



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 364 'A' OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th April, 2020)

RICHARD O. PAMBA.....1ST CLAIMANT

STEPHEN OEREKEK PAMBA..... 2ND CLAIMANT

(Suing as personal representatives of the estate of Lilian Alata Pamba)

VERSUS

THE REGISTERED TRUSTEES, KENYA COMMUNITY

DEVELOPMENT FOUNDATION..... RESPONDENT

JUDGMENT

1. The Claimants filed an Amended Memorandum of Claim on 13th July 2017 as the personal representatives of the estate of Lilian Alata Pamba, the deceased. They aver that the deceased was employed by the Respondent as a Financial Accountant from 15th October 2012 until 31st January 2014.

2. They aver that the reason for the Claimant's termination was reorganisation but the termination was unfair as she was not issued with any notice of termination and the laid down procedure for redundancy was not followed.

3. They seek the following prayers:-

i. A declaration that the termination of the deceased's employment by the Respondent amounted to redundancy and was unlawful, null and void.

ii. Compensation to the Claimants to the maximum remuneration for the remainder of the deceased's contractual period less statutory deductions being Kshs.1,450,262 (Kenya shillings One Million, Four Hundred and Fifty Thousand and Two Hundred and Sixty Two Only).

iii. Costs of the suit.

iv. Interest on (ii) above at court rates from the date of filing the claim till payment in full.

v. Any other relief that this Court may deem fit and just to grant.

4. The Respondent filed an amended Reply to the Memorandum of Claim on 14th February 2018. It avers that in November and December 2013, 3 staff who directly reported to the deceased were involved in having large unliquidated amounts of money and as a result, the staff salaries were surcharged to recover the lost funds.

5. It avers that in August 2013, the Program Officer discovered that there was misappropriation of community funds amounting to Kshs.4,000,000 and the deceased had failed to report the misappropriation leading to the suspension of the grant by the donor of Kshs.40,000,000.

6. It further avers that the 2012-2013 audit revealed that there were huge balances due to the deceased's inefficiency and that deceased had acted in disregard of due process. It further avers that the deceased forged a medical receipt of Kshs.400 to read Kshs.4,000/=.

7. It further contends that on 13th January 2014, the deceased was requested to attend a brief meeting with her 2 other senior managers to discuss the issues of concern but she stormed out of the meeting stating that she was too angry to discuss the issues.

8. It is the Respondent's case that the deceased appeared to suffer depression and in those circumstances, it chose not to summarily dismiss her thus it afforded her a soft landing by terminating her with 2 months' notice.

Claimant's Case

9. Richard O. Pamba, CWI, adopted his Witness Statement dated 10th May 2018 as his evidence in chief. He states that the Respondent's action of declaring the deceased redundant without following laid down procedures are unlawful and laden with malice and that the Respondent was aware that the deceased's illness did not hinder her from discharging her duties.

10. He stated that the Respondent created false and tendentious reasons in attempts to legitimise the deceased's termination and that it terminated her without giving her a fair hearing.

11. He stated that the respondent's actions amounted to being declared redundant under the guise of terminating her services without following due process.

12. In cross-examination, he testified that he is not in a position to tender any evidence on the separation of the parties.

13. Upon re-examination, he testified that the matter was filed before his sister died.

Respondent's Case

14. Frank Mwaura, the Respondent's Finance and Investment director testified as RW1. He adopted his Witness Statement filed on 22nd March 2019 as his evidence in chief. He stated that the deceased acted in disregard of due process and that she failed to complete tasks within the agreed deadline and that she communicated directly with the auditor without consulting the line manager.

15. He stated that the deceased not only showed lack of team play with her colleagues but was disrespectful to her supervisors by storming out of the meeting held on 13th January, 2014.

16. He averred that the deceased's conduct was discussed with her during the course of her employment but it was not possible for the organisation to continue engaging her after she stormed out of the meeting of 13th January, 2014 He states that there is no law to show that the separation was a redundancy.

17. He states that the action of separating with the deceased was the most humane one and compassionate as she had committed actions warranting summary dismissal.

18. Upon cross-examination, he testified that fraud was discovered and that the deceased walked out of the meeting before the issues were explained to her. He stated that they did not produce any documents in respect of the matter as deceased is not alive to defend herself.

19. He stated that the meeting was a disciplinary meeting and the deceased was informed of the meeting. Upon further cross-examination, he stated that the meeting was not a disciplinary meeting as the deceased was not informed that she was to be accompanied by any witness.

20. In re-examination, he stated that the decision of terminating the Claimant was made after the meeting of 13th February 2013. He further stated that the termination letter stated that there were gaps and these were the issues that were to be discussed at the meeting.

Claimant's Submissions

21. The Claimant submits that the Respondent is bound by the provisions of Sections 40, 43, 45 and 49 of the Employment Act, Sections 107, 108, 109 and 110 Evidence Act and Article 41 of the Constitution.

22. It is the Claimants submission that the deceased was not issued with any notice of the purported disciplinary hearing that took place on 13th January 2014. They submit that the disease which the deceased was suffering from did not affect her work performance at work as confirmed by the RW1 and the Medical Report produced by the Respondent.

23. They contend that no audit report was produced to prove the discovery of the deceased's inefficiencies. They further contend that the reasons for termination as indicated in the termination letter dated 31st January, 2014 did not comply with Section 40 of the Employment Act as it does not refer to the disciplinary hearing held on 14th January, 2014 and the reasons for termination are contrary to the ones stated during the disciplinary hearing.

24. They submit that the reasons for termination of the deceased's employment cannot pass the procedural test since the deceased was neither notified of the disciplinary hearing nor was she informed of her right to be accompanied with an employee or a shop floor union official.

25. They rely on the cases of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held that for termination to pass the test of fairness, there should not only be substantive justification for termination but also procedural fairness.

26. In conclusion, they submit that the deceased's termination was unlawful and unfair having failed to accord the deceased a fair hearing contrary to the rules of natural justice.

Respondent's Submissions

27. The Respondent submits that the deceased stormed out of the meeting thus when the issues were raised thus the Claimants cannot state that the deceased was not granted a fair hearing. It relies on the case of **Carolyn Munala v Hoggers Limited [2018] eKLR** where the Court held that the refusal to go through the hearing meant that she had no defence to offer and that the employer was justified to believe that she was guilty of offences charged. It further relied on the Court of Appeal decision in **Judicial Service Commission v Gladys Boss Shollei and Another [2014] eKLR**.

28. It submits that the deceased's conduct relating to her dishonesty and breach of fiduciary duties was not reprehensible as it left it with no other recourse than to terminate her services.

29. It contends that this court should find that any conduct that makes it extremely difficult for the Respondent to discharge its disciplinary mandate is not one where the Court should be invited to intervene. It relies on the Court's finding in **Judicial Service Commission v Gladys Boss Shollei and Another** (supra) that Courts do intervene in employer-employee disputes but should not micro-manage the human resource function of other institutions be they public or in the private sector.

30. It submits that the deceased's conduct of open defiance by the deceased against the lawful authority of the Respondent created a ground for summary dismissal without notice. It urges the Court to dismiss the claim with costs.

31. I have examined all the evidence and submissions of both parties. From the evidence before Court, the deceased claimant was terminated vide a letter dated 31st January 2014, which letter indicated that she was being terminated on account of re-organization in order to achieve greater effectiveness both institutionally and in the delivery of various programmes among communities they work with.

32. The termination was to be effected by 1st February 2014 and this implies that no notice was given to the Claimant.

33. Going by this termination letter, the issues raised by the respondent in their evidence that the claimant was guilty of some misconduct cannot suffice. This is because there is no evidence produced before court showing the misconduct and neither is there any evidence to show that the claimant was accorded an opportunity to defend herself against any misconduct if at all.

34. In reliance upon the letter of termination, which cites reorganization as the reason for the termination it follows that redundancy was the reason ascribed to the termination.

35. Section 40 (1) of the Employment Act 2007 states as follows:-

1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

36. There is no evidence that the claimant was given any notice as per law. There is no evidence also of which terminal benefits were to be paid to her after the termination as expected by law.

37. In view of the omission above I find the redundancy of the claimant was unfair and unjustified. In terms of remedies I award her 15 days' salary for each year worked as service pay.

$$\frac{1}{2} \times 131,842 \times 1 \text{ year} = 65,920$$

38. I also award her 10 months' salary as compensation for the unfair termination:-

$$131,842 \times 10 = 1,318,420/=$$

$$\text{Total} = \text{Kshs.1,374,340/=}$$

Less statutory deductions.

39. The Respondent will pay costs of this suit.

Dated and delivered in Chambers via Zoom on this 15th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties