



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 933 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 28th February, 2020)

GRACE MUTHONI MUHORO.....CLAIMANT

VERSUS

GITHUNGURI DAIRY AND COMMUNITY SACCO LIMITED....RESPONDENT

JUDGMENT

1. The Claimant was the Respondent's employee from 1/9/2007 and whom she served in different capacities until 21/5/2013, when her employment was terminated. The Respondent is a Sacco with its offices situated at Githunguri.

2. Before this Court is a claim for unlawful termination where the Claimant seeks the following reliefs-

- a. 1 months' salary in lieu of notice of KShs. 38,115.00.**
- b. May 2013 salary in the sum of KShs. 38,115.00.**
- c. 1-year salary as damages for unfair termination amounting to KShs. 457,380.00.**
- d. 23 unutilized leave days translating to KShs. 38,115.00.**
- e. Certificate of service.**

3. The Respondent filed its Memorandum of Reply and Defence on 31/7/2015, in response to the Claim.

Claimant's Case

4. The Claimant avers that vide the Respondent's management letter of 15/4/2013, allegations of fraud were raised against her and which allegations she had been cleared from vide an audit report. She responded to the letter on 16/4/2013 explaining the source and the reason for the alleged suspicious deposits. However, on 21/5/2013, her employment was terminated unlawfully, without a justifiable cause and without paying her terminal dues.

5. She avers that the respondent froze her accounts without being issued with a court order thereby infringing on her constitutional rights.

6. During trial, the Claimant adopted her witness statement dated 29/3/2019 as her evidence and relied on the documents she had filed as her exhibits.

7. In cross-examination, it was her testimony that she deposited some amount of money in her account number [...], at the Respondent Sacco. She further testified that she had deposited a sum of Shs. 271,300.00 in Samuel Gakua's account, who was her business partner.

8. She stated that though she had indicated in her response of 16/4/2013 that she had a business, she never provided the Respondent with any evidence to prove that fact.

9. It was her evidence that she signed all the deposit vouchers for the amounts she deposited. She stated that high standard of integrity was

required of the staff.

10. It was her concession that she had not produced sale invoices or purchases for the business. She further conceded that she had not attached any document to prove that she had been cleared of the fraud allegations. It was also her concession that she had no evidence to prove that her bank account had been frozen.

11. She confirmed receiving the letter of 28/6/2013 but denied having knowledge of whether money had been paid to her account. She conceded that fraud did not constitute the reason for her termination.

12. Upon re-examination, she clarified that the frozen account was the one held by the Respondent and that she had never accessed it. It was her testimony that the business account had been opened by her employer.

The Respondent's Case

13. The Respondent contends that fraud did not form the reason for the termination of the Claimant's employment hence it was irrelevant in this claim. The Respondent further contends that the employment was lawfully terminated under the 3rd clause of the employment contract by payment of 1 months' salary in lieu of notice.

14. It is the Respondent's case that the Claimant's terminal dues were used to offset the debt she owed the Respondent. It is of the position that this claim has been filed in an attempt to stall the outstanding debt owed by the Claimant which is subject of the proceedings in **Githunguri CMCC 21 of 2015; Githunguri Dairy and Community Sacco Limited vs. Grace Muthoni Muhoro**. As such, the claim should be dismissed with costs.

15. Charles Kioko testified as RW1. He adopted his witness statement dated 28/10/2019 as his evidence and relied on the bundle of documents filed on 6/8/2015, as his exhibits.

16. During cross-examination, RW1 conceded that he did not have records to demonstrate the procedure that had been followed to terminate the Claimant's employment but maintained that her employment was terminated after the issuance of a notice.

17. It was his testimony that the Claimant explained her position as had been requested by the Respondent. However, the Respondent was not satisfied with the explanation hence her termination.

18. He confirmed that the Claimant was not afforded a hearing before the said termination. He also conceded that the termination letter did not disclose the reason for the Claimant's termination, the Claimant's right of appeal neither did it compute the terminal dues payable to the Claimant.

19. It was his testimony that the amount of KShs. 65,519.00, comprised of severance pay and salary in lieu of notice.

20. Upon re-examination, it was his testimony that any party had the discretion to terminate the contract, as such, the board had the right to terminate the same after its dissatisfaction with the Claimant's explanation. He was of the view that high level of integrity was required of the Respondent's employees. He stated that the letter of 28/6/2013 indicated what was payable to the Claimant.

Claimant's Submissions

21. In her submissions filed on 15/11/2019, the Claimant submits that she was not subjected to disciplinary proceedings as required by Section 43 of the Employment Act a fact, which was not rebutted by the Respondent. She relies on the case of **Moses Daniel Nyongesa vs. Mumias Sugar Company Limited; ELRC Cause 1472 of 2013** where the Court held that Section 41 contains the mandatory requirement to an oral hearing in cases of summary dismissal on account of gross misconduct.

22. It was submitted that after giving her explanation as required of her, the Respondent had no proof of her gross misconduct, as such, the option to terminate her employment was a termination procedure stipulated in her contract of employment and which does not meet the threshold for a valid reason set out in Section 45 of the Employment Act. She urged the Court to find that the termination of her employment was procedurally unfair.

23. She submitted that since the termination of her employment was wrongful, the court ought to award her the remedies outlined in Section 49 of the Employment Act.

The Respondent's Submissions

24. In its submissions filed on 17/12/2019, the Respondent submits that the applicable law in this case is the Repealed Employment Act since the Claimant was employed on 1/9/2007. As such, the Respondent was not required to subject the Claimant to a disciplinary hearing before terminating her employment but still gave the Claimant an opportunity to explain herself.

25. The Respondent relies on the case of **Kenya Ports Authority vs. Festus Kipkorir; Civil Appeal 1 of 2004** and **Joseph Mwangi Gioche vs. Gatamaiyu Dairy Farmers Cooperative Society Limited [2019]** which buttress its position above. It is submitted that termination was in accordance with the contract of employment.

26. The Respondent submits that the Claimant was paid all her terminal dues as evidenced in the Benefits Computation and Loan Recovery

of 28/6/2013 for the sum of Kshs. 100,590.69, which evidence has not been controverted by the Claimant. It is submitted that the Claimant is not entitled to payment in lieu of notice as the same was paid out to her.

27. The Respondent submitted that the Claimant is not entitled to the entire sum of Kshs. 38,115.10 as her May salary since she did not work for 9 days, having been dismissed on 21/5/2013. The Respondent also submits that no evidence has been adduced to prove that the Claimant did not utilize her leave days as such, she is not entitled to a claim of the same.

28. The Respondent contends that the Claimant is not entitled to damages for unlawful termination since the Respondent had the right to summarily dismiss her and relies on the case of **Directline Assurance Company Limited vs. Jeremiah Wachira Ichaura; CA 68 of 2014.**

29. The Respondent submitted that the Claimant could be issued with a certificate of service upon her request.

30. I have considered the evidence and submissions of both Parties. From the Claimant's termination letter, fraud was not the reason for her termination. Infact, the Respondent indicated that they had exercised their option under the contract to terminate her by giving one month's notice.

31. The question is whether this is a valid reason to terminate a contract as envisaged under Section 43 of the Employment Act 2007 which states as follows:-

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".

32. Section 43 of the Employment Act envisages that the employer must have valid reasons to terminate a contract and an employer cannot just wake up and terminate a contract just because they feel like and are exercising their right to terminate.

33. Section 45 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".

34. As such, the employer is not only expected to show valid reasons before termination but must also follow due process.

35. In the case of the Claimant herein, the Respondent failed to adhere to the law and in this case, I find the termination was unfair and unlawful.

36. In terms of remedies, I award the Claimant as follows:-

1. Unutilized leave of 23 days = $23/30 \times 38,115 = 29,222/=$

2. 12 months' salary as compensation for the unlawful termination = $38,115 \times 12 = 457,380/=$

Total = 486,602/=

3. Issuance of a certificate of service.

4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 28th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Oduol holding brief Ongere for Claimant

No appearance for Respondent