



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 506 OF 2015

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

ROSE AKEYO MWOMO.....CLAIMANT

VERSUS

ASSOCIATION OF

SISTERHOODS OF KENYA.....RESPONDENT

JUDGMENT

1. Vide her Memorandum of Claim dated 30th March, 2015 and filed in Court on 31st March, 2015, the Claimant avers that the Respondent, a Catholic Organization registered as such within the Republic of Kenya, unfairly and without justifiable cause failed to renew her contract, an action which the Claimant termed as unfair and wrongful.

2. Her Case is that she was employed by the Respondent on 3rd May, 2005 as an Accountant in its organization on a contractual basis earning a monthly salary of Kshs. 15,000/-.

3. The Claimant further averred that during the subsistence of her employment with the Respondent, she performed her duties diligently and to the Respondent's satisfaction. She contended that her problems with the Respondent began in the year 2012 when the Respondent's Executive Secretary started accusing her of misusing the finance office.

4. She contended that the allegations levelled against her were baseless and untrue and that this was proved by the audited report for the year 2013 that indicated there was no misuse of funds within the Finance office.

5. The Claimant further averred that on 23rd October, 2014 the Respondent's Executive Secretary in a meeting informed her that there were concerns over a greenhouse project and that as a result some auditors were to take over her office.

6. She was further advised to proceed on paid leave with effect from 23rd October, 2014. She did nonetheless respond to the concerns raised through her lawyers vide a letter dated 30th October, 2014.

7. The Claimant further states that on 15th December, 2014 she received a letter from the Respondent relieving her off her duties and further informing her that her contract would not be renewed.

8. The Claimant maintained that the allegations levelled against her were untrue and baseless and therefore there was no justifiable reason given by the Respondent to warrant the none renewal of her employment Contract.

9. Aggrieved by this decision by the Respondent to unfairly terminate her employment, the Claimant filed the instant Claim in which he seeks the following reliefs:-

1. A declaration that the failure to renew the Claimant's contract was unfair and wrongful.

2. A declaration that the failure to give the Claimant a right of audience was not only unlawful but against the rules of natural justice.

3. General Damages

4. Costs of this suit

5. Any other relief that this Honourable Court may deem fit to grant.

10. The Respondent in its Reply to the Memorandum of Claim dated 14th May, 2015 and filed in Court on 15th May, 2015 admitted having employed the Claimant herein as from 1st July 2005 an Account a position she held until 15th December, 2014 when her services were terminated.

11. The Respondent further denied having unlawfully and unfairly failed to renew the Claimant's Contract of employment as alleged. It however maintained that the Claimant's termination and/or non-renewal of her employment contract was lawful and justified as there were financial inconsistencies in her office during the green house project which prompted it to carry out financial audit to investigate and handle the issues.

12. The Respondent further avers that from the above the Claimant was sent on paid leave as from 23rd October, 2014 to facilitate investigations, which investigations revealed a number of discrepancies in the Claimant's office.

13. The Respondent avers that it sought clarification from the Claimant on the discrepancies but the response received was not satisfactory and thus decided not to renew her Contract.

14. The Respondent averred that its actions were in accordance with the provisions of Section 44 of the Employment Act, 2007 that allows an employer to dismiss an employee summarily without a hearing in the event he is found to be guilty of gross misconduct. It is the Respondent's assertion that the Claimant was nonetheless given an opportunity to defend herself but her response was unsatisfactory.

15. It is on this basis that the Respondent avers that the Claimant is not entitled to the reliefs as sought in the Memorandum of Claim and therefore urged the Court to dismiss the same with costs to the Respondent.

16. The matter thereafter proceeded for hearing on 17th July, 2019 and 17th October, 2019 with the Claimant testifying on her own behalf as CW1 and the Respondent calling one witness (RW 1) to testify on its behalf.

Claimant's Case

17. In her evidence in chief the Claimant (CW1) sought and was allowed to have her witness statement dated 30th March, 2015 and filed in Court on 31st March, 2015 adopted. In her statement, CW1 reiterated the averments made in her Memorandum of Claim.

18. She further sought and was allowed to have the documents as annexed to her Memorandum of Claim adopted as exhibits in this matter.

19. CW1 further urged this Honourable Court to allow her Claim as drawn.

20. On cross-examination, CW1 confirmed that she worked for the Respondent from the year 2005 to the year 2014. She further confirmed that the Respondent sent her on compulsory leave on 23rd October, 2014 and that she was paid on 10th December, 2014 when she was called for a meeting with the Respondent but was not informed of her pending termination.

21. On further cross-examination CW1 confirmed that she was paid Kshs.156,409.70 as gratuity at the time of her separation with the Respondent.

Respondent's Case

22. The Respondent witness, RW1 testified on 17th October, 2019 a managing partner at Muchangi & Associates who were contracted by the Respondent to prepare audited accounts in the year 2012.

23. RW1 further testified that on conclusion of the audit, she prepared a report on the audit and noted weaknesses in the Respondent's Internal Control System and the same brought to the Respondent's attention. A copy of the said report was produced as AOSK- 3(b).

24. On cross-examination, RW1 stated that the report prepared in 2012 was unqualified and that of 2014 by their firm was qualified thus the difference.

25. On further cross-examination, RW1 confirmed that she did not attend any meeting with the Claimant herein.

26. The Parties thereafter agreed to file written submissions to the main Claim.

Submissions by the Parties

27. The Claimant submitted that her work was above per and to the Respondent's satisfaction as was evidenced by the fact that she had not been issued with any warning letter for any misconduct during the subsistence of her employment contract with the Respondent from the

year 2005 to 2014.

28. She further maintained that she was not accorded a fair opportunity to defend herself on the allegations raised by the Respondent contrary to the provisions of Section 41 (1) and (2) and 45 of the Employment Act, 2007. It is on this basis that the Claimant maintained that her termination was therefore unlawful and unfair.

29. The Claimant further contended that the Respondent failed to furnish her with appropriate documentation as proof of the alleged financial misappropriation of funds that led to her subsequent termination from employment. The Claimant therefore contended that the Respondent failed to renew her contract for no valid reason.

30. The Claimant maintained that she proved her case for unfair termination on a balance of probabilities and therefore urged this Honourable Court to allow the Claim in terms of the reliefs sought therein. To buttress this argument the Claimant relied on the Authority **Patrick Asuma Vs Arm Cement Limited (2019) eKLR** where the trial judge found the termination of the Claimant unfair and unjust for the reason that the Respondent failed to adhere to the laid down mandatory provisions of the Employment Act, 2007.

Respondent's Submissions

31. The Respondent on the other hand submitted that the Claimant's termination was done in accordance with Sections 35, 36 and 44 of the Employment Act, 2007. It is further contended that the Claimant was paid all her terminal dues at the time of her separation and has no claim as against the Respondent herein.

32. The Respondent further contended that it was entitled to terminate the Claimant's services without notice the Claimant having acted in gross misconduct. For emphasis the Respondent relied on and cited the cases of **Tomilson Vs L M & S Railways (1944) 1 ALL ER 537** and **Sinclair Vs Neighbour (1967) 2 QB 279.**

33. The Respondent maintained that the termination/non-renewal of the Claimant's employment was not unlawful as contended by the Claimant herein. It further averred that the Claimant has no claim as against it and that her assertions against it are therefore baseless and unsupported.

34. The Respondent further submitted that the Claimant has no Claim against it having been paid Kshs. 156,409.70 as terminal benefits at the time of her separation with it.

35. It is therefore the Respondent's contention that the Claimant has no claim as against it in the circumstances and urged this Honourable Court to dismiss the instant Claim in its entirety with costs to the Respondent

36. I have examined all the evidence and submissions of the Parties. From the documents presented before Court, the Claimant was employed on a one year renewable contract with effect from 1/1/2014. In effect the contract was therefore to come to an end on 31/12/2014.

37. There was no renewable clause. However, there seems to have been some problems with the accounting process and on 23/10/2014, the Claimant was served with a show cause letter which she responded to on 30/10/2014 through her advocate.

38. There were subsequent correspondences on the issue and on 15/12/2014, the Respondents decided to relieve the Claimant of her services and not review the contract expiring on 31/12/2014. She was paid 1 month salary in lieu of notice and severance pay of 146,293.27.

39. In view of the fact that the Claimant was serving on a terms contract expiring on 31/12/2014, the Respondent had a right not to renew the contract but the reasons assigned to the letter dated 15/12/2014 indicated that the contract was being terminated not because it was coming to term but because of what was being considered a malpractice following previous communication between the Claimant and the Respondent.

40. If there was some malpractice then the Claimant was indeed entitled to a hearing, which she was denied and the contract terminated before its due date.

41. I find the termination was unfair in the circumstances and I award the Claimant 3 months' salary as compensation considering that her contract was coming to an end= $3 \times 35,273 = 105,819/=$

42. The Respondent will pay costs of this suit.

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Khaseya for Respondent – Present

Kalume holding brief Siaji for Claimant – Present