



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

**AT NAIROBI**

**ELRC. CAUSE NO. 21 OF 2016**

**MELODY ACHIENG ODAW.....CLAIMANT**

**-VERSUS-**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent as a Compliance Clerk on 15.12.1997 and worked until 11.4.2014 when she was dismissed from service. Thereafter he brought this suit on 11.1.2015 and later amended the Claim on 9.5.2016. The suit seeks the following reliefs:

- (a) An order directing the respondent to unconditionally reinstate the claimant;
- (b) In the alternative, an order directing the respondent to pay the claimant the following
  - i. Final terminal dues of Kshs.18,882,972;
  - ii. Benefits and pension.
- (c) Damages;
- (d) Costs of the suit plus interest;

2. The Respondent filed defence on 29.5.2018 admitting that it employed the claimant and dismissed her on the dates stated in the Amended claim. However it denied that the dismissal was unfair and wrongful and averred that the termination was lawful because the claimant absented herself from work without permission for 5 days. It further averred that a fair procedure was followed because the claimant was given a hearing before the termination. Therefore it 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 dated 8.1.2016. She stated that she worked for the respondent for 16 years during which time she enjoyed cordial relationship with the employer. She never received any warning letter.

5. She stated that she was served with a show cause letter dated 10.2.2014 accusing her of absence from work between 2.1.2014 and 31.1.2014 without permission. However she denied the alleged offence through her reply dated 17.2.2014 stating that from 2.1.2014 – 7.1.2014, she was on her annual leave; that she reported back on 8.1.2014 and worked until 27.1.2014 when she fell sick and went to hospital; that the doctor gave her a sick off upto 30.1.2014; and that she reported back to work on 31.1.2014.

6. She further stated that on 11.4.2014, she was served with a dismissal letter. The letter stated that her explanation for 11 days was accepted but the 5 days it was not accepted including 17<sup>th</sup>, 20<sup>th</sup>-24<sup>th</sup> of 2014. However, she maintained she was on duty during those 5 days and that she signed the attendance register. Consequently, she contended that the reason for was not genuine.

7. She further explained that on 17.4.2014, she reported the matter to her trade union and but the effort by the union to resolve the matter was thwarted by the respondent. As a result, the union referred the dispute to the Ministry of labour who appointed a conciliator. After hearing

the matter the conciliator upheld the dismissal alleging that her signature in the attendance register during the said 5 days was forged. However, she contended that although the conciliator confirmed that the attendance register was signed, no evidence has been presented to prove that the signature in for 17<sup>th</sup>, 20<sup>th</sup>- 24<sup>th</sup> January 2014 was forgery.

8. She prayed for compensation plus terminal benefits totalling to Kshs.18,706,624 plus interest. She further prayed for Certificate of Service.

9. On cross examination, confirmed that she was served with a show cause letter dated 10.2.2014 and responded. She further confirmed that she was served with show cause letter dated 23.8.2002 for late reporting. She admitted that she received several show cause letters to which responded adequately and was allowed to continue working.

10. She explained that she on medication and counselling for depression on employers recommendation. However, she did not produce any medical reports from Medical Doctor advising her to stay away from work.

11. She reiterated that the reason for her dismissal was the disputed signature for 17<sup>th</sup>, 20<sup>th</sup> -24<sup>th</sup> January 2014. She maintained that she is the one who signed for the said days. She contended that during the conciliation at the Labour Office, she was represented by Mr. Owiyo and he requested for the Attendance Register but it was not produced. Therefore she contended that the allegation that the signature was forged was not proved. She contended that the same register has also not been produced herein to prove the alleged forgery.

### **Defence evidence**

12. The Respondent's HR Manager Ms. Carolyn Okul testified as RW1 and like the Claimant he also adopted his written statement dated 29.5.2018 as his evidence in chief. He confirmed that the Claimant was employed by the Respondent on 15.12.1997 as a Clerical Officer SF 13 and later she was upgraded to Grade 7. On 25.10.2011, she was posted to Industrial Area Branch in the same capacity.

13. On 10.2.2014, the claimant was charged via show cause letter with the offence of being absent from duty without permission on 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>- 10<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup> -24<sup>th</sup> and 31<sup>st</sup> January 2014. On 25.3.2014, the claimant attended disciplinary hearing, in the presence of Shop Steward, before the Fraud Prevention and Discipline Committee and made her oral representations as required under section 41 of the Employment Act.

14. Rw1 further stated that the claimant could not account for her absence on 17<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and 24<sup>th</sup>, January 2014 and she was dismissed summarily on 17.4.2014. According to Rw1, the claimant was a habitual absentee and late reporter as per the records for which she had been warned severally.

15. The claimant lodged appeal against the dismissal through her trade union but the same was rejected because it ought to have been lodged by the claimant personally as provided under the respondent's disciplinary procedures.

16. Rw1 contended that the claimant was paid all her terminal dues and as such she is not entitled to the reliefs sought.

17. On cross examination, Rw1 maintained that the claimant was not on duty on 17<sup>th</sup>, 20<sup>th</sup> -24<sup>th</sup> January 2014 and she had no permission or sick off. Rw1 reiterated that the claimant was heard on 25.3.2014 but she could not account for the said 5 days out of the 16 charged.

### **Issues for determination**

18. 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 15.12.1997 to 11.4.2014 when she was summarily dismissed for absencing herself from duty for 5 days without permission.

19. Section 45 of the Employment Act bars 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 reason, and that a fair procedure was followed. 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**

20. The reasons for dismissing the Claimant cited in the dismissal letter dated 11.4.2014 was absence from duty for 5 days on 17<sup>th</sup>, 20<sup>th</sup> - 22<sup>nd</sup> and on 24<sup>th</sup> January 2014 contrary to Section 44 (4) (a) of the Employment Act. The basis of the said dismissal is that the signature in the Attendance register was forged.

21. The Claimant denied the validity of the said reasons for dismissal and contended that she was on duty on the said dates. She stated that she signed the Attendance Register during the said 5 days, and contended that no evidence was adduced to prove that she absented herself from duty or that her signature in the Register was forged.

22. The claimant's supervisor did not give evidence in this case and as such the evidence by Rw1 requires corroborating documentary evidence or else it amounts to hearsay. The Attendance Register in contention was not produced as evidence to substantiate the alleged forgery. Again even the Register had been produced, still expert evidence would be required to verify the signatures after the claimant insisted that she signed the register.

23. The said crucial evidence was withheld from the court and I find that the alleged forgery of signature on the Attendance Register has not been substantiated. Consequently, I hold that the employer has failed to prove before this court that the reason for dismissing the claimant was valid as required by section 45 of the Employment Act.

#### **Procedure followed**

24. The Claimant contended that she was never accorded a fair hearing before the dismissal. However the Respondent has maintained that the Claimant was accorded opportunity to explain himself vide a show cause letter and later she was called to defend herself orally before a disciplinary committee. I have seen the show cause letter, her response and an excerpt from the minutes of the disciplinary hearing held on 25.3.2014. Consequently, I am satisfied that the Claimant was given fair hearing.

25. 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.”***

26. Having found that the Claimant was afforded opportunity to present his defence before the dismissal, both orally and in writing, I proceed to hold that her dismissal was in accordance with a fair procedure as required under section 45(2)(c) of the Employment Act.

#### **Reliefs**

27. Despite the foregoing finding that a fair procedure was followed before the dismissal of the claimant, my earlier finding of fact was that the Respondent has failed to prove that the reason for dismissing the Claimant was valid and fair. Consequently, I make a declaration that the dismissal was unfair, wrongful and unlawful pursuant to Section 43 of the Employment Act which provides that failure by an employer to prove the reason for termination during legal proceedings challenging termination of the employee's contract of service renders the termination unfair within the meaning of section 45 of the Act.

28. The Claimant prayed for reinstatement or in alternative compensation by an award of twelve months' salary for the unfair termination. By dint of section 12(3) (vii) of the ELRC Act, the remedy of reinstatement is overtaken by events because under the said statutory provision it cannot be ordered if 3 years have lapsed after the separation.

29. It follows that an award of damages is the only available remedy in the circumstances. Under section 49(1) of the Act, I award the prayer for one month salary in lieu of notice being Kshs 88,174 plus compensatory damages. The Claimant worked for about 17 years for the Respondent though with several disciplinary issues. Having considered the foregoing matters, and the possibility of the claimant not getting another job I award the Claimant the 6 months' gross salary as compensation for the unfair termination equalling to Kshs. 529,044.

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

31. All the other reliefs sought are declined because they are not well founded or supported by evidence.

#### **Conclusion and disposition**

32. I have found that the dismissal of the Claimant was not justified by a valid and fair reason and it was therefore unfair, wrongful and unlawful. I have also found that reinstatement cannot be ordered three (3) years after separation and as such the Claimant is only entitled to compensatory damages for the unfair dismissal. Consequently, I enter judgment for the Claimant in the sum of Kshs. 617,218 less statutory deductions. The Claimant will have 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 15<sup>th</sup> 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