



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1960 OF 2016**

**MARY GORRETI NG'ONDWE.....CLAIMANT**

**VERSUS**

**DHL WORLDWIDE EXPRESS KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant instituted the suit vide a Statement of Claim dated 21<sup>st</sup> September 2016 against DHL Worldwide Express Kenya Limited for unlawful termination of employment and refusal to pay her terminal dues. She avers that she was employed by the Respondent as a National Customer Executive from July 2013 and that her monthly remuneration was Kshs. 258,648/- as at the time of her termination. The Claimant avers that her termination on or about 9<sup>th</sup> August 2016 on alleged grounds of non-performance was false, unfair and malicious as she had been diligently performing her duties and received several awards, recognition and recommendations from the Respondent's president. Further, she had risen through the ranks up to the date of her termination of employment. The Claimant further avers that the Respondent terminated her employment without notice, without any show cause notice and without being granted an opportunity to meet her accuser and defend herself and that her position was also immediately advertised and filled internally before the exhaustion of all due processes. She contends that she has consequently suffered immensely for losing her only source of livelihood and thus seeks compensation, including her unpaid salary, leave, notice, severance pay and an acceptable Certificate of Service from the Respondent. She also seeks costs of the suit and interest on her claims at commercial rate from date of suit until payment in full.

2. The Respondent filed a Statement of Response dated 27<sup>th</sup> October 2016 denying ever promoting the Claimant during her employment with it and averring that she was lawfully terminated on grounds of poor and below standard performance. The Respondent avers that the termination came after the Claimant had been given adequate warnings on her poor performance and many opportunities, time and facility to improve but in vain. It contends that its actions were guided by fairness, reasonableness and the law and that the Claimant ought not to be compensated. The Respondent further avers that it has paid to the Claimant her terminal dues to wit; one-month salary in lieu of notice, accrued leave days; and salary for 9 days worked in August 2016 and thus owes nothing to the Claimant. The Respondent avers that the prayer for severance pay is unsustainable and cannot be claimed in the circumstances of the case and that the Claim herein is misguided, misplaced, frivolous and vexatious. It prays that the Claimant's suit be dismissed with costs.

3. The Claimant testified on her own behalf while the Respondent did not call any witness its witness having relocated to the United States of America. The Claimant adopted her statement as well restating her case as pleaded in her memorandum of claim. Parties were to file submissions and the Claimant and Respondent each filed written submissions.

4. Claimant's Submissions

The Claimant submits that Section 45 of the Employment Act forbids unfair termination, that is, termination where the employer fails to prove that the reasons for termination are valid and that the same was in accordance with fair procedure. She submits that under Section 45(5)(c), the Court in determining whether or not the termination was just and equitable is to consider the extent to which the employer has complied with any statutory requirements connected with the termination such as issuance of certificate of service under Section 51 as well as procedural requirements under Section 41. She submits that in the present case, the Respondent has not provided evidence of any show cause letter and/or fair hearing prior to the termination and that this Honourable Court should not hesitate to find that the Claimant's termination was both unfair and unlawful. On the remedies sought, it is she submits that the Certificate of service produced by the Respondent is not hers especially as regards the employment and termination dates. That Section 35(5) and (6) of the Employment Act provides for Notice before termination and/or payment of salary in lieu and since her employment contract provided for 1 month notice, this Court should find that she is entitled to 1 month salary in lieu of Notice. She submits that Section 28 of the Employment Act entitles an employee to an annual leave with full pay and having not been accorded the same as claimed and in the absence of any evidence to the contrary by the Respondent, the Court ought to find that 1 month salary is due and payable to her in lieu of leave. That as it is not disputed

that she worked for 8 days in the month of August prior to her termination, she is entitled to the wages earned as under Section 17 of the Employment Act. Further, that Section 49(c) of the Employment Act provides for 12 months' gross monthly salary as a remedy/compensation for wrongful termination and as herein demonstrated, she is entitled to the same. She also submits that the law on severance pay especially for termination related to redundancy provides for at least 18/30 of one's monthly salary for every year of service completed and having worked for 3 consecutive years, she is entitled to the same.

5. The Claimant submits that the payment of Kshs. 144,341/- on 28<sup>th</sup> September 2016 after this suit had been filed on 23<sup>rd</sup> September 2016, does not cover the foregoing claims as per the cheque and itemized payslip on pages 8 and 9 of the Respondent's bundle and that the said payment can always be credited from the payments due and payable as herein above submitted. She submits that as costs follow the event and given the Respondent's conduct that necessitated this suit, she prays and urges the Court to allow the suit with costs and interest until payment in full.

#### 6. Respondent's Submissions

The Respondent cites Section 45(2) (b) of the Employment Act and submits that from the evidence given it clearly discharged its obligation in law concerning validity of reason for termination as follows:

- a. The Respondent had clear indexes on performance which the Claimant was aware of;
- b. The performance requirements were part of the Claimant's employment contract;
- c. The performance indices were applicable to all employees of the Respondent;
- d. The Respondent conducted regular reviews which the Claimant attended and had opportunity to respond, but did not object to or otherwise respond to any of them;
- e. The Respondent communicated to the Claimant the findings of poor performance in writing, and the Claimant confirms receiving the said letters;
- f. The Respondent initiated and organized coaching and training sessions for the Claimant on several occasions following the negative reviews in order to improve her performance and which the Claimant confirms she attended;
- g. The Claimant failed to improve despite all the efforts put by the Respondent to support her achieve the required work standards, hence the termination.

7. It submits that in accordance with Section 45(2) of the Act, the Claimant's poor performance was a valid and fair reason as it related to the employee's conduct, capability and compatibility with the company and was also based on the operational requirements of the Respondent. The Respondent submits that the Claimant never offered any explanation for her poor performance nor assured the employer of better performance following the reviews and warnings and that it is thus unreasonable and in bad faith that she comes back to claim unfair termination. It is the Respondent's submission that it has discharged its obligation in accordance with Section 45(2)(b) and 45(5)(a), (b) and (e) as issued the Claimant with a final warning prior to terminating her employment; stated the reasons for termination in her letter of termination; paid her outstanding dues; and accorded her an opportunity to be heard but she failed to attend and did not pursue the case any further. It submits that the Claimant's termination in the circumstances was lawful and fair.

8. The Respondent submits that the Claimant is not entitled to the remedies sought since it already paid her dues and awarding her the same would amount to double compensation and having submitted that the Claimant was terminated for lawful cause and through fair procedure, she is not entitled to any compensation as sought and that without prejudice, 1 month pay would be sufficient since she had only worked with the Respondent for 3 years and 1 month. On the prayer for severance pay, the Respondent submits that as per Section 40(1)(g) of the Employment Act, it is trite law that severance pay is only available to an employee who has been declared redundant. The Respondent submits that the case and the evidence presented to court do not show or support redundancy and that the Claimant is thus not entitled to the prayer for severance pay. It is submitted by the Respondent that the Claimant should pay costs to it because she was not justified to file this suit as the issues raised were already canvassed between them prior to termination and further, she does not dispute receiving her final dues. Further, that the Claimant is also not entitled to interest which in any case ought to be payable from the date of judgment.

9. The Claimant was employed by the Respondent and was terminated on account of poor performance. That on its own resolves the issue of redundancy alleged by the Claimant. The dismissal was not a declaration of redundancy and as such cannot attract severance pay. In respect to the balance of the claim, the Claimant was dismissed unceremoniously and the payments in respect to her claim made after this suit was filed. The dismissal was not preceded by a hearing as required under Section 41 of the Employment Act and though an employer is permitted to dismiss an employee on grounds of poor performance, the same must be meted out in accordance with the law. The unilateral termination by the Respondent was thus *ipso facto* unfair as the Claimant was not accorded any opportunity to defend herself against the allegations of poor performance nor was any assessment done by way of performance review. The Claimant's terminal dues were duly settled and thus only the issue of compensation remains. The Respondent asserts that for the compensation aspect a sum of one-month's pay would suffice as the Claimant had only worked for it for a period of 3 years one month. The Claimant on her part would wish for the maximum compensation for the dismissal. The Respondent having failed to accord the Claimant the safeguards under Section 41 and granted the fact that she held a mid-level position coupled with the fact that she has not been able to secure alternative employment since the dismissal, a compensation of payment of 5 months salary would suffice for compensation of the Claimant for the unscheduled termination of her career. In the final analysis I enter judgment for the Claimant for:

- i. 5 month's salary as compensation – Kshs. 1,293,240/-;

ii. Interest on the sum in i) above at court rates from the date of judgment till payment in full;

iii. Costs of the suit; and

iv. A proper certificate of service under Section 51 of the Employment Act.

It is so ordered.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of November 2021**

**Nzioki wa Makau**

**JUDGE**