



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1685 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ESTHER WANJIKU WANGARI.....CLAIMANT

VERSUS

AAR HEALTH CARE HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his claim vide a Memorandum of claim dated 25th August 2017 in which he prays for the following remedies.
 - a. A declaration that the termination of employment issued to the Claimant was unfair, unlawful, unprocedural and unjustified
 - b. Damages for unlawful termination the equivalent of 12 months' salary at Kshs.340,260 per month totalling..... Kshs.4,083,120
 - c. One month salary in lieu of notice at..... Kshs.340,260
 - d. Accrued leave days..... Kshs.192,814
 - e. 7 days' pay as part of the notice period..... Kshs.79,394
 - f. Severance pay for the 7 year worked
 - g. General damages for causing the Claimant emotional distress and lack by unduly withholding her terminal dues
 - h. Interest on (b), (c), (d), (e) and (f) at Court rates from the date of filling the suit until payment in full and;
 - i. Costs of the suit
 - j. Any other remedy that this Court may deem fit to grant.
2. The Respondent entered appearance on the 11th September 2017 but did not file a response to the claim. The facts as pleaded in the memorandum of claim are therefore uncontested. The Court on 9th December 2019 gave directions that the matter proceeds as an undefended claim and the Claimant was directed to file witness affidavit and submissions.
3. The Claimant pleaded that she was employed by the Respondent AAR Insurance Kenya Limited on the 11th of January 2007, that in the course of her employment she served diligently. That due to her performance she rose in rank to the position of Regional financial controller earning a gross salary of Kshs.340,260.
4. The Claimant states that on the 9th May 2017 she was issued with a termination letter that did not disclose the reasons for termination. The Claimant further states that prior to the issuance of the termination letter the Human resource manager of the Respondent pleaded with her to resign as the company had already advertised the position and issued her with a recommendation letter.
5. The Claimant avers that the termination was unprocedural, unfair and malicious as she was not subjected to disciplinary hearing nor informed of the reasons for termination. The Claimant states that she was not paid salary in lieu of notice, accrued leave days nor issued a

certificate of service.

Claimant's Submissions

6. The Claimant submits that Courts have considered termination to be unfair if the employer fails to demonstrate the reasons for termination.

7. The Claimant relies on the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** where the Court held that;

“...for a termination of employment to pass the fairness test,

It ought to shown that there was not only substantive justification for termination but also procedural fairness....”

8. The Claimant states that Section 43 of the employment Act obligates the employer to prove the reasons for termination of employment and where the employers fails to do so the termination is deemed to be unfair.

9. The Claimant submits that the letter dated 9th May 2017 did not disclose reasons for termination. Further that there was no procedural fairness envisaged under Section 41 of the Employment Act.

10. She relied on the decision in **Kenfreight (EA) Limited v Benson K Nguti (2016)** where the Court of Appeal held that;

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer was duty bound to explain to an employee in the presence of another employee or union official, in a language the employee understood, the reason or reasons for which the employer was considering termination of the contract. In addition an employee is entitled to be heard and his representation if any considered by an employer before a decision to terminate his contract of service was taken.”

11. The Claimant submits that the termination caused her trauma, ridicule and emotional torture. She therefore prays that the Court awards her 12 months' salary as compensation for damages suffered.

12. The Claimant relies on the remedies as provided for in Section 49 of the Employment Act and the mode of assessment as set out by the Court in **Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union [2016] eKLR**.

Analysis and Determination

13. The law relating to termination of employment is contained in Sections 41, 43 and 45 of the Employment Act.

14. The Claimant submitted that the Respondent terminated her employment vide a letter dated 9th May, 2017 referencing her contract of employment dated 11th January, 2014 which indicated that the organization would terminate her upon issuance of a 1 month notice.

15. The termination letter did not give reasons for termination of employment. The letter is reproduced below –

“CONFIDENTIAL

09 May 2017

ESTHER WANGARI

C/O AAR HEALTHCARE HOLDINGS LTD

NAIROBI

Dear Ms. Esther,

RE: TERMINATION OF CONTRACT

Reference is made to your contract dated 11th January 2014. Under clause 11 on termination, it is states that the organization can give you one month notice if they wish to terminate your contract. In light of this we wish to give one month notice effective today 8th May 2017. Your last working day will be 30th May 2017.

Your dues in full and final settlement will be paid as worked out here-below, less any liabilities to the company:

- 7 days being part of your notice
- One month pay
- Your accrued 16.67 Leave days.

Your pension dues will be paid to you as per the RBA rules and facilitated by our pension scheme administrators. You are required to hand over all the company properties in your possession as per the attached clearance form.

We take this opportunity to thank you for your contribution to the company during your period of employment and wish you luck in your future endeavours.

Yours Sincerely,

AAR HEALTHCARE HOLDINGS LIMITED

SIGNED

DR. ROB BAKKER

GROUP CHIEF OPERATION OFFICER”

16. Section 45 prohibits the unfair termination of employment by employers and specifically provides that for termination to be lawful the employer must comply with both fair procedure and prove valid reason for the termination. Section 45(2) of the Employment Act is reproduced below –

45. Unfair termination

2. No employer shall terminate the employment of an employee unfairly.

3. A termination of employment by an employer is unfair if the employer fails to prove—

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason—

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.

17. In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

18. The termination letter issued by the Respondent did not disclose the reasons for termination as required by section 45(2)(b) of the employment Act as such did not pass the substantive test of termination. As such I declare Claimant’s termination of employment unlawful and unprocedural.

Whether the Claimant is entitled to the reliefs sought;

a. Damages for Unfair Termination

19. Having found the termination of her employment unfair, and taking into account the manner in which the said employment was terminated, the fact that the Claimant did not contribute to the same, and that she worked for the Respondent for a period of over 10 years, further taking into account the fact that the Claimant was never subjected to a fair disciplinary process, I award the Claimant maximum compensation equivalent to 12 months’ salary. According to the Claimant’s last salary review by letter dated 23rd February 2017, she was earning a monthly gross salary of Kshs.340,260. I therefore award her the sum of **Kshs.4,083,120.00** as compensation.

b. One month Salary in lieu of notice

20. The termination letter dated 9th May 2017 indicated the Claimant was issued a notice of 1 month which the Claimant states that she was never paid. As such I find that the Claimant is entitled to one month’s salary in lieu of notice in the sum of **Kshs.340,260.**

c. Accrued leave days

21. The Claimant’s letter of termination states that she had 16.67 leave days. She is thus entitled to payment for accrued leave days and is awarded as prayed in the sum **Kshs.192,814.**

d. Certificate of Service

22. The Respondent is directed to issue a certificate of service to the Claimant in terms of Section 51 of the Employment Act.

e. Costs and Interest

23. The Claimant is awarded costs and interests at Court rate.

Conclusion

24. In conclusion judgment is entered for the Claimant against the Respondent in the total sum of Kshs.4,616,194/=.

25. The Respondent to issue the Claimant with a Certificate of Service forthwith.

26. The Claimant is awarded costs and interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF NOVEMBER, 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE