



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2104 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DORIS MUKAMI MUHIATO.....CLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed her memorandum of claim dated 5th October, 2016.

She says she was employed as a guard earning a salary of Kshs.8,651/= per month from 16th August, 2008. She says that on 25th October, 2011 she was promoted to a position of stores clerk earning a salary of Kshs.20,000/= per month.

Subsequently she says that her salary was increased to Kshs.33,920/=.

2. The Claimant states that on 11th February, 2016 she was issued with a notice to show cause whereby she was accused of failing to respond to an email from the Human Resource Department.

3. She says that on 23rd February, 2016 she got a notice to terminate her employment with accusation of entering wrong data in the NAV system.

She appealed and was reinstated.

On 20th June, 2016 the Claimant's employment was terminated on the grounds that she had not repaid a personal loan borrowed from one Granville Siko a junior staff.

4. The Claimant says that prior to her termination, she had been harassed by Sophia Mwendwa who had insisted that she should resign or else her employment would be terminated summarily.

5. The Claimant says that the Respondent was not a privy to the loan from Granville Siko and had no authority to act as a debt collector.

She says that the Respondent refused to consider her father was in hospital and his medical bills were draining her resources.

6. She therefore states that her termination was unfair and unlawful.

7. She prays as compensation as a result thereof Kshs.608,816/= made as follows:-

(a) 22 days worked in June, 2016 Kshs.22,000/=

(b) One month salary in lieu of notice Kshs.33,920/=

(c) Accumulated leave days Kshs.33,920/=

(d) Outstanding overtime Kshs.111,936/=

(e) Compensation for loss of employment for 12 months Kshs.407,040/=

Totaling Kshs.608,816/=

Costs of the suit and interest.

8. The Respondent in his evidence states that Claimant was employed as a guard and subsequently was promoted to an administrative clerk around 2011.

He says that the position accorded to the Claimant carried great responsibility.

Unfortunately they received complaints around the fact that the Claimant would use her position to gain benefits from the subordinates. She apparently would coerce her subordinates to loan her money and would refuse to pay the same.

9. A particular incident was brought by one Granville Siko who lent money to the Claimant in 2015 and refused to pay him.

10. Respondent says that the claimant's action towards the subordinate was detrimental to the Respondent and was contrary to the terms of contract of service and Claimant's legal obligations as an employee under the Employment Act 2007.

11. Following the Claimant's unprofessional actions she was asked to show cause why disciplinary action should not be taken against her (13th June, 2016).

The disciplinary hearing took place on 16th June, 2016.

12. After the disciplinary hearing it was ruled that the Claimant be summarily dismissed. She was given an opportunity to appeal but she did not appeal.

13. The Respondent states that the Claimant was paid all her terminal dues.

14. The Respondent states that there is no dispute therefore for determination and the Claimant's claim is misplaced and an abuse of the court process.

15. The Respondent's averment is that the Claimant's employment was lawfully terminated and her claim should be dismissed with costs.

ISSUES FOR DETERMINATION

(i) Did the Respondent have a valid reason to terminate the Claimant's employment.

(ii) Did the Respondent follow the right procedure.

(iii) Is the Claimant entitled to the reliefs sought.

DETERMINATION

16. The issue as to whether the Respondent had a valid reason to terminate the Claimant's employment.

A valid reason or reasons for terminating an employee is now mandatory. It is not just a mere excuse or a mere perception. The reason must be tangible and valid.

The law of employment and numerous authorities are candid on that.

17. Section 45(1) of the Employment Act provide that an employer shall not terminate the employment of an employee unfairly. Section 45 (2) of the said Act provide that the termination of employment by an employer is unfair if the employer fails to prove that the reason for termination is valid.

18. Further Section 43 (1) of the Employment Act provides that in any claim arising out of termination of a contract the employer shall be required to prove the reason or reasons of 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.

19. The Claimant worked for the Respondent from 2008 to 20th June, 2016 when her employment was terminated.

20. From the Claimant's evidence on 11th February, 2016 Respondent issued the Claimant with a notice to show cause on the grounds she had failed to respond to an email from Human Resource Department.

On 23rd February, 2016 her employment was terminated on ground of entering wrong data entries into NAV system upon appeal the termination was withdrawn and she was reinstated to work.

21. On 20th June, 2016 her employment was terminated on the basis of a loan she had borrowed from her colleague one Granville Siko.

She says she was dismissed without holding a disciplinary meeting.

22. The Respondent annexed a hearing form which indicates a hearing took place and Claimant admitted she had borrowed Kenya Shillings fifteen thousand which she had refunded except Kenya Shillings two thousand only.

Claimant also wrote a letter the same day on 16th June, 2016 to the Operations Manager and accepted she had borrowed the money from Granville and had done her best to pay except 2000/=. She emphasized that the issue was very personal. She also revealed that she was struggling with her father who was undergoing cancer treatment.

23. Granville seemed to have raised the issue on 13th June, 2016 and so is not clear where the Respondent got the information referred in their letter of 13th June, 2016 with a call for notice to show cause.

They claim that the Claimant had been called to another disciplinary meeting on 8th April, 2016 where they said she was accused of borrowing money from a junior staff being one Granville Siko. There is no reference or documents to that alleged meeting of 8th April, 2016.

24. The said Granville is purported to have written a letter about the money owed to him on 13th June, 2016 and the same day Claimant was given notice to show cause and was suspended from work. She was asked to report to work on 16th June, 2016 for disciplinary hearing.

25. There is no evidence that the right procedure was followed as provided in Section 41 of the Employment Act during the disciplinary hearing.

The only document availed to the court is the hearing form which is very casual and does not capture the minutes of the meeting or the procedure of how the said disciplinary meeting was convened.

The outcome of the deliberations of the meeting are also not captured.

26. The Claimant in her defence says she had paid Siko the money except Kshs.2000/= which she says she had already discussed with him.

27. The other employees who the Claimant is accused of having owed money seem to have raised their complaints only after the Claimant had already been terminated from employment.

The Claimant was dismissed on 20th June, 2016 and those others apparently wrote their complaints on 27th June, 2016.

28. The court finds that the reason given by the Respondent to terminate her services was quite far-fetched. The issue of having borrowed money from her colleague was not related to her employment.

In any event she was in the process of repaying the same and admitted as much.

It would appear the respondent was looking for a reason to terminate the Claimant's employment and found the debt owed to Granville Siko a soft landing to use.

I will not even refer to the other employees because their letters were written after she had already been terminated.

29. Considering the Respondent had already terminated the Claimant's employment on 23rd February 2016 but reinstated her only to terminate her again on 20th June 2016, it would appear the matter of terminating the Claimant by the Respondent was foregone conclusion.

The reason given for terminating her employment was not valid.

30. The process followed was also not in compliance with Section 41 of the Employment Act. There was no proper disciplinary hearing that took place on 16th June, 2016.

The Claimant was called to a disciplinary hearing by a letter dated 13th June, 2016 and was told the meeting was on 16th June, 2016 at 8.30a.m. She was not informed that she could take a fellow employee as her representative or a floor shop steward.

31. I however note that in the hearing form it is recorded that a Geoffrey Obedi was employee representative but were not told if she was the one who invited him. Section 41 of the Employment Act provide that subject to Section 42(1) an employer shall before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language he understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during his explanation.

This procedure was ignored by the Respondent and it seems the Respondent was just in a great hurry to terminate the Claimant's employment in total disregard of the law.

32. I have considered submissions by both the Claimant's advocates and the Respondent's advocates and I am not convinced that the Respondent proved it had valid reasons to terminate the Claimant's employment. There were probably other measures they could have taken like pay off the loan from her salary for example. Summary dismissal was quite punitive.

33. I agree with the wordings of the learned Honourable Judge in the case of **WALTER OGAL ANURO VS TEACHERS SERVICE COMMISSION (2013) eKLRC** as in the Respondent's submissions that "for a termination of employment to pass the fairness test there must be both substantive justifications 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 in effecting the termination.

34. In my well considered finding the Respondent failed that fairness test and so I find the Claimant was unlawfully terminated and so enters judgment in her favour.

RELIEFS AWARDED

I. 20 Days worked in June, 2016 Kshs.22,000/=

II. One month salary in lieu of notice Kshs.33,920/=

III. Accumulated leave days Kshs.33,920/=

IV. Outstanding overtime is declined for lack of particulars

V. Compensation for loss of employment for 4 months Kshs.135,680/=

The final effect of the award is a total of Kshs.225,520/=

Respondent will pay the costs.

Interest will apply until full payment.

The payment is less any payment so far paid by the Respondent.

Finally the Claimant to be given her certificate of service.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 14TH DAY OF DECEMBER 2021.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE