



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 366 OF 2017

BEATRICE JELIMO TOROITICH.....CLAIMANT

VERSUS

1. S.G.S. KENYA LTD

2. KEZIE KARUOKO KIHARA

3. ALBERT STOCKELL.....RESPONDENTS

J U D G M E N T

1. The suit herein was instituted by the Claimant vide a Memorandum of claim dated 20th February 2017 and filed in Court on 21st February 2017. The Claimant's claim against the Respondent is for two months salary in lieu of notice, payment for pending eight (8) leave days, six (6) years severance pay and overtime worked during that period, twelve (12) months salary being compensation for loss of employment, and payment for the period the Claimant would have worked before the retirement age of sixty (60) years (Paragraph 15 and 22 of the Memorandum of Claim). In the prayer part of the Memorandum of Claim, the Claimant also prays for issuance and release of her Certificate of Service and payment of NHIF, NSSF and all insurance claims.

2. The Claimant pleaded, *inter alia*:

a) that in April 2011, the Claimant was employed by the Respondent as an Environmental Inspector, earning a salary of ksh.98,643.52.

b) that on 11th January 2017, the Claimant's services were terminated by the Respondent without commission of any offence by the Claimant, contrary to Sections 43 and 45 of the Employment Act 2007.

c) that no disciplinary proceedings were held and that the Claimant was only called and handed a dismissal letter; signed by the 2nd and 3rd Respondents.

d) that the 2nd and 3rd Respondents were biased and there was no independent disciplinary committee/meeting that could come up with fair findings.

e) that the Respondent did not comply with Sections 43 and 45 of the Employment Act 2007.

3. The Respondents entered appearance on 20th March 2017 and subsequently filed a Response to the Claim and a Counter-Claim on 26th April 2017. The Respondent denied all the matters set out in the Claimant's Memorandum of Claim and put the Claimant to strict proof thereof.

4. The Respondent further pleaded, *inter-alia*:-

a) that by a letter dated 16th November 2016, the Claimant was asked to show cause why she could not be disciplined for committing fraud by submitting false claim forms and receipts for ksh.67,750 for accommodation at Royal Homes, Mombasa.

b) that the Claimant responded to the said notice vide a letter dated 17th November 2016.

c) that subsequently on 25th November 2016, a disciplinary hearing was held at the 1st Respondent's premises and presided over by Philip Abuor and Ben Kilavi, and that the Claimant willingly attended the hearing.

5. The 1st Respondent Counter-claimed from the Claimant a sum of kshs.67,750 which the 1st Respondent pleaded the Claimant had refused to refund.

6. On 20th November 2019, the Claimant filed a Reply to the Respondent's Response and Response to Counter-Claim and *inter-alia*:-

a) denied submitting any false receipts, as alleged by the Respondent and pleaded that the Respondents' allegations were not pegged on factual findings as the Respondents had failed to make proper enquiries and findings into the matter.

b) pleaded that the Claimant performed her duties well and that the sums being claimed by the 1st Respondent had been well utilized towards the 1st Respondent's work and interest, and that the 1st Respondent should not be allowed to unjustly enrich itself.

7. The Claimant also filed her recorded statement dated 20th February 2017 and a list of documents dated the same date. On their part, the Respondents filed two witness statements (by Benson Kilavi and Adams Onger) dated 6th August 2021 and a list of documents dated 3rd August 2021.

8. Among the documents listed by the Respondents are EHS Travel Expense Final Audit Report, Copies of Royal Homes Receipts for ksh.33,250 and Ksh.20,500 respectively, a show Cause letter dated 16th November 2016, Hearing Report dated 25th November 2016 and the Claimant's dismissal letter dated 11th January 2017.

9. On her part, the Claimant listed and filed the following documents, among others; the contract of employment dated 11th May 2012, a payslip (for September 2016) and demand notice dated 13th January 2017.

10. When the suit came up for hearing on 9th August 2021, the Claimant adopted her recorded and filed statement as part of her evidence and produced as exhibits the documents filed together with her Memorandum of Claim as exhibits. Documents produced in evidence by the Claimant included her contract of employment dated 11th May 2012, the Claimant's payslip for September 2016, a letter dated 8/1/2015 by Total Kenya Limited to its dealers, a purchase Order in favour of the 1st Respondent (by Total Kenya Limited) dated 19th December 2014, an invoice to Total Kenya Limited (by the 1st Respondent) dated 12th February 2015 and letters by the 1st Respondent to the Claimant dated 16th October 2012 and 31/1/2013 respectively, among other documents.

11. The Claimant testified, both in chief and under cross-examination, that she was employed by the 1st Respondent as an Environmental Inspector, and that during the period January and February 2015, she was assigned to do an environmental audit report for Total Service Stations in Mombasa and Kilifi in the Coastal Region, which region was outside her work station. The Claimant further testified that together with her line manager, she prepared a work plan and budgeted for fourteen (14) days, which was approved by the manager, upon which money was given to the Claimant for the job.

12. The Claimant testified that she stayed at Royal Homes in Mombasa for fourteen (14) days, which period was sufficient for the work she was doing, and that she stayed in the hotel together with the company driver who drove her there every day.

13. The Claimant further testified that during the disciplinary hearing on 25th November 2015, she told the panelists that she could not describe the physical location of the Royal Homes Hotel where she had stayed, but could walk there physically.

14. The Claimant denied the 1st Respondent's allegation that the telephone number indicated on the hotel receipts presented to the 1st Respondent by herself was hers, and denied that she had intended to defraud the first Respondent as charged in the show cause letter dated 16th November 2016.

15. The Claimant admitted having received the show cause letter dated 16th November 2016, having responded to the show cause letter on 17th November 2016, having attended a disciplinary hearing on 25th November 2016 and having been informed of the right to be accompanied to the hearing by either a witness or any other person.

16. The Respondents called two (2) witnesses, Adams Onger (DW1) and Benson Kilavi (DW2). DW1 told the Court, under cross examination, that he prepared the 1st Respondent's Audit Report dated 24th November 2016 in which he mentioned Royal Homes in the report on the Claimant, and that when he called the telephone number on the hotel receipts, the phone was picked by a lady who said it was a wrong number. DW1 testified that he did not seek to find out when the said lady had acquired the said phone number and did not seek assistance from the service provider (safaricom). DW1 produced the audit report as the Respondents' exhibit no. 1.

17. DW2 testified that he was employed by the 1st Respondent from 2013 to 2018 as a Human Resource Assistant. He produced the documents listed in the Respondents' list of documents as exhibits, save for the audit report which DW1 had produced.

18. DW2 testified that the period of January and February 2015 was covered by the audit report and that during that period the Claimant was given money to travel for an assignment, and she travelled. That the Claimant was not a resident of Mombasa and that for her to work in Mombasa she had to get accommodation and that action regarding the Claimant's travel to Mombasa in January and February 2015 was taken in November 2016, almost two (2) years later.

19. DW2 further testified that the disciplinary panel, of which he was part, concluded that the receipts presented by the Claimant were fictitious because the hotel facility could not be reached on the contacts given on the receipts presented. He however told the Court that he had nothing to show that the contacts given on the receipts in issue belonged to the Claimant.

20. The show cause letter issued to the Claimant by the Respondent on 16th November 2016 reads in part:-

“further to an internal audit carried out within SGS Kenya Limited, we have discovered anomalies on your travel expenses claim forms and accompanying receipts submitted to support your claim as tabulated below.

1. Claimed ksh.67,750 as cost for 14 days accommodation at Royal Homes Mombasa: facility does not exist, hotel contacts on receipts belong to you. This implies dishonesty, falsification of receipts and fraud...”

21. In view of the Claimant’s admission as set out in paragraph 15 of this judgment; the major issue that the Court must determine before delving into any other issue is whether the reasons given by the 1st Respondent for termination of the Claimant’s employment were valid.

22. Section 43 of the Employment Act provides as follows:-

“ in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

23. The 1st Respondent’s audit report dated 24th November 2016 that led to the issuance of the show cause letter states as follows in relation to the Claimant:-

“JELIMO BEATRICE

While conducting audits for Total Kenya she claimed to have spent in Royal Homes Mombasa for 14 days paying a total sum of ksh.67,750. This facility does not exist, and the contact given on the receipt is an individual’s contact not hotel...”

24. The foregoing extract of the 1st Respondent’s Audit Report confirms, *prima facie*, that the Claimant undertook an audit for Total Kenya. The Claimant produced as an exhibit a letter by Total Kenya Limited dated 8th January 2015, addressed to its dealers advising them of an annual environmental audit that was to be conducted at their service stations by the 1st Respondent. The Claimant was an Environmental Inspector with the 1st Respondent.

25. DW2 confirmed that the Claimant, who was not a resident of Mombasa, travelled to Mombasa for the audit assignment and that for her to work there, she had to get accommodation. The Respondents (DW1 and DW2) did not dispute the number of days that the Claimant took to complete the assignment in Mombasa and Kilifi. They did not give any other hotel facility in which, in their view, the Claimant ought to have stayed.

26. The Claimant’s dismissal letter states in part:-

“ ...you falsified Hotel receipts and failed to confirm the existence of the facility, with intent to fleece the company money issued for the business trip as presented to you during your hearing...”

27. The Respondents did not allege that the Claimant did not travel to Mombasa, that she did not undertake the assignment assigned there, or that the assignment took fewer days than those for which money had been advanced by the 1st Respondent, or that the fourteen days accommodation cost less than the money advanced/given to the Claimant.

28. Further, the Respondents did not tender any evidence to show that the contact on the hotel receipts presented by the Claimant either belonged to the Claimant or to another individual as alleged both in the show cause and dismissal letters. The two letters contain deferring allegations regarding the contacts on the hotel receipts. The show cause letter stated that the contacts belong to the Claimant whereas the dismissal letter stated that the contacts belonged to an individual.

29. Section 107 of the Evidence Act provides as follows:-

(1) “whoever desires any Court to give judgment as to any legal right or liability depended on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies in that person.”

30. The 1st Respondent failed to demonstrate that the contacts on the hotel receipts presented by the Claimant did not belong to any hotel, but to either the Claimant or to another individual. The 1st Respondent did not discharge the burden of proving its allegations as by law required.

31. The allegations of dishonesty, falsification of receipts, fraud and intent to fleece the 1st Respondent of money given for a business trip, on the basis of which the Claimant was dismissed, were not proved by the 1st Respondent (the employer). Termination of the Claimant's employment was not based on valid reasons. It was unfair within the meaning of Sections 43 and 45 of the Employment Act 2007.

32. Section 45(1) of the Employment Act provides as follows:-

“ no employer shall terminate the employment of an employee unfairly”.

Section 45(2) provides:

“a termination of employment by an employer is unfair if an 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 employees conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer and;

(iii) That the employment was terminated in accordance with fair procedure.”

33. Having considered the pleadings filed, evidence adduced and submissions filed by counsel for both parties, issues for determination appear to me to be as follows:-

a) whether termination of the Claimant's employment was procedurally fair.

b) whether termination of the Claimant's employment was substantively fair.

c) whether the Claimant is entitled to the reliefs sought.

d) whether the 1st Respondent's counter-Claim has been proved.

34. On the first issue, the Respondent demonstrated, and the Claimant admitted under cross examination that, indeed, due process was followed. The Claimant was served with a show cause letter which she admitted having responded to on 17th November 2016, though none of the parties herein exhibited the response in Court. The Claimant was invited for a disciplinary hearing by the 1st Respondent, which she attended and she admitted having been advised on the right to be accompanied to the hearing by a witness. I find and hold that procedural fairness as set out in Section 41 of the Employment Act 2007 was served.

35. On the second issue, and as already stated in paragraphs 29, 30 and 31 of this Judgment, the 1st Respondent did not demonstrate the validity of the reasons for termination of the Claimant's employment. The assignment assigned to the Claimant in the coastal region was undertaken by the Claimant, and the number of days utilized in undertaking or performing the assignment was never disputed by the 1st Respondent, and neither was the cost of reasonable accommodation in the area of assignment. All that the 1st Respondent questioned was the existence of the hotel facility in which the Claimant was accommodated during the period of the assignment. The contacts on the hotel receipts presented by the Claimant was the subject of disciplinary proceedings against the Claimant.

36. The 1st Respondent alleged in the show cause letter that the contacts belonged to the Claimant while in both the audit report giving rise to the disciplinary proceedings and the dismissal letter it was alleged that the contacts belonged to an individual, but not to an hotel and that the hotel did not exist. The Respondent never proved the validity of these allegations through conclusive investigations into the ownership of the telephone contacts provided on the hotel receipts presented. Although the Claimant told the panelists during the disciplinary hearing that she could physically walk to the hotel in issue, she was never asked to show the same physically to the Respondents or to the panelists. The allegations of falsification of documents/receipts, dishonesty, fraud, fleecing of company money and violation of the 1st Respondent's code of integrity were never proved by the 1st Respondent. There was no substantive fairness in terminating the Claimant's employment. It was held by the Court of Appeal in the case of Janet Nyandiko –vs- Kenya Commercial Bank Limited [2017] eKLR as follows:-

“Section 45 of the Act makes provisions, inter alia that no employer shall terminate the employment of an employee unfairly. In the terms of the said section, a termination of an employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid: That the reason for the termination was fair reason and that the same was related to the employees conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.....the parameters of determining whether an employer acted in accordance with justice and equity in determining employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal...the extent to which the employer has complied with the procedural requirements of Section 41...and the existence of any warning letters to the employee.”

37. In the present case, the 1st Respondent did not act in accordance with justice and equity. The Claimant undertook the assignment given to her by the 1st Respondent and the 1st Respondent benefitted from the same. No issues were raised by the 1st Respondent over the quality and precision of the work done by the Claimant during the fourteen days that she stayed in Mombasa on a tour of duty. No fraud was demonstrated regarding the use of money given to the Claimant to facilitate her stay and work in the coastal region. The only issue raised by the 1st Respondent was the existence or non-existence of Royal Homes where the Claimant alleged to have been accommodated. The 1st Respondent alleged that the hotel did not exist. It behoved the 1st Respondent to prove that allegation. It failed to do so, but nevertheless proceeded to terminate the Claimant's employment on the basis of that allegation.

38. The Claimant was not shown to have had a record of previous iniquities or transgressions against her employer. The employer had not provided and/or recommended a particular hotel facility where the Claimant was supposed to be accommodated during her fourteen days stay in Mombasa.

39. On the third issue, I find and hold that the Claimant is entitled to some of the reliefs sought, which I proceed to address.

40. Having found that there was procedural fairness in the termination of the Claimant's employment, **though for invalid reasons**, it is my finding that the prayer for payment in lieu of notice is not merited. The prayer for severance pay cannot be allowed as the Claimant's termination did not result from redundancy.

41. The Claimant is entitled to compensation for unfair termination of employment as the employment was terminated on the basis of invalid reasons, and I award her ten (10) months salary for unfair termination of employment. The prayer for payment of a sum equivalent to the Claimant's earnings until she attains the retirement age of sixty (60) years cannot be allowed under Section 49 of the Employment Act 2007.

42. The claim for overtime payment was NOT specifically pleaded and was NOT proved, though the Respondent (DW2) admitted, under Cross examination, that the 1st Respondent's employees worked from 8.00 a.m to 5.30pm. The claim is declined. The claim for NHIF and NSSF is untenable, and cannot be allowed. NHIF and NSSF contributions are statutory deductions which must be remitted by the employer to the relevant statutory bodies, once deducted. National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) operate within statutory provisions, and are mandated to legally recover from any employer any deductions made from employees but not remitted to them as by law provided. The Claimant cannot, therefore, claim the same.

43. On the claim for insurance claims, the Claimant's employment contract dated 11th May 2012 contains the following clause:-

“after confirmation of your service, you will be placed on the company Provident Fund Scheme in January following date of confirmation. Contributions will be 5% employee and 10% employer of your basic salary.”

If the benefits payable to the Claimant under the aforesaid provident fund Scheme has to date not been released by the 1st Respondent, the Claimant should have no difficulties pursuing payment of the same under the relevant law.

44. On the fourth issue, it is my finding that the Claimant's Counter-Claim against the Claimant was not proved. The same is hereby dismissed.

45. Finally, judgment is hereby entered in favour of the Claimant against the 1st Respondent for a sum of ksh.986,435.20 being the Claimant's ten (10) months' salary as compensation for unfair termination of employment.

46. The 1st Respondent is hereby directed to issue the Claimant with a Certificate of Service within forty five (45) days of this judgment.

47. The Claimant's claim against the 2nd and 3rd Respondents is dismissed with no orders as to costs. The two ought not to have been sued in the first place.

48. The Claimant is awarded costs of the claim and of the Counter-Claim and interest at Court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF DECEMBER 2021

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Awadu for Claimant

Mr. Obura Respondent