



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 418 OF 2017

MIRIAM WANJIRU NJOYA.....CLAIMANT

VERSUS

TOWER SACCO SOCIETY.....RESPONDENT

JUDGMENT

1. The Claimant sued the savings and credit cooperative society averring that she was employed by the Respondent on 1st April 2014 as a loans officer. She averred that she earned Kshs. 63,661/- a month and that on 29th May 2017 while executing her duties as usual she received a letter from the Respondent summarily dismissing her from service without proper cause, justification or explanation whatsoever. The Claimant averred that the Respondent failed to uphold, observe, respect, protect, promote and fulfil the tenets of the Employment Act. She averred that the Respondent wrongfully, unlawfully and unfairly terminated the employment services of the Claimant. She thus sought 3 month's salary in lieu of notice – Kshs. 190,983/-, severance pay (15 days per year for 3 years) – Kshs. 95,491.50, 12 month's salary as compensation for wrongful dismissal – Kshs. 763,932/- making a total of Kshs. 1,049,423.50.

2. The Respondent filed a defence in which it averred that at the material time and in particular from 29th March 2017 the Claimant, without any reasonable cause and in breach of the employment contract abandoned her duties by failing to report to work thus terminating the contract by that breach. The Respondent averred that the Claimant invariably conducted herself in the course of her employment in a manner that undermined the relationship of trust and confidence thus repudiating the contract of employment. The Respondent averred that the Claimant performed her duties contrary to the interests of the Respondent and was incompetent, insubordinate and recalcitrant in her duties. The Respondent by way of counterclaim averred that the Claimant by her conduct terminated the employment contract contrary to the terms thereof in particular notice of termination and is thus liable to pay 3 month's salary in lieu thereof which the Respondent hereby claims at Kshs. 190,983/-. The Respondent thus sought the dismissal of the Claimant's claim and judgment be entered in the counterclaim for Kshs. 190,983/- with costs and interest.

3. The Claimant filed a defence to counterclaim in which she averred that she was entitled to an award as claimed in her suit and that the Respondent was put to strict proof of the averments in the counterclaim. She averred that the Respondent was not entitled to orders sought in the counterclaim and thus sought for entry of judgment against the Respondent and the dismissal of the counterclaim with costs.

4. The Claimant testified as did the Respondent's witness Catherine Mathenge the Human Resource Manager of the Respondent. The Claimant testified that she was at present undertaking consultancy work. She referred to her payslip, the appointment letter and the documents attached to her claim and produced in her claim as proof in support of her case. She presented a clearer copy of the notice to show cause letter issued to her. She sought payment of the terminal benefits tabulated in her claim. In cross-examination she stated that her duties included loan distribution, issuance and collection of loans meaning recovery of loans issued. She stated that in the relationship with her employer there was trust and confidence and there was no issue on performance. She testified that there were 2 issues for the Naivasha transfer as Naivasha was a new office and she had a medical issue with cold which led to her transfer to Naivasha from Engineer. She stated that as far as she was concerned there was no issue as to how she handled customers. She was referred to a letter in the Respondent's bundle and agreed that she was summoned to the CEO's office where she found the CEO and HR waiting for her. She stated that she was summoned to appear on 20th January 2017. She denied being given a copy of the allegations and that when she attended the meeting there was an allegation that she mishandled clients. She testified that there was a complaint but there were no allegations that she was instigating the members of staff not to accept transfers. She stated that there was a specific teacher she was handling and there had been a complaint. She was referred to an email she sent and she stated that she was compelled to send the email thanking the employer for giving her a chance to serve. She said that the email showed that she was happy with the meeting of 20th January 2017 and she promised to work better from that time. She was transferred from Naivasha to head the office and no reason was given for the transfer. She stated that she reported to the new office and reported to Mr. Waihenya the Registry Officer and she worked until 12.00pm and then left. She testified that she never reported on 31st March 2017 and has not reported to work since then. She stated that she sent an SMS to the HR and she did not get written permission to be absent. She testified that in April a week after she went off she received a notice to show cause when she reported on 6th April. She stated that she never got a chance to present the medical sick off. She said that she indicated in the SMS that she would report after treatment. She testified that she received a letter of dismissal after frequent enquiry. She stated that there was tendency to communicate verbally and that on

6th April she was told to go home by the Human Resources. She stated that she did not respond to the verbal instruction to go home and she did not make any communication after being told to go home. She admitted writing the letter in response to the show cause letter from the Respondent. She stated that the letter showed cause that she was unwell. She testified that she did not attach the sick leave. In re-exam she stated that the email did not refer to a meeting of 20th January 2017 or proceedings on that day. She stated there were no particulars of the misconduct. She stated the letter of transfer was with immediate effect and she had no option. She testified that the transfer was on medical grounds.

5. The Respondent's witness Catherine Mathenge testified that the Claimant was known to her as the Respondent's former employee. She stated that the communication was by phone, verbally, email and written communication. She stated that there was a time the Claimant received a verbal warning from the CEO but it was documented in the personnel file. She testified that the Claimant reported after she was transferred to Naivasha from Engineer. She stated that the Claimant worked for about 2 years and was transferred to HQ later. She testified that the Claimant was transferred to head office at Registry from Naivasha Branch. She testified that the Claimant was to be deployed but she left before she was deployed. She stated that the reason the Claimant was transferred to head office was because she had incited staff and mishandled clients. She testified that the Claimant left and reported on 12th April 2017 to see the CEO and the CEO was absent and she left and did not report again. She stated that the Claimant was issued with the show cause letter dated 23rd April 2017 and her response was that she was unwell and she was not comfortable she was taken to another department. On the issue of gross misconduct the Claimant sought to get more information on it. She testified that the Claimant had been deployed to the registry and the Claimant indicated this was not her line. She stated that the Claimant's earning was not affected and in her reply she did not attach any sick leave and she just said she was unwell. In cross-examination she testified that the Claimant had been accused of gross misconduct which was communicated to the Claimant previously. She stated that before the email from the Claimant there was communication verbally and she owned up to having made a mistake and thanked the addressee for giving her words of guidance. She stated that the Claimant was not compelled to write the email. She testified that the Claimant was not called to give her side of the story as the Claimant was nowhere to be found. She stated they did the letter through the branch at Naivasha and called the Claimant. She stated that they did not respond and give the Claimant the particulars of misconduct. In re-examination she stated that the Claimant was required to support her absence with certified medical evidence and none was availed. She testified that the Claimant was summoned in January to meet the CEO and the HR and the Claimant admitted she was on the wrong and remorseful. After that the Claimant was given counselling and guidance and the Claimant promised to change. She stated that the Respondent had no proof as to whether the Claimant was sick or nor or as to why the Claimant went away.

6. The Claimant submitted that upon receipt of the departmental transfer she was transferred to the head office with immediate effect on allegations of gross misconduct pending further investigations. She submitted that she reported as instructed and was to be given a deployment after briefing that afternoon but she unfortunately fell ill that morning. She submitted that after falling ill she sought medical attention that afternoon and informed the human resource manager of the development via SMS which communication was acknowledged in the notice to show cause letter dated 8th April 2017. She submitted that she reported to work on 6th April 2017 and was denied access to her work station and sent away. She submitted that she collected the notice to show cause letter on 19th April 2017 and responded to it on 23rd April 2017 and sought particulars to the misconduct allegations in her departmental transfer letter of 27th March 2017. She submitted that the issues for determination were whether the summary dismissal of the Claimant was unlawful and unfair, whether the Claimant's termination was discriminatory and violated her right to fair labour practices, whether she was entitled to the reliefs sought and costs. The Claimant submitted that the Respondent bore the burden of proving there were valid reasons for the dismissal of the Claimant and that due process was followed. She cited the case of **Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others [2018] eKLR** for the proposition that there is a heavy burden of proof placed upon the employer to justify any termination of employment. The Claimant submitted that in the termination letter of 29th May 2017 it was indicated that her case was discussed by the Board of Directors on 27th May 2017 and the Board decided to summarily dismiss the Claimant on account of the incidents of incompetence, insubordination and being recalcitrant in her performance of her duties. She submitted that she was not present and was never invited to the said meeting. The Claimant submits that her termination was pre-meditated considering she was never given particulars of the alleged incidents of incompetence, insubordination and recalcitrance in performance of her duties. She submitted that she was never summoned for a disciplinary hearing. The Claimant submitted that Section 44 of the Employment Act provides for the procedure to be followed by an employer when terminating an employees contract of employment through summary dismissal. She submitted that an employer has no right to summarily dismiss an employee per Section 44(2) except where an employee fundamentally breached his obligations arising under the contract of service per Section 44(3). The Claimant submitted that the grounds for summary dismissal for gross misconduct are set out under Section 44(4). She submitted that when she was sent home verbally to await communication in hindsight this was a ploy by the Respondent to establish grounds for summary dismissal for absenteeism from work. she submitted that the Respondent failed to justify the reasons for dismissal. She submitted that the dismissal was discriminatory and actuated by malice and violated her rights to fair labour practice. The Claimant cited the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2103] eKLR** where it was held that:

Where a person is treated differently from others similarly situated like him, and then this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is a specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified.

The Claimant submitted that the premediated action of the Respondent that targeted only the Claimant was proof of discrimination against her.

The Claimant submitted that there was a marked distinction between an unfair termination and wrongful dismissal and that whereas unfairness in the termination of employment is what is to be found in the failure to abide by statutory provisions, wrongful dismissal involves a breach of the employment contract. She cited the Court of Appeal decision in **CMC Aviation Limited v Mohamed Noor [2015] eKLR** where the Court of Appeal held *unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract. Section 49 of the Act sets out the remedies for*

both wrongful dismissal and unfair termination.

The Claimant submitted that she was dismissed without being subjected to due process under the law thus rendering her termination by the Respondent to be both procedurally unfair as well as wrongful. She submitted that she was entitled to notification and hearing under Section 41 of the Employment Act which is bolstered by Article 41(2) of the Constitution and Article 47(1) on fair administrative action. She cited the case of **Nicholas Otinyu Muruka v Equity Bank Limited [2013] eKLR** where Mbaru J. held *even where an employer has a just cause as to apply the provisions of section 44(4) (g), the same must still comply with the provisions of section 41 and 43 of the Employment Act. If the reasons for termination are not proved to amount to gross misconduct, then the application of Section 41 of the Act will apply. Thus, disputes of summary dismissal will always be subjected to the test of Section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct.* The Claimant submitted that she is entitled to the relief sought as she was dismissed unfairly without adherence to the law. She urged the grant of her prayers.

7. The Respondent submitted that the Claimant was guilty of desertion of duty and despite being given a notice to show cause and asserting she had been sick did not avail any evidence. The Respondent relied on the case of **Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR** where Ndolo J. held:

Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration

The Respondent also cited the case of **Sebolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** where it was held that *an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.* The Respondent submitted that the Claimant deserted duty by absenting herself from work. The Respondent submitted that the Claimant was asked to show cause and she responded that it was by reason of sickness per the letter of 23rd April 2017 which the Respondent disregarded as the Claimant had not brought any sickness to the Respondent's knowledge prior thereto. The Respondent submitted that in support of its counterclaim the desertion of duty amounts to abandonment of the employment contract thus a repudiation which is duly accepted by an employer by way of summary dismissal. The Respondent cited the case of **Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713** for the proposition that an employment contract is like any other contract and subject to the basic principles of contract and once an employee expresses the wish not to be bound by the contract it amounts to a fundamental breach which once accepted rescinds the contract on account of that breach. The Respondent thus sought payment of the 3 months' salary in lieu of notice since the Claimant never gave it indication of the intention to terminate her contract through desertion.

8. The Claimant was allegedly sick after reporting to her new station upon a departmental transfer. She asserts that she fell ill in the afternoon and communicated this via SMS to the HR manager. Whereas sickness is sufficient cause for absenteeism, the Claimant seems to have treated the absence from work rather casually. After the notice to show cause she indicated that the reason for her absence was illness but failed to avail the sick sheet. She asserts that she was not given an opportunity to be heard and therefore an opportunity to demonstrate there was basis for her absence was denied her. The Respondent summarily dismissed the Claimant ostensibly for her incompetence, insubordination and recalcitrance in the performance of her duties. Upon the termination the Respondent has mounted a counter-claim for the notice due to it which was 3 months' salary in lieu of notice. Section 43 of the Employment Act provides for proof of reason for termination. Section 43 provides as follows:-

43(1) 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.

9. It is not in doubt that an employer has the statutory right to dismiss an employee by summary action under the provisions of section 44 of the Employment Act as was done in this case. Such summary action must of necessity follow a fundamental breach of the contract of employment or involving gross misconduct. In my view, whereas there may have been grounds for dismissal being the recalcitrance or insubordination the dismissal was effected contrary to the law as the Claimant was not heard. Upon misconduct being reported the employer must make an enquiry into the matter and allow the employee to show cause why employment should not be terminated and ensure the employee is given a hearing under the provisions of section 41 of the Act. The Claimant should have been called for a hearing pursuant to the notice to show cause and after hearing her dismissal would have followed which dismissal could have been upheld by court as being proper. That would have been procedural and substantive fairness. None was availed and the Claimant is thus entitled to recover. As she contributed to the scenario she faced I will limit the compensation to 1 month's salary as compensation in terms of Section 49 of the Employment Act. The counterclaim is dismissed with no order as to costs. In the final analysis I enter judgment for the Claimant against the Respondent for:-

1. A declaration that the dismissal of the Claimant was unfair and unlawful
2. Kshs. 63,661/- being compensation for her unlawful dismissal
3. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 22nd day of January 2020

Nzioki wa Makau

JUDGE