



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 39 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

EMILY WAWIRA NJOGU.....CLAIMANT

VERSUS

BENCHMARK DISTRIBUTORS LIMITED...RESPONDENT

JUDGMENT

By her Memorandum of Claim dated 8th January and filed 16th January 2015 the Claimant avers that she was unfairly dismissed by the Respondent. She prays for the following reliefs.

- a. A declaration that the summary dismissal was unlawful as provided by law
- b. Terminal dues (one month for each complete year)

Kshs.20,570.00 x 3 years = 61,710,00
- c. General damages
- d. Costs of this suit
- e. Any other relief this Court will deem fit to grant.

The Respondent filed a response denying the averments of unfair dismissal as pleaded in the Memorandum of Claim and states that it paid the Claimant her terminal dues which she acknowledged and signed a clearance form in which she state she has no further claims against the Respondent.

The case was heard on 20th February 2019 when the Claimant testified on her own behalf while the Respondent called one witness IRENE MBURU, the Respondent's Human Resource Manager. The parties thereafter filed and exchanged written submissions.

Claimant's Case

It is the Claimant's case that she was employed in 2011 as a Distribution Representative (DR) Mwingi Branch. Her starting salary was Kshs.14,000. At the time of termination of employment her salary had increased to Kshs.20,000 per month.

She testified that she was transferred to Kayole Branch where she was accused of taking money, a claim she denied. She testified that she had a meeting with the boss at the branch and the Human Resource Manager after which she was given a termination letter. She testified that she was not issued with any notice and was not paid her dues.

She testified that she took only 14 days leave for the entire period of 4 years that she worked for the Respondent. She testified that she was paid Kshs.36,000 for the leave.

Under cross examination she stated that she had not prayed for leave days and notice in her claim. She stated that the reason for termination was that she took Kshs.4,000/= from the shop but in the letter of termination she was accused of refusing to communicate with the Sales and Communication Manager. She stated her immediate supervisor was the Sales and Distribution Manager. She stated she was forced to sign

the clearance form as she was with her son who was 3 months old.

In the submissions filed on behalf of the Claimant it is submitted that her employment was terminated without compliance with procedures under the Employment Act as she was not issued with a notice to show cause. The Claimant relied on the case of **Walter Ogal Anuro v. Teacher Service Commission** where the court heard:

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural addresses the procedure adopted by the employer in effecting the termination.”

The Claimant further relied on section 45(1) (2) and (4) of the Employment Act and submitted that the termination was wrongful, unfair and unlawful.

On remedies sought the Claimant submitted that Regulation 10(2) provides that:

“An employee who is summarily dismissed for lawful cause or who terminates his service for any reason other than certified ill-health or retirement age shall not be entitled to a gratuity.”

It is not stated which regulations the Claimant referred to.

Respondent's Case

RW1 testified that the Claimant was employed as a Distribution Representative and transferred to Kayole when she got a baby because it was easier for her to access the place of work.

That one day RW1 received a call that there was a shortage in the shop. That the supervisor and the Claimant almost fought over the issue. RW1 testified that when she went to the shop the Sales and Distribution Manager was not present. That she asked the Claimant to continue working but she did not go to work from that day. She testified that the Claimant also refused to attend any meeting. She testified that the Respondent called the Claimant and sent her text messages but she did not attend the first meeting. She also did not attend the second meeting.

That following the Claimant's refusal to go to work or attend meetings a decision was made to dismiss her. RW1 testified that she called the Claimant to the head office where she was handed the letter of dismissal and Certificate of Service. That she was also paid her dues in the office of RW1 when the Claimant raised no objection.

Under cross examination RW1 stated that the Claimant's employment was not terminated because of the lost money but for absencing herself from duty. She clarified that this is what she meant by stating that the Claimant failed to perform her duties.

She testified that she sent messages to the Claimant through the claimant's brother Edward Kiganjo. She testified that the reason she went to Kayole was because of the lost money. That the Claimant was present on the first day but refused to attend subsequent meetings.

In the submissions filed on behalf of the Respondent it submits that the reason for Claimant's dismissal was not loss of funds but failure to report on duty. That the Claimant last reported for duty on the date of the incident on 26th September 2014 and had not reported back to work by 21st October 2014 when she was dismissed.

The Respondent submitted that the Claimant was accorded an opportunity to be heard in Kayole but squandered the opportunity.

The Respondent submitted that the summary dismissal was lawful and prayed that the claim be dismissed.

Determination

I have considered the pleadings and evidence adduced in court as well as the submissions by the parties. The issues for determination are whether the Claimant was unfairly dismissed from service by the Respondent and if she is entitled to remedies.

The Claimant's letter of termination gives reasons for the same to be the Claimant's refusal to communicate with the Sales Distribution Manager who attempted to reach her on several occasions through her telephone number and messages. The Claimant did not deny that following the altercation she had with the Manager on 13th September 2014 she never went back to work until the date she was dismissed. She did not deny that the Respondent tried to reach her on phone and text messages, or through her brother to go back to work and discuss the incident of the loss of money.

I find that in the circumstances the Claimant gave the Respondent no option but to terminate her employment as she did not expect the problem to be resolved in her absence.

I however find that the Respondent acted in a mediocre way by only relying on phone, text messages and emissaries. The Respondent should have invited the Claimant for a hearing by letter.

It is for this reason only that I reduce the summary dismissal to normal termination so that the Respondent will pay the Claimant one month's salary in lieu of notice in the sum of Kshs.20,570.

Since the Claimant was responsible for the situation that led to termination of her employment she is not entitled to any compensation.

The Respondent will pay Claimant's costs at only 50% as taxed costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH 2020

MAUREEN ONYANGO

JUDGE