



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 644 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 14<sup>th</sup> January, 2020)**

**ZIPPORAH LILIAN WAMWERU.....CLAIMANT**

**VERSUS**

**MITSUMI COMPUTER GARAGE LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed a Memorandum of Claim on 20<sup>th</sup> April, 2015, seeking damages for wrongful and unlawful dismissal from the Respondent's employment and failure to pay terminal dues owed to her as a result thereof.

2. The Claimant avers that she was employed by the Respondent herein, a limited liability Company on or about 11<sup>th</sup> March, 2014 as a Trainee Executive earning a monthly salary of Kshs. 55,000/-.

3. She further averred that she performed her duties diligently and to the Respondent's satisfaction until 31<sup>st</sup> March, 2015 when her employment was terminated vide its letter dated even date. The reason for termination indicated therein was absconding work.

4. The Claimant contends that her termination was unfair and unlawful as the Respondent failed to follow the laid down mandatory provisions in her employment contract as well as Section 45 of the Employment Act. More specifically she contended having not received any notice prior to her termination and/or payment in lieu thereof.

5. Aggrieved by the decision of the Respondent to terminate her services the Claimant filed the instant Claim seeking the following reliefs:-

***a) A declaration that she was wrongfully and unfairly dismissed from her employment.***

***b) Unpaid dues totalling to Kshs. 399,500/=.***

***c) Notice period of one month Kshs. 55,000/=.***

***d) 12 months' salary as compensation for wrongful and unfair termination Kshs. 55,000 x 12 totalling to Kshs. 660, 000/=.***

***e) Punitive and aggravated damages for breach of the Claimant's Constitutional Rights.***

***f) Costs and incidental to this suit.***

6. In response to the Memorandum of Claim the Respondent through the firm of Ochieng', Onyango, Kibet and Ohaga, filed its statement of Response dated on 7<sup>th</sup> September, 2015 and filed in Court on 8<sup>th</sup> September, 2015, in which it admits having engaged the Claimant in the manner stated in the Memorandum.

7. The Respondent however, denied that it unlawfully and unfairly terminated the Claimant's employment with it as alleged. It contended that the Claimant was summarily dismissed through its letter dated 21<sup>st</sup> March, 2015 following incidents of gross misconduct and that prior to her termination she was issued with several warnings on the issue of absconding duties on Saturday as she was required to work on the said day of the week.

8. The Respondent further contended that the Claimant is not entitled to notice of intention to termination or payment in lieu thereof as alleged having been summarily dismissed. The Respondent further denied owing the Claimant any dues as alleged in her Memorandum of

Claim.

9. It is further contended that at the time of separation the Claimant was paid all the dues that were owing to her and therefore has no claim as against it. Further, that she is not entitled to service pay as she was a member of NSSF and the relevant deductions were duly deducted and remitted as required by law.

10. The Respondent contended that it had reason to terminate the Claimant and that it followed the law and due process. In the circumstances, the Respondent contended that the Claimant is not entitled to the reliefs as sought.

11. In conclusion, the Respondent urged this Honourable Court to dismiss the Claim herein with costs to the Respondent.

12. The matter proceeded for hearing on 16<sup>th</sup> July, 2019 with the Claimant testifying on her own behalf and the Respondent calling one witness to testify on its behalf.

### **Evidence**

13. The Claimant (CW1) requested to have his witness statement dated 25<sup>th</sup> March, 2019 and filed in Court on 12<sup>th</sup> April, 2019 adopted as her evidence in chief.

14. She also produced as exhibits the bundle of documents dated 25<sup>th</sup> March, 2019 and filed in Court on 12<sup>th</sup> April, 2019. In her statement, the Claimant reiterated the averments made in her Memorandum of Claim. She further urged this Court to allow her Claim in terms of the reliefs therein.

15. On cross-examination, CW1 confirmed that she was employed by the Respondent for a period of 1 year from 11<sup>th</sup> March, 2014 to 31<sup>st</sup> March 2015 as an accountant executive. She further confirmed that her monthly salary was Kshs. 55,000/-.

16. CW1 further stated that she understood the terms of her contract and that she was bound by the same during the subsistence of her employment with the Respondent.

17. On re-examination, CW1 testified that she is a faithful of SDA church and attends church on Saturdays. She further testified that no disciplinary hearing was conducted prior to her termination and that no previous warning was issued to her by the Respondent prior to her termination.

18. CW1 urged the Court to allow her Claim as prayed.

19. The Respondent Witness (**Anita Varsani, RW1**) adopted her witness statement filed in Court on 16<sup>th</sup> July, 2019 as her evidence in chief. She also produced as exhibits the bundle of documents dated 25<sup>th</sup> March, 2019 and filed in Court on 12<sup>th</sup> April, 2019. In her statement, RW1 reiterated the averments made in the Memorandum of Response. She further urged this Court to dismiss the Claim filed herein.

20. On cross-examination, RW1 confirmed that the Claimant was never issued with any payslip during the subsistence of her employment with the Respondent. Further, she averred that the Claimant was not paid any house allowance.

21. She further averred that the Respondent had reason to terminate the Claimant's services and that she is not entitled to the reliefs sought in her Claim. She further contended that due process as provided under the Employment Act, 2007 were also complied with.

### **Submissions by the Parties.**

22. It is submitted on behalf of the Claimant herein that her termination by the Respondent was unfair and wrongful as it was contrary to Section 45 (2) of the Employment Act, 2007.

23. The Claimant further submitted that her summary dismissal was unfair as she was not accorded a hearing prior to her termination contrary to the mandatory provisions of Section 41 of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the case of **Kenfreight (E.A) Ltd Vs Benson K. Nguti (2016) eKLR** and **Geoffrey Gikonyo Mathu Vs Intex Construction Company Limited (2017) eKLR**.

24. It is on this basis that the Claimant contended that she is entitled to the reliefs as sought in her Claim therefore urging this Honourable Court to allow the same as prayed.

25. With regard to specific reliefs, the Claimant urged the Court to allow her prayer for salary in lieu of notice as the same is provided for under her contract of employment.

26. That on the prayer for unpaid telephone allowance for 9 months, the Claimant submitted that she is entitled to the same by dint of Section 10 and 74 of the Employment Act. She contended that she has proved her claim therefore urging this Honourable Court to allow the same as pleaded.

27. The Claimant further submitted that she is entitled to house allowance the same having been provided for under her contract of employment. She further contended that she was not provided with any housing and is therefore entitled to payment of house allowance in

lieu of the same. She relied on the case of **Jane Njeri Wanyoike & 23 Others Vs Pan Africa Insurance Company Limited & Others (2017) eKLR** for emphasis.

28. With regard to payment of unpaid leave, the Claimant submitted that she is entitled to the same as no evidence was adduced by the Respondent to rebut the Claimant's assertion that she had not proceeded on leave for the year worked.

29. The Claimant further contended that it was the Respondent's duty of keeping employment records by virtue of Section 10(3) (a) of the Employment Act, 2007 and that the same was not properly discharged.

30. She therefore submitted that the Respondent failed to discharge its duty as provided under Section 10(7) of the Employment Act, 2007. She therefore urged this Court to allow the prayer for unpaid leave as pleaded.

31. The Claimant further contended that she is entitled to service pay as no evidence has been tendered by the Respondent to challenge the Claimant's averment of her entitlement to the same. To buttress this argument the Claimant cited and relied on the findings in the case of **Joab Ashitiba Hashon Vs Samaritan Medical Services (2017) eKLR**.

32. The Claimant submitted that she is entitled to maximum compensation for wrongful termination as provided under Section 19 (1) (c) of the Employment Act computed to a sum of Kshs. 660,000/=.

33. The Claimant for emphasis relied on the cases of **Pamela K. Butalanyi Vs University Council for the Kenya Polytechnic University College (2015) eKLR**, **John Mwanzia Mbithuka Vs Mr. Mukesh Malde (Managing Director) & Another (2014) eKLR** and **Rose Mwikali Nzuki Vs Food for the Hungry Kenya (2015) eKLR**.

34. I have examined all the evidence and submissions submitted by the Parties herein. The Claimant was terminated vide a letter dated 31/3/2015 which states that the reason for terminating her employment was absconding duty on Saturdays.

35. The Claimant on her part indicated that she was a faithful of the SDA Church and Saturday was her day of worship and she could therefore not have been on duty on Saturday.

36. The Claimant had been employed vide a contract she signed on 11/3/2014 and which had indicated her official working hours to be Monday to Friday 8.30 am to 6 pm and Saturday – 9 am to 1 pm. The Claimant signed this contract on 11/3/2014 in which she agreed to this arrangement. There is no indication that she had reservations about working on Saturdays as she signed this contract.

37. In essence, the Claimant seems to agree that she failed to attend work on Saturdays because she was attending her worship as a Seventh Day Adventist Member. This in itself may not have been a good excuse as she needed to discuss this issue with her employer before taking up this job which she did not.

38. It is therefore apparent that she did not attend to her work every Saturday as expected in the appointment letter and thus the Respondent had a valid reason to terminate her services.

39. The other issue for this Court's consideration is whether the Claimant was accorded due process before being terminated.

40. The Respondent have averred that they issued her with several warnings before terminating her.

41. There is however no evidence that the Claimant was ever warned about not attending work on Saturdays. She was also never issued with a show cause letter before the termination. Disciplinary hearing was also never conducted and no notice to terminate her services issued.

42. It is therefore my finding that the Respondent breached the law in particular Section 41 of Employment Act 2007 by terminating the Claimant's services without due process.

43. Section 45(2) of the Employment Act 2007 states as follows:-

***2) "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".***

44. Given that no due process was followed, I return the verdict that the termination of the Claimant was unfair.

45. As for the remedies sought, the Claimant seeks various prayers including house allowance, notice pay and telephone allowance.

46. The Respondent avers that they paid her all her dues. They exhibited some payslips to show this.

47. The RW1 however admitted that during the pendency of her employment, the Claimant was never issued with any payslip. This therefore implies that the exhibited payslip is a “cooked up” document and of no evidential value. The document also does not tally with the emoluments the Claimant was to be paid as per contract letter.

48. From the Claimant’s letter of appointment her salary was 660,000/= per annual and this translates to 55,000/= per month. There is no mention of house allowance as being part of the 55,000/= as would be expected under Section 31(1) and 2(a) of the Employment Act 2007, which states as follows:-

*1. “An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.*

*2. This section shall not apply to an employee whose contract of service:-*

*a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation;*

49. It is therefore my finding that the Claimant is entitled to the following remedies as sought:-

*1) 1 month salary in lieu of notice = 55,000/=*

*2) House allowance not paid being 15% of 55,000 x 12 = 99,000/=*

*3) Telephone allowance for 9 months at the rate of 2,500 per month = 2,500 x 9 = 22,500/=*

*4) Unpaid leave for 1 year = 55,000/=*

*5) Service pay of 15 days for each year worked =  $\frac{1}{2}$  x 55,000 = 27,500/=*

*6) 6 months’ salary as compensation for the unfair termination = 6 x 55,000 = 330,000/=*

**TOTAL = 589,000/=**

*Less statutory deductions*

*7) The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this 14<sup>th</sup> day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

**JUDGE**

**In the presence of:**

Kivindyo holding brief Miss Oduor for Respondent –Present

No appearance for Claimant