the claimant was assigned by her supervisor to collect 22 outgoing EMS mails from the Acceptance Counter Officer and charged with distributing the same to various local dispatch cage officers.

12. The claimant signed for the 22 items including EMS item number 0206254, which she was supposed to deliver to Cage D for onward dispatch to Gilgil. However, the claimant neither delivered the said item as expected of her nor could she explain how it went missing from her custody. Rw1 contended that in losing the said item the claimant failed in her cardinal duty of "hand to hand" delivery expected of her as a Postal Officer.

13. Rw1 acknowledged that the respondent's EMS Local Dispatch Section has 4 Cages: A, B, C, and D with each cage manned by a different officers according to the routes. She further acknowledged that the arrangement was that once items were collected from the Acceptance Counter officer and signed for, they are placed on the sorting table from where each of the officers manning the 4 Cages would pick their respective items based on the route.

14. She stated that the claimant was charged with the offence vide the letter dated 3.9.2015 and she responded denying the offence and contended that she was manning Cage B for western region while Mr Langat was the one manning Cage D which was covering Gilgil route where the lost item was destined. Rw1 further stated that the claimant denied liability for the lost item and refuted failure to observe the "hand to hand" check rule and contended that once the items were placed on the Local dispatch Table, anyone could sort out the items to the relevant cages.

15. Rw1 further stated that the Disciplinary Committee considered the defence by the claimant and found that she had not denied collecting the lost item but had failed to observe the cardinal rule of the "hand to Hand" leading to the loss of the item and recommended for her dismissal for gross negligence.

16. She explained that the claimant appealed against the dismissal contending that she took for granted that her colleague Mr. Langat who was manning Cage D would collect the item No.0206254 and that she was at a loss how that situation had slipped her mind. The claimant further admitted negligence in her appeal when she sought a second chance because that was her first shortcoming and promised to be more focused, more sensitive and more careful in handling customers care.

17. Rw1 contended that the claimant was invited for hearing of her appeal on 5.8.2016 but she declined and stated that she would only communicate to the respondent through her lawyer. Consequently, Rw1 denied that the dismissal of the claimant was unfair and unlawful and contended that it was substantively and procedurally fair because the claimant was culpable of negligence and due process was followed.

18. She further contended that the dismissal letter set out the benefits payable to the claimant and as such she was free to pursue her pension

from the Pensions Scheme. Rw1 further contended that the claimant was free to collect her certificate of service from the respondent's office. Finally, she contended that the claimant was paid all her emoluments in full upto and including the 8.4.2016 when she was dismissed and prayed for the suit to be dismissed with costs.

Issues for determination

19. I have carefully considered the pleadings, evidence and the submissions presented by both sides. There is no dispute that the Claimant was employed by the Respondent from 2008 upto 8.4.2016 when she was summarily dismissed for gross negligence in performance of her duties leading to loss of EMS item No. 0206254.

20. Section 45 of the Employment Act bars the employer from terminating employee's contract of employment unfairly and places on the employer, the burden of proving that the reason for the termination is valid and fair, and that the procedure followed was fair. Consequently, the issues for determination herein are:

(a) Whether the reason for dismissing the Claimant was valid and fair.

(b) Whether a fair procedure was followed

(c) Whether she is entitled to the reliefs sought.

The reason for dismissal

21. The reasons for dismissing the Claimant according to the dismissal letter dated 8.4.2016 was set out as follows:

“In accordance with the Employment Act and the provision of the Postal code regulations, the Postmaster General has approved your dismissal from service on ground of negligence of duty and loss of confident [sic] in your continued service.”

22. The Claimant denied the validity of the said reasons and averred that she performed her duties as expected by collecting the 22 items including item number 0206254 and placing them at the Dispatch Table for sorting by the officers manning the dispatch cages. She contended that after placing the items on the said table it was not her role to ensure that the items were dispatched. She further contended that there was no register for signing by the officers Manning the 4 Cages after collecting the items from the Dispatch table. She denied the alleged failure to observe “hand to hand” delivery of the item number 0206254.

23. The respondent pleaded as follows in paragraph 8 of its response to the claim:

“The Respondent further states that its EMS Local Dispatch Section has 4 Cages: A, B, C, and D with each cage manned by a different officer according to the routes. The arrangement was that once items are collected from the acceptance counter officer and signed for, they are placed on the sorting table from where each of the officers manning the 4 Cages would pick their respective items based on the route.”

24. Rw1 in her written statement which she adopted as her evidence in chief reiterated the above pleading verbatim. Having considered the evidence and the above pleading I find that the alleged negligence of duty by the claimant was not valid. She did all that she was supposed to do. There was no procedural requirement for her to hand over the item number 0206254 to the officer manning Cage D to dispatch to Gilgil.

25. It was enough for her to place the item on the sorting table together with the others for the respective officers to sort and pick them according to their dispatch route. Consequently, I hold that the employer has failed to prove before this court by evidence that the reason for dismissing the claimant was valid as required by section 45 of the Employment Act.

26. Accordingly, I further find and hold that the alleged loss of confidence in the claimant's continued service was not well grounded and it was also not valid and fair reason for dismissing the claimant from service.

Procedure followed

27. The Claimant contended that she was never accorded a fair hearing before the dismissal. She contended that the letter dated 3.9.2015 which charged her, promised to accord a hearing but after responding to the charges, she was never called for the hearing until 8.4.2016 when she was summarily dismissed while away on leave. However the Respondent has maintained that the Claimant was accorded opportunity to explain herself in writing vide the said letter and the disciplinary committee found that she had admitted the offence charged vide her said reply and recommended for her dismissal.

28. Section 41 of the Employment Act provides that:

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

(2) Notwithstanding any other provisions 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.”

29. Rw1 admitted that the claimant was not accorded hearing by the disciplinary committee because she allegedly had admitted the offence charged. I have held before and I still stand by that the position, that where an employee admits the offence charged in response to show cause letter, the employer need not take the employee through disciplinary hearing.

30. In this case, however, I am clear in my mind that there was no admission of the offence. The claimant denied the charges and maintained the position that after placing the EMS items at the sorting table it was upon the officers manning the 4 Cages to sort the items according to their route. The respondent confirmed that positing in its pleadings and evidence. Consequently, I find and hold that a fair disciplinary hearing under section 41 of the Employment Act was warranted but the respondent failed to conduct the same and thereby rendered the termination procedurally unfair.

Reliefs

31. In view of the finding that the reason for dismissing the claimant was not valid and fair and that that a fair procedure was not followed before the dismissal of the claimant, I make a declaration that the dismissal was unfair, wrongful and unlawful within the meaning of Section 45 of the Employment Act.

32. Having found that the dismissal was unfair and wrongful, the claimant is entitled to damages under section 49 (1) of the Act. I allow the prayer for one month salary in lieu of notice being Kshs33, 480. I further award her 10 months gross pay equalling to Kshs.334,800 as damages for the unfair termination of her employment contract considering that she had worked for the company from 2008 to 2016, about 8 years without any discipline issues. I have further considered that the claimant did not cause her dismissal through misconduct. Finally I have considered that the dismissal ruined her career at a very young age for no valid reason.

33. The claim for leave allowance for 2016 has not been substantiated and the claimant has not shown how she arrived at that figure.

34. The Claim for pension is declined with direction that the claimant ought to pursue the same from the Pension Scheme under the applicable Scheme Rules.

35. Finally, the claim for certificate of service is allowed as prayed and admitted by the Rw1.

Conclusion and disposition

36. I have found that the dismissal of the Claimant was unfair, wrongful and unlawful within the meaning of section 45 of the Employment Act because it was not grounded on a valid reason and fair procedure was not followed. I have further found that the claimant is entitled to damages as a result of the breaches by the respondent. Consequently, I enter judgment for the Claimant in the sum of Kshs. 368,280 less statutory deductions. The Claimant will have certificate of service, costs plus interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED IN NAKURU THIS 8TH DAY OF OCTOBER, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE