



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 124 OF 2015**

(Before Hon. Justice Hellen S. Wasilwa on 28<sup>th</sup> May, 2020)

**BETH NYAWIRA GATHOMI.....CLAIMANT**

**VERSUS**

**UNILEVER KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant commenced her employment with the Respondent on 15/3/1996 as trainee technical operator which was confirmed on 14/11/1996. She progressed in her career and at the time of her termination, she was an Assistant CAPEX/MRO buyer.
2. On 28/10/2014, the Claimant was suspended for violating the Respondent's Code of Business Principles, to pave way for investigations. She was required to hand in the Respondent's property that was in her possession and halt any work that was in progress.
3. Her suspension was extended by a week and on 18/11/2014, she was issued with a letter to show cause. The allegations contained in the letter included dishonesty, using undue influence to influence work allocation and negligence, among others. She was required to respond to the letter by 9:00am on 21/11/2014.
4. The Claimant issued her response on 21/11/2014 and she was summoned for a hearing scheduled for 27/11/2014 and on 9/12/2014 her employment was terminated.
5. She instituted this cause vide her Statement of Claim filed on 4/2/2015, to challenge the termination of her employment and to seek the following reliefs-
  - a. *A declaration that the Respondent unfairly, wrongfully and unlawfully terminated the Claimant's contract of employment.*
  - b. *Release of the Claimant's pension.*
  - c. *Three months' salary in lieu of notice amounting to KShs. 552,721.05.*
  - d. *Salary arrears for days worked in the month of December 2014 amounting to KShs. 53,489.13.*
  - e. *15 accrued leave days at the time of termination amounting to the sum of KShs. 92,120.00.*
  - f. *Unpaid leave allowance for the year 2014 amounting to KShs. 18,000.00.*
  - g. *12 months' salary for wrongful and unfair dismissal amounting to KShs. 2,210,884.20.*
  - h. *Costs of this suit.*
  - i. *Interest on the amounts awarded above.*
  - j. *Such other and further orders that this Honourable Court deems just and expedient to grant.*

### **The Claimant's Case**

6. The Claimant avers that the suspension letter did not indicate who had made the allegations against her or when the investigations had been commenced.
7. She avers that at the time she received the show cause letter, she had not been interviewed by any investigators or issued with the investigation report and the documents the Respondent was relying on. Further, that the allegations contained in her show cause letter were vague and unsubstantiated. It is averred that in her response, the Claimant requested to be issued with a copy of the investigation report.
8. It is her case that new charges were introduced while two were dropped, she was not given an opportunity to peruse the evidence against her and that her case was prosecuted by a third party and not the Respondent.
9. She avers that she was directed to commence the clearing process by obtaining an exit clearance form from her line manager who was in South Africa. It is her position that this was a ploy by the Respondent to withhold her pension money.
10. In light of the foregoing, it is the Claimant's case that her employment has been wrongfully and unlawfully terminated as it was predicated on an unfair process.
11. During trial, the Claimant testified as CW1 and adopted her witness statement together with her documents as her evidence. It was her testimony that union officials requested for the investigation letter but were informed that it would be availed in the course of the hearing, which was never done. He stated that Derrick Pearson who testified at her disciplinary hearing, referred to documents that had never been availed to her.
12. During cross examination, she conceded that she was paid during the suspension period. She further conceded that she did not request for more time to put in her response. It was her concession that the Respondent had a policy to protect their source, but contended that the investigation results ought to have been communicated. It was her position that the investigation would have provided clarity to the allegations against her.
13. It was her testimony that not all the allegations against her were discussed at the meeting. She conceded that she never wrote to the Respondent challenging the contents of the minutes but contended that she signed the minutes of her disciplinary meeting under duress. She stated that her failure to clear was due to her inability to reach her line manager who was in South Africa. She admitted to being paid her November salary together with her pension.
14. Upon re-examination, she maintained that she was not paid her final dues as computed by the Respondent.

### **The Respondent's Case**

15. In their Memorandum of Defence filed on 18/3/2015, the Respondent contends that the Claimant's summary dismissal was warranted and lawful and that she was paid her terminal dues upon dismissal. The Respondent further contends that the Claimant's letter to show cause was clear concerning the allegations levelled against her and that the allegations regarding her misconduct were genuine.
16. The Respondent contends that disciplinary proceedings were commenced against the Claimant because she failed to address the allegations that had been made against her. The Respondent denies receiving any request for information from the Claimant, to enable her prepare for her defence and denies violating the Claimant's constitutional rights.
17. During trial, Mary Nyagi testified as RW1. She relied on her witness statement, the defence and their bundle of documents as her evidence. It was her testimony that the Claimant was suspended because she was one of the suspects. She confirmed that the Claimant could only access the premises during her suspension, she was to contact the Director. It was her position that employees were to respond to show cause letters within 48 hours.
18. She contended that the Claimant did not request for more time to reply to the letter to show cause neither did she request for any documents or indicate that she wanted the allegations against her specified. It was her position that no new issues were raised at the hearing. It was her evidence that the Claimant was fully conversant with what was discussed.
19. RW1 testified that the Claimant together with the union representatives signed the minutes as a true representation of the deliberations. She denied the Claimant's allegations that she had signed the minutes under duress. It was her testimony that the Claimant was paid her salary, leave pay and her pension. According to her, the Claimant was not ejected from the premises.
20. During cross examination, she conceded that the Claimant had indicated in her response that she had been denied access to the company's systems and had also requested for the investigation report. It was her testimony that the Code Committee was part of the Disciplinary Committee but conceded that she did not have evidence to prove that they worked together. She admitted that the Code Committee handled the disciplinary process.
21. It was her concession that the Claimant signed the minutes on the same day she was given her dismissal letter. She conceded that there was no one from the procurement who gave evidence. She confirmed that the Claimant had been informed that the investigation report would be availed during the hearing.
22. It was her evidence that the copy of the anonymous complaint was to be availed in future and that some documents would have been given to the Claimant if she had requested. She admitted that the anonymous complaint was relied on too. She admitted that the line manager

was in South Africa and that he had been part of the investigation team.

23. She contended that the Claimant was paid all her dues but conceded that her witness statement indicated that the Claimant had no accrued leave or unpaid salary.

24. Upon re-examination, she maintained that the Claimant did not request to be given certain documents. She explained that the Code Committee looks at the breach of the code and reviews a testimony before making a decision. She stated that Armoutech issued the anonymous complaint.

### **The Claimant's Rejoinder**

25. On 8/4/2015, the Claimant filed a rejoinder to the Respondent's defence where she reiterates the averments in her plaint.

### **The Claimant's Submissions**

26. In her submissions filed on 28/2/2020, the Claimant submits that the Respondent failed to adhere to its own disciplinary code, charged the Claimant with ambiguous charges and gave her little time to respond to the same thus tainting the entire disciplinary process. As such, there was no hearing as envisaged by section 41 of the Employment Act.

27. She relies on the case of **Rebecca Ann Mana and 2 Others vs. Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where the Court held that an employee must be issued with clear charges and sufficient time to prepare their defence, and the case of **Peterson Ndung'u & 5 Others vs. Kenya Power and Lighting Company [2014] eKLR** where the Court held that since the Claimants did not appear before the disciplinary committee, the process was unfair within the meaning of Sections 41 and 45 of the Act.

28. Consequently, the Claimant was wrongfully and unlawfully terminated from employment.

29. The Claimant submits that she is entitled to house and transport allowance since it was an entitlement under the CBA. She submits that she is entitled to 3 months' salary in lieu of notice having worked for the Respondent for more than 6 years and since there were justified grounds for her summary dismissal.

30. The Claimant submits that she is entitled to unpaid leave allowance which was due in 2014, being the third year of the CBA. It is submitted that the Claimant is entitled to the 9 days worked in December and the 15 days accrued leave not taken. It is her submissions that she entitled to 12 months' compensation having been wrongfully and unlawfully terminated.

31. I have examined the evidence of the Parties herein and submissions filed herein. The issues for this Court's determination are as follows:-

1. *Whether there were valid reasons to warrant the Claimant's dismissal.*
2. *Whether the Claimant was subjected to a fair disciplinary hearing before dismissal.*
3. *Whether the Claimant is entitled to the remedies sought.*

### **Reasons for dismissal**

32. On 28/10/2014 the Claimant was suspended from duty on the grounds that she had violated the Respondent's Code of Business Principles (COBP). The details of the particular breaches were not indicated in the suspension letter. She was to remain on suspension for 2 weeks.

33. She was also expected to hand in all the company property in her possession including her laptop, company phone and company access card and halt all work that was in progress.

34. On 18/11/2014, she was now issued with a show cause letter which indicated that she had violated the Code of Business Principles (COBP) and or Code Policies as follows:-

1. *Used your position to unduly influence work allocation (eg Armoutech Purchase orders that you worked with).*
2. *Anti Trust activities and infringements in the conduct of your duties.*
3. *By gross negligence or intentionally negatively impacted Unilever cash flow by guiding unauthorised advance payments in respect of purchase orders to Armoutech.*
4. *Your falsely referenced incorrect tender numbers with purchase orders.*
5. *To Unilever's detriment assigned work (large works) to a supplier (Armoutech) without following tender process and without proper authorization.*

**6. Were in a dishonest relationship with suppliers.**

**7. Exposed Unilever to loss and risk by wilful dishonest conduct.**

**8. Influenced payment terms and conditions to a supplier (Armotech) outside of your authorization mandate.**

**9. Influenced work allocation directly and indirectly outside of our authorization mandate.**

35. The Claimant responded to this show cause letter vide her letter dated 21/11/2014 indicating that allegations made against her were very broad and requested for some degree of specificity of the exact nature and extent of the allegations against her.

36. She also indicated that after suspension she was denied access to the company system and all records of all transactions are stored in them and so it would be difficult to respond to any query without being granted access to the company system for reference and for memory. She nonetheless denied all allegations levelled against her.

37. She also requested to be furnished with a copy of the investigation report to enable her respond appropriately to any valid and particularized allegations that may exist.

38. The Respondent did not respond to the requests made in her reply to the show cause letter. They did not supply the investigation report nor make clear the allegations levelled against the Claimant. They also did not allow her access to the computer that had details of allegations made.

39. She was however invited to a disciplinary hearing vide a letter dated 25<sup>th</sup> November 2014.

40. From the Minutes of the disciplinary committee held on 27/11/2014, the Claimant requested for a copy of the Investigation Committee. This was raised by the Union representative. The representative also raised the issue that the Code Committee was not recognised in the CBA nor was the suspension procedure as outlined in the CBA.

41. In response to this, the Chairman of the Committee indicated that information in the report will be presented during the hearing and the Claimant and her representative can respond to all the allegations.

42. During the disciplinary hearing 3 complaints against the Claimant were withdrawn but she was then dismissed for the following reason "gross misconduct in violation of Unilever's Code of Business Principles (COBP)".

43. The details of the gross misconduct are also missing from the face of the dismissal letter.

44. However going by the said letter, reasons assigned to the dismissal emanate from the Minutes of the disciplinary hearing which show that 2 of the charges were dropped leaving reason that the Claimant was found culpable of serious misconduct adversely impacting Unilever.

45. It was also found that the Claimant fraudulently misquoted tender number CL14/12 on the Amor Tech Purchase Order. Finally that the Claimant was found to have fraudulently and intentionally misrepresented Unilever and this harmed her financially.

46. The Respondent also laid emphasis on an anonymous complaint forwarded to Respondent indicating corrupt deals between the Claimant and Elicon Building Contractors and Armotech Engineering Limited.

47. In determining whether the Respondent had valid reasons to dismiss the Claimant, I refer to Section 43 of the Employment Act 2007 which provides 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".**

48. From the Minutes of the hearing, the Respondent were able to put to the Claimant their concerns concerning her involvement in some procurement issues and she responded. She was however found culpable as per the Minutes.

49. What is imperative is that they establish valid reasons for the dismissal which reasons were what they believe to exist as at the time of dismissal.

50. From the Minutes herein, the Respondents believed the reasons that existed and which led to the dismissal of the Claimant. It is my finding that the Respondent indeed believed the existence of these reasons and established them as per the Minutes of the disciplinary hearing.

#### **Disciplinary process**

51. The Claimant submitted that the disciplinary process was flawed as she was denied some documents to help her defend herself.
52. From the Notice to show cause (NTSC) letter the Claimant indeed indicated she had no access to her computer to enable her respond adequately to issues placed before her. She also asked for a copy of the investigation report in order to comprehend the gravity of the complaints against her. These were never provided to her.
53. The Claimant was invited to a disciplinary hearing under the letter dated 25/11/2014.
54. There is no evidence that the letter laid down to her the charges levelled against her. It is therefore evident that though she appeared for a disciplinary hearing, the charges against her were not presented to her before the hearing to enable her prepare her defence.
55. Indeed under Article 50 of the Constitution, the need for an accused to be accorded a fair hearing is emphasized and this includes the need to be aware of the charges levelled against her in a clear and unambiguous manner.
56. In the case of the Claimant however, I find that the Claimant was not only denied the advantage of knowing in advance charges against her but she was also denied the investigation report and access to her computer which would have enabled her access information to defend herself.
57. In the circumstances, I find the disciplinary hearing against the Claimant was not fair.
58. Section 45 (2) 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".*

59. In the case of the Claimant, this Court having established that she was not accorded a fair hearing, also finds that her dismissal was unfair in terms of Section 45 (2) of the Employment Act 2007.

### **Remedies**

60. Given that the Respondent had valid reasons to dismiss the Claimant but exercised improper disciplinary process, I will award the Claimant:-

*1. 4 months' salary as compensation for the unfair dismissal = 4 x 166,198.33 = 664,793/=*

61. I also award the Claimant the following remedies as prayed:-

*2. 3 months' salary in lieu of notice = 3 x 166,198.33 = 498,594.99/= as per the CBA between Respondent and Claimant's Union.*

*3. 18,000/= as leave allowance as per Respondent's admission and as computed.*

*4. Salary for 9 days worked in December 2014 = 49,859.68/=*

*5. Leave for 15 days unutilised leave = 83,099.50/=*

**Total = 1,314,347.17**

*Less statutory deductions*

*6. 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 28<sup>th</sup> day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

**JUDGE**

**In the presence of:**

Onyango for Respondent – Present

Omwebu for Claimant – Present