



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

CAUSE NO. 381 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

RHODA NYATUKA ISENA..... CLAIMANT

VERSUS

COPTIC HOSPITAL..... RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 19th February 2016 and filed in Court on 11th March 2016, the Claimant sued the Respondent alleging unfair termination. The Claimant avers that she was employed by the Respondent as a cook in December 2010 and worked diligently. That her last salary was Kshs.12,128 per month. It is averred that on 5th December 2015 while on duty, she was summoned by the Respondent's Human Resource Manager who informed her that her services were no longer required as the organisation wanted to hire new cooks after declaring her redundant. That she was not given any prior notice of termination nor was the Labour Office notified of the redundancy in writing.

2. It is further averred that contributions to the NSSF had not been remitted and demands the outstanding arrears. The Claimant prays for –

(i).. One month's salary in lieu of notice.... Kshs.12,128.00

(ii).. Service pay at the rate of 26 days salary for every year completed ()..... Kshs.72,768.00

(iii). Unpaid leave

(12,128 x 0.71 x 5 years)..... Kshs.55,182.40

(iv). Unpaid NSSF and NHIF

(400 x 5.5 years x 12 months)..... Kshs.26,400.00

(v).. Compensation at unfair termination

(12,128 x 12 months)..... Kshs.145,536.00

Total..... Kshs.312,014.40

(vi). Costs of this suit and interest.

3. The Respondent filed its memorandum of reply dated 6th March 2016 on 6th May 2016. It denies the contents of paragraph 3 – 11 of the memorandum of claim including the allegation that the Claimant served diligently and was unlawfully dismissed. It avers that the parties had a meeting and the decision that the Claimants should stop working was by mutual consent and agreement.

4. That the Claimant was not declared redundant and is not owed any leave days.

5. It is further averred that the Respondent offered to settle the sum of Kshs.44,271.80 which is owed to the Claimant but she refused to accept the same after she deserted work.

6. Finally, it is averred that there was no termination in this case.

Evidence

7. Both witnesses adopted their written statements and were cross examined.

8. CW1 confirmed that she was a congregant at the Coptic Church, Nairobi and was employed at the Raha Kids (children with disabilities) to assist with cooking. That she was engaged under an arrangement to assist indigent mothers who were members of the Coptic Church and received a monthly salary as agreed.

9. She testified that she was given a certificate of service and the NSSF statement showed that although some contributions had been made, some had not.

10. The Claimant's payslip for May 2015 shows that the salary was Kshs.12,128 per month and the certificate of service show that she left in December 2015.

11. On re-examination, the Claimant stated that the Respondent did not pay her terminal dues.

12. **RW1 MARION ATIENO ODHAIMBO** testified that the Respondent offered the Claimant the sum of Kshs.44,271 but she declined. She confirmed that the Claimant was dismissed by word of mouth by her predecessor.

13. On cross examination the witness confirmed that Coptic Church member had a fellowship for women and the agreement was to engage indigent women on rotational basis for a specified duration so as to give way to the next on the queue.

14. That the Claimant and one Margaret's term was expiring at the end of 2015. She also confirmed that the contracts of employment was verbal. That the Claimant had been notified and was aware of her duration of employment since she had been invited to the office (Human Resource) and informed by word of mouth in July 2015.

Claimant's Submissions

15. The Claimant isolated two issues for determination namely–

(i) Whether the Claimant was unfairly terminated or declared redundant;

(ii) Whether the Claimant is entitled to the reliefs sought.

16. On termination or redundancy, the Claimant submitted that Section 35 of the Employment Act required an employer to give notice of termination which the Respondent did not since the Claimant was dismissed by word of mouth and was thus wrongfully and unfairly terminated.

17. It is also submitted that the provisions of Section 41 of the Employment Act were not complied with.

18. Reliance was made on the decisions in **Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Ltd [2013] eKLR** on the requirements for redundancy under Section 40 of the Employment Act. The decision in **Francis Maina Kamau v Lee Construction [2014] eKLR** was also relied on to buttress the submission on redundancy. Finally, the decisions in **Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Ltd [2014] eKLR** on the mandatory requirements of Section 41 of the Employment Act on the procedure for termination.

19. On the reliefs sought, it was submitted since it had been demonstrated that the Claimant was unfairly terminated, she was entitled to the reliefs prayed for as per the memorandum of claim.

Respondent's Submissions

20. The Respondent submitted that since the Claimant admitted having been a member of the Coptic Church Women Fellowship, she was obligated to give way for another member of the congregation after effluxion of her duration of service and had been informed of the same by the Human Resource Department as early as July 2015.

21. That the Respondent acting in good faith prepared her final dues but the Claimant rejected it on the ground that it was too little and left. It was submitted that the Respondent is still ready and will to pay the Claimant the sum of Kshs.44,271/= after deduction of PAYE of Kshs.10,304/=.

22. It is further submitted that this is not a case of illegal termination or redundancy. That the purpose of the arrangement was to assist members of the Women Fellowship not employment properly so called. That the Claimant and other women would as they worked save for purposes of starting a business, a fact the Claimant was aware of and is thus estopped from claiming that she was not aware. That the Respondent acted properly at all times and issue a certificate of service and paid NSSF contributions on behalf of the Claimant.

23. It is submitted that there is no basis for the award of damages for unlawful termination as there was no unfair termination. That there

was no basis to award costs.

Analysis and Determination

24. After due consideration of the pleadings, evidence and submissions, the issues for determination are: -

- a) Whether the Claimant's termination was unfair;
- b) Whether the Claimant is entitled to the reliefs prayed for.

25. The Employment Act sets out the various provisions an employer must invoke in the event of termination of a contract of employment. The provisions prescribe the substantive as well as the procedural requirements to be complied with. These requirements are mandatory and noncompliance renders the termination unfair and unlawful.

26. It is not in dispute that the Claimant was terminated in December 2015 and by word of mouth as confirmed by RW1 who testified that the circumstances had been explained to the Claimant whose term of employment had come to an end to enable the Respondent engage the next person on the queue. The Claimant agreed that she had been engaged under a church program designed to assist indigent members of the women fellowship.

27. In as much as the Respondent's arrangement was undoubtedly well intentioned, it failed to formalise the process to ensure compliance with employment law. The Claimant was an employee of the Respondent, the absence of a written contract notwithstanding.

28. Section 45 of the Employment Act provides that for a termination of employment to be deemed fair, the employer must demonstrate that it had a valid and fair reason for termination and the procedure employed must be fair. A termination must pass the substantive and procedural fairness test as courts have held in countless decisions such as **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, **Standard Group Limited v Jenny Luesby [2018] eKLR** and **CMC Aviation Limited v Mohammed Noor [2015] eKLR**.

29. In the instant case, the Claimant alleges that she was declared redundant but adduced no evidence to show that the Respondent had indicated to her that her position would be declared redundant. Her statement is emphatic that –

“On or about 5th December 2015, the Claimant was summoned by the Human Resource Manager who informed her that the Company wanted to hire new cooks thus declaring her redundant.”

30. This statement cannot be true in the context of Section 2 of the Employment Act which defines redundancy as:-

loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

31. The Claimant led no evidence of the alleged redundancy by the Respondent. The Respondent could not have declared the Claimant redundant to hire new cooks if her statement on record is to be believed. From the evidence on record, the Claimant failed and/or refused to honour her part of the bargain insisting on documentation for her termination yet it had been explained to her by the Human Resource Manager. She was aware that the reason was to give another indigent colleague a chance to benefit from the temporal employment offered by the Respondent.

32. The foregoing notwithstanding, the Claimant was not taken through the procedural requirements under Section 41 of the Employment Act. The Respondent's witness confirmed that the Claimant was terminated by her predecessor by word of mouth. It is the finding of the Court that the Claimant's termination was procedurally flawed and thus unfair.

33. The Claimant prays for several reliefs –

(i) One month's salary in lieu of notice

34. The Respondent terminated the Claimant by word of mouth contrary to the provisions of Section 35 of the Employment Act. The Claimant is entitled to one month's salary in lieu of notice of **Kshs.12,138/=**.

(ii) Service Pay at the rate of 26 days' salary for every completed year

35. It is unclear on what basis the Claimant used 26 days per year to compute service pay. In addition the Claimant was a member of the NSSF. In **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR**, the Court held that

“Under Section 35(6) an employee who is a member of NSSF is not entitled to service pay. The claimant having been a member of NSSF is not entitled to service pay.”

36. The amount claimed under this head is **declined**.

(iii) Unpaid leave

37. The Claimant led no evidence on her leave entitlement and how the days accrued or why she did not proceed on leave for the entire duration of her employment by the Respondent. Neither the written statement nor oral testimony make reference to this claim. The claim is **declined**.

(iv) Unpaid NSSF and NHIF

38. This is an amorphous claim. The Claimant adduced no evidence that her NHIF contributions were not made nor did she avail evidence of medical expenses incurred on account of lack of NHIF cover. On NSSF the statement on record show that other than 2011, the Claimant's contributions had been remitted. But more importantly NSSF and NHIF contributions are payable to the relevant statutory bodies and not to employees. These bodies have the necessary administrative structures to ensure compliance with the provisions of law. See **Hassanath Wanjiku v Vanela House of Coffees (supra)**. The claim is **declined**.

(v) Compensation for illegal and unfair dismissal, equivalent to 12 months' salary

39. Having found that the Claimant's termination of employment was unfair for want of procedural propriety, the Claimant becomes entitled to the discretionary remedy provided by Section 49 of the Employment Act. The Court has considered that the Claimant –

- i. Served the Respondent for about 5 years and wished to continue;
- ii. Had a good record as an employee;
- iii. Though aware of the desire of the Women Fellowship at the Coptic Church to help indigent members of the group, took advantage of the informal arrangement to assert her rights as an employee while the Respondent on the other hand made no attempt to formalise the relationship and maintain records as required by law, thereby exposing itself to potential and actual liability as in this case.

40. Taking into account these circumstances, the Court is satisfied that the equivalent of three (3) months' salary is fair. The Court awards **Kshs.36,384/=**. This amount is comparable to the three months awarded in **Liz Ayany v Leisure Lodge Limited [2018] eKLR** where the Claimant had served for 4 years.

41. **In conclusion judgment is entered for the Claimant for the sum of Kshs.48,512/= with costs. Interest at Court rates from the date of judgment till payment in full.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF NOVEMBER 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