



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 23 OF 2019

(Before Hon. Justice Hellen S. Wasilwa 27th February, 2020)

HILDAH WANJIKU WAWERU.....APPELLANT

VERSUS

BIDWOOD SUITES HOTEL LIMITED.....RESPONDENT

JUDGMENT

1. The Appellant was the Respondent's employee until 2017 when her employment was terminated on account of her failure to adhere to the Respondent's handbook and code of conduct. She instituted a suit before the Chief Magistrate's Court challenging the termination but judgment was entered in the Respondent's favour.

2. Aggrieved by the decision of the trial court, the Appellant filed this appeal on 9/7/2019 seeking to challenge the judgment of the Hon. G.A. Mmasi (Mrs.), issued on 3/7/2019; on the following grounds-

- a. **THAT the learned trial magistrate erred in fact and law in being satisfied that the Appellant had not proved a case of wrongful termination on balance of probability.**
- b. **THAT the learned trial magistrate erred in law and in fact by finding that the parties were strictly bound by terms of contract.**
- c. **THAT the trial magistrate erred in fact and in law in finding that the Appellant had not proved her case against the Respondent whereas there was overwhelming evidence to the contrary.**
- d. **THAT the trial magistrate erred in fact and in law by disregarding the Claimant's evidence, submissions and authorities relied upon thus arriving at an erroneous decision.**
- e. **THAT the learned magistrate erred in fact and in law by dismissing the Appellant's claim.**

3. Consequently, the Appellant sought the following orders-

- a. **This appeal be allowed, the judgment of the subordinate court issued on 3/7/2019 in Nairobi CMEL 143 of 2018; Hildah Wanjiku Waweru vs. Bidwood Suites Hotel Limited be set aside in its entirety.**
- b. **The Honourable Court enters judgment against the Respondent for-**
 - i. **A declaration that the Appellant's termination from employment was unfair and unlawful.**
 - ii. **The appellant be paid terminal benefits amounting to KShs. 825,663.75 as tabulated in the statement of claim dated 31st August 2018.**
 - iii. **Costs of the suit in the lower court and in this appeal.**
 - iv. **Interests on (iii) and (iv) above.**

4. The appeal was disposed of by way of written submissions with the Appellant filing her submissions on 15/11/2019 while the Respondent filed theirs on 4/12/2019.

The Appellant's Submissions

5. The Appellant submits that her employment was terminated without a justifiable reason since there was evidence by DW1 that the Appellant had not been given a notice of termination and had been issued with her termination letter on the same day she was terminated and which letter did not indicate the reasons for termination.

6. The Appellant submits that the finding of the trial court that she had not demonstrated that she had been unfairly treated was erroneous since the Employment Act 2007 requires an employer to have valid reasons for termination and an employee be notified of the same. She relies on the case of **Kenfreight EA Limited vs. Benson K. Nguti; CA 31 of 2015** to fortify this position.

7. The Appellant submits that the trial court would have reached a different decision had it considered the evidence presented. It is her position that the trial court relied on the Respondent's testimony which had not been backed by evidence or had been supported by evidence which could not adequately prove its assertions.

8. For instance, she contends that the assertion that the Appellant had gone on leave, was supported by leave forms which she had not signed or another which had been approved 8 months after the request was made. Further, on the issue of overtime, the biometric system referred to by DW1 to prove employee's clocking in time was not presented in court and that her contract of employment indicated that there would be no compensation for overtime.

9. The Appellant submits that the trial court did not consider the claim, the evidence presented before it, the submissions by the Appellant and that of the Respondent, wherein it made major concessions.

10. She urged the Court to allow the appeal and grant the reliefs sought in the claim.

The Respondent's Submissions

11. The Respondent submits that the trial Court's finding was proper as the Appellant was issued with notice as required by Section 35 (1) (c) of the Employment Act, a fact that proves that the correct procedure was followed. Further, that the Appellant had acknowledged receipt of her final dues, a fact she admitted during cross-examination.

12. The Respondent submits that the trial court's decision that they were bound by their contract was correct because a contract is a binding agreement which can only be vitiated where there is proof of coercion, fraud or undue influence, which the Appellant failed to prove. The Respondent relies on the case of **Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Limited [2017] eKLR**.

13. The Respondent submits that Appellant did not produce any documentation or examine a witness to corroborate her assertions for not taking her leave days or working overtime, thus rendering the claims untenable and relies on the case of **Patrick Lumumba Kimuyu vs. Prime Fuels Kenya Limited; Civil Appeal 18 of 2018** where the Court held that the burden of proof lies on the party who wishes the Court to believe the existence of a fact.

14. Further, that the Respondent had proved that the house allowance claimed by the Appellant was included on the gross pay and relies on the case of **Banking Insurance & Finance Union Kenya vs. Maisha Bora Sacco Society Limited [2018] eKLR** where the Court stated that gross pay was inclusive of the basic salary and allowances as per the contract of service.

15. The Respondent submits that the trial magistrate took into account all the evidence and the grounds raised to prove the claim but which did not prove the claim, for failing to meet the evidentiary threshold. On the other hand, the Respondent submits that it proved its case on a balance of probabilities, as such, the appeal should be dismissed with cost for lacking merit.

16. This being the first appeal from the judgement of the Hon. Learned Magistrate, this Court has a duty to re-evaluate the evidence from the lower Court and make a finding thereof.

17. From the evidence on record, the Claimant was terminated by the Respondent vide a letter dated 3/3/2017 but served upon the Claimant on 3/4/2017 terminating her services with effect from 3/4/2017. The letter does not give reasons for the said termination. This is contrary to the mandatory provisions of law as provided 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".

18. In their defence, the Respondent attempted to indicate that they terminated the Claimant for failure to observe the company's rules and regulations and that the Appellant had previously been warned against forgery of signatures.

19. If indeed the Appellant had failed to observe company rules and regulations or even forged some signatures, the Appellant ought to have

been informed that these reasons were the ones necessitating her termination. This was never done.

20. Even before the trial Court, the Respondent did not explain what company regulations the Appellant flouted or which signatures she forged. In effect, the Respondent failed to prove that they had valid reasons to warrant terminating the Appellant's services.

21. There is also no indication that the Appellant was subjected to any disciplinary hearing as provided under Section 41 of Employment Act 2007 which states as follows:-

1. "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee 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 this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

22. In essence, the termination of the Appellant purely because the contract between the Appellant and Respondent provided for a notice period flouts the letter and the spirit of the employment law and employment contracts in general which envisages that there must be valid reasons and due process before termination of an employment contract.

23. 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".

24. Indeed in case of the Appellant there was no valid reason nor was due process followed before her termination and I therefore find her termination unfair and unjustified.

25. The Learned Magistrate had found her termination valid purely on account of the employment contract which I find is an error in appreciating that an employment contract is a social contract and employment should not just be terminated without following due process or establishing the existence of valid reasons.

26. In the circumstances, I find this appeal has merit. I allow the appeal. I set aside the lower Court's judgment dismissing the Appellants claim. I now enter judgement for the Appellant as follows:-

1. 1 months' salary in lieu of notice = 20,505/=

2. House allowance at 15% of her salary x 28 months = $15/100 \times 20,505 \times 28 = 86,121/=$

3. 10 months' salary as compensation for the unfair and unlawful termination = $20,505 \times 10 = 205,050/=$

Total = 311,676/=

4. Other claim for service charge not proved as there were deemed payable through the payslip and this also applied to overtime where there is an indication that the Appellant used to be paid the same.

5. The Respondent will pay costs of the claim and appeal.

Dated and delivered in open Court this 27th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Applicant in Court – Present

Respondent – Absent