



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1435 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ELIZABETH NJOKI KAMAU.....CLAIMANT

VERSUS

KENYA MEDICAL LABORATORY AND

TECHNOLOGISTS BOARD.....RESPONDENT

JUDGMENT

By her memorandum of claim dated 25th August 2014 and filed on 28th August 2014 the claimant alleges that the respondent, a regulator of professional conduct of medical laboratory scientists established under Cap 253A of the Laws of Kenya employed her in June 2011 as an intern. That she rose up the ladder after her confirmation to permanent status and she was promoted to the position of Head of Standards.

It is the claimant's case that her services were terminated unlawfully by the respondent on 11th July 2014. That the demand letter sent to the respondent by her advocates did not elicit any response.

The claimant seeks the following remedies from the respondent –

1. The Respondent do re-engage the Claimant in work comparable to that in which the Claimant was employed prior to her dismissal or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both, the period she had been working and out of office/work.
2. Reinstate the claimant and treat them in all aspects as if the claimant's employment had not been terminated.

In the alternative to the demand for reinstatement of the Claimant, she demands monetary compensation as under: -

1. That the termination of the claimant be and is hereby declared unlawful and hence null and void.
2. The Respondent be ordered to pay the Claimant terminal dues as enumerated below –

- (i) 11 days worked up to July 2014 Kshs.18,333.33
- (ii) Notice 3 months' salary (3 x 50,000.00) Kshs.150,000.00
- (iii) 36 Unutilized Leave Days
(36/30 x 50,000.00) Kshs.60,000.00
- (iv) Service pay (3 x 15/30 x 50,000.00) Kshs75,000.00
- (v) Compensation for unfair and unlawful Termination
(12 x 50,000.00) Kshs.600,000.00

Total Kshs.903,333.33

3. Interest on (i) from date of termination until payment in full at Court rates.

4. Any other statutory entitlements.

5. The Respondent to pay legal costs in this suit.

The respondent filed a statement of response to the memorandum of claim on 4th June 2015 in which it states that although the claimant was engaged as an intern by the respondent, she was never absorbed as an employee of the respondent. It further denies that the claimant ever earned a salary of Kshs.50,000 as alleged in the Memorandum of claim or that her employment was terminated as alleged. The respondent denies all other allegations in the memorandum of claim except that it was served with a demand letter by the claimant's Counsel.

When the case came up for hearing on 3rd April 2019 the parties requested and were granted leave to proceed by way of adoption of documents and statements of witnesses on record and written submissions.

Claimant's Case

It is the claimant's case that she was employed by the respondent as an intern from 1st June 2011 for a period of 6 months earning Kshs.8,000 per month. That the internship of 6 months was at the Respondent's Quality Assurance/Validation Section.

She avers that upon expiry of the internship, she was subjected to a performance appraisal on 14th December 2011 following which she was verbally promised engagement on permanent terms. That during the year 2012 she was assigned various duties which she capably performed thus proving her capabilities as a result of which she became a leading team player and focal person. That her employment was eventually confirmed by letter dated 8th March 2013.

The claimant avers that between 2012 and 2014 her salary rose to Kshs.38,607.00 and later to Kshs.50,000. That the respondent did not issue her with an itemized pay slip but deposited her salary into her bank account.

The claimant avers that by memorandum dated 5th June 2013 the respondent referred to her as Acting Head of Standards. That between 3rd and 4th July 2014, she attended a conference in Arusha sponsored by London School of Hygiene and Tropical Medicine to which she was recommended by the respondent by letter dated 16th

April 2014.

The claimant avers that the respondent did not disclose the reason for the termination of her employment and did not subject her to any disciplinary process before termination by letter dated 11th July 2014.

The claimant submits that the respondent contravened Sections 41(2), 43, 45, 49 and 51 of the Employment Act as well as the ILO Convention 158 and Rules of Natural Justice.

The claimant relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** where Radido J. captured the principles in Section 41 of the Employment Act as follows;

...And what does section 41 of the Act require? The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."

The claimant also relies on **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** where the Judge held as follows:

"...The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness."

The claimant further relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where Mbaru J. held that –

"Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions,

whatever outcome of the process is bound to be unfair ...

Summary dismissal ... is largely at the instance of an employer. The standard applicable therefore are of a higher nature as this process is prone to abuse as the employer is in a more superior position than an employee. Summary dismissal can take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term. However, even in cases of serious breach of a contract as under Section 44(3) or on committing acts as outlined under Section 44(4) of an employee being absent from work, being intoxicated, negligence, abusive, failure to obey lawful orders, criminal arrest or charges, suspect in a criminal case, all these serious acts, such an employee is subject to be treated as under section 41 of the Employment Act with regard to being accorded a hearing.

The claimant prays for orders as prayed in the memorandum of claim.

Respondent's Case

The respondent's case as set out in the response to the claim and in the submissions is that the claimant was employed as an intern in the month of June 2011. On completion of the internship on the 3rd of April 2012 an internal advert dated 3rd April 2012 invited members of its staff who wished to be considered for any position including those on contract to apply for the said positions. The Claimant in that regard declined to apply for any position with the Respondent. She instead opted to write to the Respondent giving two weeks' notice of her intention to leave the Respondents' employment.

Subsequently, the Respondent held a meeting to deliberate on the Applications received from the staff amongst other issues and the Respondent was informed of the Claimants resignation whereupon a decision was taken to re advertise the said position. The two week's notice given to the Claimant lapsed on the 30th of April 2012. The claimant however stayed on doing a few tasks for the respondent on a voluntary basis.

The Respondent in the year 2013 decided to retain the Claimant on a piece rate basis as and when the Respondent required the Claimant to assist in certain tasks for which she would be engaged and paid for work done.

That on the above understanding the Claimant continued to work for the Respondent on a piece rate basis. That her engagement was not without constant reprimands from the officials of the Respondent due to her laxity in adhering to the Respondent's Human Resource Policies and Procedures Manual that clearly spelt out the conduct of the Respondent's employees and piece rate workers.

That the hallmark of the Claimants ineptness was sometime in June 2014 when she wrote a memo to the Respondent's office requesting for leave. The leave was denied due to the fact that the Claimant had just been out of the office for a number of days without any formidable reason advanced by the Claimant

It is the respondent's submission that the claimant was never employed by the respondent but was retained on piece rate basis, relying on exhibit 2 of the claimant's bundle, a letter from the respondent in the following terms –

"The Board is in receipt of your undated letter received on the 28th of February 2013 requesting for consideration for the position of a Validation officer on the Board. It is noted that you have been the focal person for validation and therefore in the interest of the Board it is beneficial to engage you. However, noting that the Board has not planned for recruitment in the current financial year, we shall engage you on a piece rate basis for the assignments you undertake."

It is the respondent's position that the claimant accepted the terms in the letter and it is on those terms that she was employed by the respondent. The respondent relies on the case of **Martin Juma Kundu -V- Kemu Salt Packers Production Limited (2016) eKLR** where the court held –

"After considering the pleadings, evidence and submission, I find that the claimant has not proved on a balance of probability that he was employed by the respondent under a contract of service. On the contrary the court finds in favour of the respondent that the claimant was independent contractor employed under a contract for services on piece work basis. Under section 2 of the said Act piece work has been defined as: "any work for which is ascertained by the amount of work performed irrespective of the time occupied in its performance."

On whether the claimant was lawfully dismissed, the respondent submits that the claimant breached the agreement between her and the respondent. That the claimant used to report late for work and as a consequence was issued with several letters of warning. The respondent relied on the case of **Martin Juma Kundu** (supra) where the court stated –

"Termination of employment is unfair if the employer fails to prove that it was founded on valid and fair reasons and that it was done after following a fair procedure. In this case however, the nature of employment was such that the requirement for substantive and procedural fairness guaranteed under section 35, 40, 41 and 45 of the Employment Act was not applicable. As opined herein above the respondent has proved on balance of probability that the claimant was an independent contractor and even if the General Manager dismissed him before finishing the piece work, he was assigned, I find that he was not entitled to the substantive and procedural fairness guaranteed under the aforesaid sections of the Act."

It is thus the respondent's position that the claimant was lawfully dismissed for misconduct and poor attitude towards her work.

On remedies the respondent submits that the claimant is not entitled to leave allowance as she had not worked for the respondent for a year and is not eligible for the same and in addition, was on piece rate which does not qualify for leave.

On payment of 3 months' salary in lieu of notice the respondent submits that having been on piece rate the claimant is not entitled to notice. That should the court find that she is entitled to notice, the same should be at the rate of Kshs.8,000 which was the salary of an intern.

On the prayer for compensation equivalent to 12 months' salary the respondent submits that there having been no contract of employment between the claimant and the respondent, the claimant is not entitled to compensation. Further, that in any event, the sum claimed of Kshs.600,000 is excessive as the claimant's salary was Kshs.8,000 per month. It relied on the case of **Daniel Kiplagat Kipkeibut -V- SMEP Deposit Taking Micro Finance Limited (2016) eKLR** where the claimant was awarded 6 months' compensation after working for the respondent for 12 years.

The respondent prays that the claim be dismissed.

Determination

I have considered the pleadings, evidence and submissions of the parties. The issues arising for determination are the following –

1. Whether the claimant was employed by the respondent.
2. Whether the claimant's employment was unfairly terminated by the respondent, and
3. Whether the claimant is entitled to the remedies sought.

On the first issue, the respondent does not deny employing the claimant. It admits having employed her as an intern and after the end of the internship, as a piece rate worker.

The Employment Act defines an employee as –

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

Further Section 9(1) provides that-

(1) A contract of service —

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified

work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months,

shall be in writing.

An intern is an indentured learner and therefore an employee. A piece rate worker is also an employee as provided under Section 18(1) of the Act as follows –

18. When wages or salaries due

(1) Where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled—

(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or

(b) in the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.

The letter of termination refers to internship (refer to claimant's exhibit 8). Yet the letter of engagement as an intern at exhibit 1 of the respondent's bundle of documents expressly states that the internship was from 1st June 2011 for a period of 6 months. There is no letter extending the internship. There is further no evidence that there was ever a break in service of the claimant's engagement from 1st June 2011 to 11th June 2014 when she received the letter of termination of internship.

I find that the claimant's internship lapsed at the end of November 2011 and that thereafter she was a regular employee of the respondent having worked continuously and earned remuneration until 11th July 2014.

Termination

Having found that the claimant was in regular employment of the respondent, she was entitled to be treated in the same way as all other employees including being subjected to a disciplinary hearing before termination of employment. This is confirmed by the letters at pages 5 and 6 of the respondent's bundle of documents which are warning letters addressed to the claimant threatening further disciplinary action against her should she persist with the misconduct referred to in the said memos dated 2nd October 2012 and 23rd April 2014 respectively.

The respondent having not accorded the claimant a disciplinary hearing as envisaged in Section 41 of the Employment Act or given a valid reason for termination in terms of Section 43 of the Act, the termination of the claimant's employment was unfair. I thus make a finding accordingly.

With regard to the remedies, the claimant is not eligible for reinstatement which is only available within 3 years of the date of termination and only upon proof of exceptional circumstances. The claimant does not qualify under both conditions.

With regard to terminal benefits and compensation, the claimant is entitled to pay up to 11th July 2014. She is further entitled to pay in lieu of notice. According to clause 8.4.1 of the respondent's Human Resources Policies and Procedures Manual, the claimant is entitled to 3 months' notice or pay in lieu thereof. I award the same at Kshs.115,821.30. I further award her unutilised leave of 36 days as this was not contested by the respondent nor were employment records produced by the respondent to prove that the claimant was not entitled to the same or that she had taken all her annual leave. The leave entitlement having been 30 days per annum and 5 working days per week, I have used the formula salary/22 x 36 being Kshs.63,175.25.

Having found that the claimant's employment was unfairly terminated, she is entitled to compensation. Taking into account the circumstances under which she was terminated, the length of service and all relevant factors set out in Section 49(4) of the Employment Act, I award the claimant 6 months' salary as compensation in the sum of Kshs.231,642.60.

Award

1. 3 months' notice pay Kshs.115,821.30
2. 36 days leave pay Kshs.63,175.25
3. 6 months' salary as compensation Kshs.231,642.60

Total Award Kshs.410,639.15

I have used a net salary of Kshs.38,607.10 as per bank statement.

The decretal sum shall therefore not be subject to statutory deductions.

The respondent shall pay claimant's costs to this suit and decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE