



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2600 OF 2016

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

ABIGAIL KHASOA SIMIYU.....CLAIMANT

VERSUS

BRITAM GENERAL INSURANCE COMPANY KENYA LIMITED.....RESPONDENT

JUDGMENT

1. In her Statement of Claim dated 16th December, 2016 and filed in Court on 19th December, 2016, the Claimant avers that the Respondent, a Limited Liability Company wrongfully, unfairly and without justifiable cause terminated her employment.
2. Her Case is that she was employed by the Respondent on or about 1st January, 2015 in the position of Chief Claims Manager, earning a basic salary of Kshs. 733,575.74/-.
3. The Claimant maintained that during the subsistence of her employment with the Respondent she carried out her duties diligently and to the Respondent's satisfaction and was at all times willing to continue with such services were it not for her unfair and premature termination.
4. The Claimant contended that her problems with the Respondent began sometime in the year 2016 when she received a report regarding alleged loss of missing logbooks that prompted her to initiate internal investigations. She further contended that one of the members of staff within her department resigned as a result of the alleged loss.
5. The Claimant averred that before she could finalize on her investigations she was served with a letter from the Respondent that required her response to the Audit report prepared in May 2016, which she did.
6. The Claimant further averred that the Respondent failed to follow up on her investigations and instead proposed an Early Voluntary Retirement Package via email, which offer she maintained that she respectfully declined.
7. The Claimant stated that she was on 4th November, 2016 invited to a meeting that was scheduled for 7th November, 2016 for what was termed as a notification hearing for termination proceedings. She further stated that she attended the meeting accompanied by her witness, Mercy Andaro.
8. The Claimant maintained that the grounds given for the termination of her employment were different to those set out in the Notice to Show Cause letter that were later discussed in the disciplinary hearing.
9. The Claimant further maintained that her termination was precipitated by the fact that she declined the Early Voluntary Retirement Package and was therefore null and void *ab initio*.
10. Aggrieved by this decision by the Respondent to unfairly and un-procedurally terminate her employment, the Claimant filed the instant Claim in which he seeks the following reliefs:-

1. A declaration that the Claimant suffered unfair and unlawful termination by the Respondent.

2. An Order for Reinstatement to her previous position without any loss of benefits.

3. Damages for the mental stress, harassment and discrimination.

4. Payment of all the lawful terminal dues totalling to Kshs. 55,507,230/- as tabulated below:-

i. Pay for three months' salary in lieu of notice Kshs. 2,200,727.22/-

ii. Pay in lieu of pending 20 leave days not taken Kshs. 489,050.49/-

iii. 6 years' salary for the period up to retirement age of 60 years Kshs.52,817,453/-

TOTALKshs. 55,507,230/-

iv. Pension dues.

5. Maximum compensation of Twelve (12) months' salary.

6. Costs of this suit with interest thereon.

11. The Respondent in its Memorandum of Response dated 13th February, 2017 and filed in Court on 15th February, 2017 admitted having employed the Claimant herein as alleged in her Statement of Claim.

12. The Respondent however denied that it unfairly, wrongfully and un-procedurally terminated the Claimant's employment with it.

13. The Respondent further confirmed having received reports of 3 cases of lost logbooks for Motor Vehicles Registration Numbers KBM 169F, KCA 472V and KBV 252B and sought to carry out its investigations.

14. From its investigations, the Respondent averred that gaps and flawed process within the General Claims Department were revealed. The Respondent further contended that as a result of its findings it did proceed to issue the Claimant with a Notice to Show Cause and found her response unsatisfactory and proceeded to schedule a disciplinary hearing for her on 1st July, 2016.

15. The Respondent maintained that the Claimant's termination was procedural and was on the ground of gross misconduct and abdication of duty.

16. It further maintained that the option to send the Claimant on early retirement was a proposal which the Claimant had a choice to accept or decline, which she declined and was not made in duress or to coerce the Claimant to accept the same.

17. The Respondent averred that it is ready and willing to remit to the Claimant the sum of Kshs. 2,036,928/- as terminal dues which she had refused and/or declined to collect at the time of her separation.

18. The Respondent maintained that the Claimant is not entitled to the reliefs sought in her Claim and therefore urged this Honourable Court to dismiss the same with costs to the Respondent.

Evidence

19. The matter thereafter proceeded for hearing on 15th October, 2019 and 17th December, 2019 with the Claimant testifying on her own behalf as CW1 and the Respondent calling two witnesses to testify on its behalf.

Claimant's Case

20. In her evidence in chief the Claimant (CW1) sought and was allowed to have her witness statement dated 16th December, 2016 and filed in Court on 19th December, 2016 adopted. In her statement CW1 reiterated the averments made in her Statement of Claim. She further sought and was allowed to have the documents as annexed to her Memorandum of Claim adopted as exhibits in this matter.

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

22. On cross examination CW1 confirmed that she was engaged by the Respondent in the position of Chief Claims Manager in January 2015. She further confirmed the report on loss of logbook for Motor Vehicle Registration Numbers KBX 835V and KBQ 537C and that it was her duty to ensure safe custody of the said logbooks.

23. CW1 further testified having been issued with a notice to show cause and that she responded to all the issues raised therein. She further stated that she did not agree with the findings and recommendations of the disciplinary panel.

24. CW1 confirmed having been offered a Voluntary Retirement Package by the Respondent, which offer she declined in October, 2016 and therefore her employment with the Respondent was terminated on 7/11/2016.

25. On further cross examination CW1 stated that she did not appeal the decision to terminate her services as she did not have confidence in the process.
26. She further stated that the Notice to Show Cause issued to her was on issues raised in the Audit report and that she was later invited for a disciplinary hearing albeit 6 months later.
27. On re-examination CW1 stated that she adequately responded to the Notice to Show Cause and that the Respondent did not indicate what aspect of her response was not satisfactory.
28. CW1 further confirmed that in March 2015 the audit done was for the year 2014 during which period the Claimant was not under the Respondent's employment.
29. On the issue of the lost logbooks the Claimant contended that she is the one who noted the same and reported the issue to the Respondent's Management and as a result the audit was conducted. She contended that the audit report was prepared to look like she was the problem.
30. CW1 further testified that she was not in any way negligent in the manner in which she conducted her duties. She further contended that under her leadership the Respondent did not incur any losses and in fact posted profits which is a clear indication of no negligence.
31. CW1 maintained that she is entitled to the reliefs sought in her Claim and therefore urged this Honourable Court to allow the same as prayed.

Respondent's Case

32. RW1 **Anthony Njau Ngigi**, a senior Manager in Internal Audit at with the Respondent sought and was allowed to have his witness statement dated and filed in Court on 15/5/2019 adopted as his evidence in chief. In his statement RW1 reiterates the averments made in the Respondent's Memorandum of Response.
33. RW1 further testified that the audit report done in March, 2016 unearthed irregularities within the Respondent Company that involved officers of the Respondent including the Claimant herein.
34. RW1 further testified that the report was prepared following a report of missing logbooks in relation to Motor Vehicles salvages.
35. RW1 confirmed that following the Respondent's findings as contained in the said audit report the Claimant was issued with a notice to show cause and subsequently a disciplinary hearing arranged.
36. On cross examination RW1 confirmed that the issues covered in the audit report were for the period between January 2013 and May 2014 during which period the Claimant was not under the Respondent's employment.
37. He further averred that the issues raised in the notice to show cause are the same issues raised in her termination letter. RW1 insisted that the Claimant's services were terminated for a valid reason and that fair procedure was duly adhered to.
38. RW2 **Salome Mukuna**, the Human Resource Manager of the Respondent similarly sought to have her witness statement filed in Court on 3/4/2017 adopted as her evidence in chief.
39. She further confirmed that the Claimant's employment was terminated for the reasons set out in her termination letter and that due process as set out in the Employment Act was followed.
40. RW2 further testified that the Claimant was accorded a chance to make her representation at the disciplinary hearing which was duly considered by the Respondent before the decision to terminate her employment was arrived at. She further stated that when the decision to terminate the Claimant was made to the management, it was recommended that she be given early voluntary retirement, which offer the Claimant decline.
41. RW2 further testified that the Claimant was informed of her right to appeal the decision but declined to appeal. RW2 also confirmed that the Claimant's termination letter was posted to her and that the same was returned after the Claimant failed to collect the same.
42. RW2 confirmed that the 2nd Audit report was prompted by the Claimant through an email seeking for action against an employee who had lost a logbook.
43. On cross examination RW2 testified that she issued the Claimant with a Notice to Show Cause on 7/6/2016 and that the same was informed by the audit report. She further confirmed that the Respondent did arrange for 2 meetings on 1/6/2016 and 16/6/2016 which the Claimant failed to attend.
44. RW2 further testified that the Respondent did arrange for yet another disciplinary meeting on 7/11/2016 where the decision to terminate the Claimant's employment was arrived at. RW2 confirmed that the Claimant did not attend this meeting as well as she did not sign against her name.

45. RW2 further confirmed that the Claimant was offered VER which she declined and subsequently she was informed of the decision to terminate her employment.

46. On re-examination RW2 stated that there was no plot to terminate the Claimant as alluded by Counsel for the Claimant. She further confirmed that after the Claimant was issued with a Notice to Show Cause a meeting was held on 16/6/2016 which the Claimant was not invited to where her response to the NTSC was discussed.

47. RW2 further confirmed that the Claimant did attend a subsequent meeting as the minutes reflect that she was present despite the fact that her name was missing from the list of attendees.

48. RW2 further clarified that the meeting of November 2016 was for purposes of communicating the outcome of the disciplinary committee and was not a disciplinary hearing as alluded by Claimant. RW2 insisted that due process was followed prior to the Claimant's termination and is therefore not entitled to the reliefs sought in her Statement of Claim.

49. In conclusion RW2 urged this Honourable Court to dismiss the Claim in its entirety with costs to the Respondent.

50. The Parties thereafter agreed to file and exchange their written submissions to the main Claim.

Submissions by the Parties

51. The Claimant submitted that the Respondent has failed to prove that it had a valid reason for terminating her employment as it was evident from the show cause letter and the disciplinary hearings brought up different issues from those that informed the respondent's decision to terminate her employment.

52. 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 and 45 of the Employment Act, 2007, the Respondent's Human Resource Manual and the Constitution of Kenya, 2010. It is on this basis that the Claimant maintained that her termination was therefore unlawful and unfair.

53. 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 Authorities of Caroline **Nancy Atieno Sikuku Vs Kujenga Maisha East Africa (KEMEA) (2019) eKLR** and **Thierry Poussard Vs Bradley Limited (2019) eKLR** where the trial judge found the termination of the Claimants unfair and unjust for the reason that the Respondent failed to adhere to the laid down mandatory provisions of the Employment Act, 2007.

54. In conclusion the Claimant maintained that she is entitled to the reliefs sought in her Claim and urged this Honourable Court to allow the same as prayed.

Respondent's Submissions

55. The Respondent on the other hand submitted that the Claimant's termination was on the ground of gross negligence as it unearthed irregularities through its audit report prepared in May, 2016 that was within the Claims department that was headed by the Claimant herein.

56. The Respondent further submitted that it did accord the Claimant a fair hearing as a disciplinary committee was constituted and met on 17th June, 2016 when it considered the responses, which it found unsatisfactory and the matter set for a disciplinary hearing on 1st July, 2016.

57. The Respondent therefore maintained that there were valid reasons (grounds) for the Claimant's termination and that it had complied with the provisions of Section 43 of the Employment Act, 2007. To buttress this argument the Respondent relied on the case of **Evans Kamadi Misango Vs Barclays Bank of Kenya Limited (2015) eKLR**.

58. The Respondent further maintained that the Claimant was terminated on account of negligence of duty as well as poor performance of duty. It is on this basis that the Respondent submitted that the Claimant's termination was lawful and valid.

59. The Respondent further submitted that the Claimant's termination was done in accordance with the mandatory provisions of Section 41 of the Employment Act, 2007. For emphasis the respondent cited and relied on the case of **James Odima Kabesa Vs Trojan International Limited (2017) eKLR** where the Court emphasised the importance of according a Claimant a fair hearing in accordance with the provisions of Section 41 of the Employment Act.

60. It is on this basis that the Respondent maintained that the instant Claim is void of merit and urged this Honourable Court to dismiss it with costs to the Respondent. To fortify this argument the Respondent cited the Court of Appeal decision in the cases of **Moi Teaching and Referral Hospital Vs James Kipkonga Kendagor (2019) eKLR** and **Barclays Bank of Kenya Limited & Another Vs Gladys Muthoni & 20 Others (2018) eKLR**.

61. I have considered all the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. Whether the Respondents had valid reasons to terminate the services of the Claimant.

2. Whether due process was accorded to the Claimant before her termination.

3. What remedies if any the Claimant is entitled to.

Reasons for termination

62. From the termination letter issued to the Claimant dated 7/11/2016, the Claimant was informed that she was being terminated due to reports of two Audits conducted in her department and which had demonstrated her lack of care, negligence and inability to resolve critical and substantive matters leading to loss for the company as well as creating room for potential losses of unquantifiable value. The major lapses noted were as follows:-

1. Failure to exercise control over salvages by refusal to update and enforce the process and procedure manual.

During the Internal Audit conducted in March 2015, you committed as the Chief Claims Manager to update the claims processes and procedure manual, a role which is part of your job description, and requires you to prepare and maintain processes and procedure manuals while ensuring systems and procedures are adhered to. Despite this commitment through your management responses captured in the internal audit report dated March 2015, the second audit conducted in May 2016 revealed that the department's policy and procedure manuals remained un-updated, a fact that left the Company exposed.

2. Failure to maintain complete and accurate records of salvages.

During the internal audit conducted in March 2015, various instances of incomplete data were noted on the salvages register, subsequent to which recommendations were made by the auditor. These recommendations were not undertaken to ensure that; a) the process of updating the salvages register should be updated in the process and procedures manual b) Enhanced reviews of salvages on a monthly basis to ensure that there are no manual errors or incomplete capture of salvages. In your capacity as the 'chief claims manager you are required to ensure performance targets, policy and procedures are adhered to at all times. The internal auditor's conclusions charged that the incomplete data entry made it impossible to determine the total number and value of salvages, exposing the company to fraud and revenue leakages.

3. Poor segregation of duties and improper delegation.

During the internal audit conducted in March 2015, segregation of duties with respect to maintenance of salvage records and the custody of the physical documents (and key to the cabinet) were recommended. In your capacity as chief claims manager, you agreed with these recommendations. However, this was yet to be implemented at the time of the second internal audit resulting to financial loss on the part of the Company.

63. Before this termination, the Claimant averred that she had noted loss of 3 log books in her department. She brought out this issue to the management in May 2016 and this prompted some investigations to be done. She avers that investigations unearthed that one staff was responsible for the loss and she pointed this out to the Human Resource Department.

64. An audit was also carried out following her report and on 7th June 2016 she was issued with a show cause letter.

65. The Respondent's RW1 admitted that the audit was carried out following the report by the Claimant.

66. In the Notice to show cause (NTSC) letter to the Claimant dated 7/6/2016 the issues the Claimant was asked to show cause were as follows:-

1. "Numerous instances where salvages are retained by insured, in some cases without expression of interest in the salvage. Also, cases where salvages are retained by insured but the claim is settled in full whereas the procedure and industry practice is to settle net of the salvage amount. It is likely that these salvages are bought by persons other than the insured.

2. Cases of salvages being sold outside the auction process or at below reserve price without proper documentation of approvals. Management's explanation is that these were approved by a committee or through negotiations with the highest bidder. However there are no minutes of this committee's deliberations.

3. Limited documentation or document retention.

4. It was not possible to ascertain the total inventory of salvages and their location;

· To test completeness of the salvages registers for the period under review, we extracted all claims paid that would be considered total loss (i.e. where the claim paid is more than 50% of the sum insured) then matched these with the records per the salvage register, We noted 154 cases that were not in the salvages register. 56 of these had been confirmed, as salvages and management are yet to confirm status of the remaining 95.

· Management initially indicated 19 of the 56 as located at a yard in Utawala, Nairobi, On visiting the yard we only found 14 and on further inquiry management explained and we confirmed that 1 had been sold, 1 was retained by insured, and the other 3 were explained to be at different locations.

67. The Claimant responded to these issues vide her letter dated 10th June 2016. On issue of log books, she stated the matter was investigated and the investigation revealed possible misconduct of one of their staff.

68. She also responded to issues of missing salvages from the Salvage register and indicated that all the salvages were fully accounted for and the register updated and that there would in future be physical verification of salvages on a quarterly basis.
69. After the show cause letter and response thereto there seems to have been some action by the Respondent vide their meeting held on 17th June 2016 at 2 pm the meeting amongst other issues discussed the show cause letter issued to the Claimant and her response.
70. The Committee felt that there was gross negligence of her role and as per the Respondent's Manual which was a ground for dismissal. The Committee recommended a hearing to determine her final verdict.
71. From the reading of these Minutes, the Committee found her response and that of Mercy Andaro identical and this made it unclear as to who is head of Claimant. The Committee also found that her response did not address concerns on poor oversight by Management and lack of proper controls and governance. **The Claimant did not attend this meeting.**
72. Another meeting was held on 1st July 2016 and the Panel also reviewed the show cause issued to the Claimant and her response. The Committee recommended her termination on grounds of gross negligence.
73. Though the Minutes indicate it was a disciplinary hearing, the members who sat in the meeting exclude the Claimant. The Minutes were also signed by those who attended and the Claimant did not sign it. The Minutes were signed on 14th February 2017 after the Claimant had been terminated.
74. In the intervening period on 28/10/2016, the Respondent's Director one Maitha James wrote to the Claimant offering her Voluntary Early Retirement and setting terms of the retirement.
75. The Claimant responded to this email (page 37 of Claimant's documents) indicating that she was not part of the meeting of 28th October and the contents of the discussion that took place were not brought to her attention nor Minutes of the meeting.
76. She also indicated that the meeting was to give her feedback on the results of the disciplinary process and that they had told her it was necessary to part ways due to a "crisis of confidence in her leadership".
77. On 7/11/2016, the Claimant was invited to a termination hearing and was finally terminated vide a letter dated 7/11/2016.
78. I have taken time to analyse the events leading to Claimant's termination in order to establish whether the Respondent had any valid reasons in terminating her.
79. From the show cause letter, reason for the show cause are indicated – the reason for the termination are also indicated in the termination letter. A comparison of the reason for which the Claimant was asked to show cause and those which lead to her termination are invariably different.
80. At termination, the Respondent seem to suggest the lack of leadership in the Claimant whereas in the show cause letter the issues were loss of log books, failure to update Salvage register, retention of salvages auction process of Salvage and implementation of recommendation for the previous audit and for which the Claimant responded to.
81. The issue of Voluntary Early Retirement also coming in after the show cause and disciplinary hearing and the Claimant also tends to suggest lack of proper or valid reasons for outright termination of the Claimant.
82. There are no Minutes also adduced by the Respondent which show response to the Claimant of issues complained against her and which allude to the fact that she was indeed culpable.
83. Section 43 of the Employment Act 2007 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".**
84. The law is categorical that an employer can terminate an employee for valid reasons and the onus of proof lies upon the employer to prove the validity of the said reasons.
85. In the case of the Claimant herein, the Respondent was expected to show valid reasons for termination. However as demonstrated before this Court, the reasons are varied and do not flow from the show cause letter. Coupled with an attempt to serve the Claimant an early Voluntary Early Retirement, I find that the Respondent did not have valid reasons to terminate the Claimant.

Due process

86. As for due process, the Claimant submitted that she was not accorded a fair disciplinary process. As indicated above, there are no valid

Minutes submitted in Court showing how the Claimant was heard. The Minutes submitted show the list of attendees and the Claimant's name is conspicuously missing.

87. The hearing if at all fell below the requisite standard as per Section 41 of Employment Act 2007b 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".*

88. Section 45 (2) of the Employment Act 2007 on the other hand provides 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".

89. Having found that the Claimant was terminated without the Respondent establishing the existence of valid reasons and without following due process, I find the Claimant's termination was unfair and unjustified.

Remedies

90. In terms of the remedies, I find for the Claimant and I award her as follows:-

1. *3 months' salary as notice = 733,575.74 x 3 = 2,200,727.22*

2. *Pending 20 leave days = 20/30 x 733,575.74 = 489,050.5*

3. *8 months' salary as compensation for the unlawful termination = 8 x 733,575.74 = 5,868,606/=*

TOTAL = 8,558,383.72/=

Less statutory deductions

4. *Pension dues*

5. *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 Chambers via zoom this 28th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties