



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 775 OF 2017

Jael Awino Ogwel.....CLAIMANT

VERSUS

NAIROBI JAVA HOUSERESPONDENT

JUDGMENT

1. The claimant was employed by the respondent until 9.3.2017 when she was summarily dismissed for alleged misconduct. She therefore brought this suit on 26.4.2017 seeking the following reliefs:-

- (a) A declaration that the claimant's termination was unfair and wrongful
- (b) General damages for wrongful/unfair termination.
- (c) Payment of all the monies as tabulated at paragraph 19 above and other sums as the court shall direct.
- (d) Aggravated and Punitive damages for defamation.
- (e) Severance Pay
- (f) Permanent injunction restraining the respondent from stipulating that the claimant was dismissed on grounds of fraud
- (g) Costs of this claim
- (h) Interest on b,c,d and e above at commercial rates
- (i) Any other relief the court may deem just to grant

2. The respondent filed defence on 5.7.2017 admitting that she dismissed the claimant but denied that the dismissal was unfair. She averred that the dismissal was for a valid reason and fair procedure was followed. She therefore prayed for the suit to be dismissed with costs contending the claimant is not entitled to the reliefs sought.

3. The suit was heard on 26.9.2019 when the claimant testified as CW1 but the respondent called no witnesses. However, after the hearing, both parties filed written submissions.

Claimant's case

4. The claimant testified that she joined the respondent in June 2006 as a Store keeper and in November 2008, she was promoted to Assistant Branch Manager. In 2009 she rose to become Branch Manager earning Kshs. 59,500 which was later increased to Kshs. 73,000.

5. On 28.2.2017, she was suspended for an alleged fraud and invited to a hearing on 3.3.2017. On arrival at the meeting she was arrested and detained at the police station for eight (8) hours and then released on Kshs. 50,000 cash bail. Finally the disciplinary hearing was held on 7.3.2017 for 15-20 minutes where she was asked to defend herself against allegations made by Mr. David Githua, respondent's Senior Accountant, that she was defrauding the respondent by redeeming vouchers for cash and shared the proceeds with others. She was further accused of merging bills worth Kshs. 5,000 to enable her cash them out as vouchers. She denied all the allegations contended that and the accuser, Mr. Githua never attended the disciplinary hearing to give evidence and for her to get an opportunity to cross-examine him.

6. She contended that despite the accused not attending the hearing, she was dismissed from work on 9.3.2017 and on 12.3.2017 the

respondent withdrew the criminal case against her. She therefore contended that the procedure followed in her dismissal was not fair because she never faced her accuser at the hearing.

7. As regards the reason for the dismissal she denied any wrong doing and contended that when she received the vouchers at the branch, she could sell them to customers and bank the money and give the banking slips to the Accountant in the branch to remit to the Head office. She contended that the other time she interacted with vouchers is when she received them from the cashier during conciliation. She denied ever receiving vouchers directly from customers to exchange with money.

8. On cross-examination, she admitted that her contract was terminable by one month notice. She further admitted that the contract did not provide for salary for remainder of the contract term. She contended that from the day she was dismissed she did not get any other job until February 2019 when she started a soap detergent business.

9. She admitted that after dismissal she was paid terminal dues including salary for March 2016, 15 leave days, one month salary in lieu of notice and pension. As regards the unremitted NSSF and NHIF deductions, she produced statements as evidence to prove that the money was not remitted.

10. She admitted that the letter dated 28.2.2017 informed her the reason for which termination was being considered, and it also invited her to a hearing in the company of another employee. She further admitted that she was allowed to make written and oral defence. She reiterated that no evidence was adduced during the hearing to support the alleged offence of fraud against her.

Issues for determination

11. I have carefully considered the pleadings, evidence, and submissions presented to the court. There is no dispute that the claimant was employed by the respondent from 2006 to March 2017 when she was dismissed by the respondent. Under section 45 of the Employment Act, termination of employees' contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason, and that a fair procedure was followed. The issues for determination herein are therefore:

- (a) Whether the reason for dismissing the claimant was valid and fair.
- (b) Whether a fair procedure was followed.
- (c) Whether the reliefs sought ought to issue.

Reason for the termination

12. The claimant tendered evidence to deny the offence of fraud which was cited for her dismissal but the respondent tendered no evidence herein to support the alleged fraud. It follows therefore that the respondent has failed to prove that the reason for dismissing the claimant was valid.

Procedure followed.

13. The claimant admitted in evidence that she was informed of the reason upon which dismissal was being ordered and thereafter invited to make a written defence. The claimant further admitted that on 7.3.2017 she was invited to a disciplinary hearing in the company of another employee. To that extent, I return that the procedure followed was fair because it accorded with the procedure provided under section 41 of the Employment Act. The said provision require that before dismissing an employee for misconduct, the employer shall explain the reason to the employee in the presence of another employee and thereafter invite the two to make their defence, which must be considered before the dismissal is decided.

Relief

14. In view of the finding that the respondent has failed to prove that the reason for dismissing the claimant was valid and fair, I make declaration that the dismissal of the claimant herein was unfair and wrongful.

15. Flowing from the foregoing, and by dint of section 49 of the Employment Act, I find and hold that the claimant is entitled to compensation for unfair dismissal. Considering her long service of over ten years, and the fact that she did not secure another job for three years after the dismissal, I award her 12 months' salary as compensation for the unfair dismissal.

Hence Kshs. 73000 x 12 = Kshs. 876,000/-.

16. The claim for salary for the period before retirement is dismissed for lack of legal and contractual basis. Likewise, the claim for unremitted NHIF and NSSF must fail because it lacks particulars.

17. The claim for 15 days leave salary in lieu of notice and salary for March is also dismissed because the claimant admitted that she was paid after the dismissal.

Disposition

18. I enter judgment for the claim in the sum of **Kshs. 876,000/-** subject to statutory deductions. The claimant will also have costs plus

interest at court rates from the date hereof.

Dated, signed and delivered in Nairobi this 26th day Of June, 2020.

ONESMUS N. MAKAU

JUDGE