



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2487 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**LILY YEKO NGEYWA.....CLAIMANT**

**VERSUS**

**WORLD VISION KENYA..... RESPONDENT**

**JUDGMENT**

The Claimant was employed by the respondent as a secretary on 1<sup>st</sup> October 2001 and rose in rank through a series of promotions to the position of systems operator earning a salary of Kshs.87,794.50. The respondent is a donor funded Christian relief, development and advocacy organisation and works with children, families and communities to overcome poverty and injustices. The claimant was at the time material to this stationed at the respondent's Osiligi ADP Camp Kajiado. Her role was to ensure all data collected from the ground was keyed into the respondent's system. The data was used by the respondent to account for expenditure to donors.

On 9<sup>th</sup> May 2016 after being subjected to disciplinary proceedings, the Claimant's employment was terminated for failure to record cases of child abuse in the single STEP system, inconsistencies between the system and the stamped documents, use of outdated forms and failure to invoke the whistle blower policy. As a result, the Claimant filed this suit seeking the following reliefs-

- a. Declaration that the Claimant was unfairly dismissed.*
- b. Reinstatement and in the alternative, payment of pension dues and gratuity.*
- c. 12 months' salary pursuant to Section 49(1)(c) of the Employment Act 2007 being compensation for wrongful dismissal, unfair and/or unlawful termination of employment in the total sum of Kshs.1,053,528.00.*
- d. Payment of arrears of salary from the date of termination to the date of expiry of the Claimant's employment contract amounting to Kshs.438,970.00.*
- e. Interest at court rates on (b), (c) and (d).*
- f. Costs of the suit.*
- g. Any other order the Court may deem fit.*

The Respondent filed its Response in which it contends that the termination of the Claimant's employment was lawful as there was justifiable reason. Further, that the matter was investigated, after which the Claimant was issued with a show cause letter which she responded to. She was thereafter subjected to a disciplinary hearing before her employment was terminated. The respondent prayed that the suit be dismissed.

**The Claimant's Case**

In examination in chief, the Claimant testified that it was her duty to receive and key information about the health and education of children as well as general information on welfare of children sponsored by the respondent. The information was provided by community volunteers and given to the Child Wellbeing Facilitator whose responsibility was to give her the information to feed into the system.

The claimant testified that there were child monitoring forms which contained information on the child's name and the registration number. She keyed in the information then stamped the forms.

The claimant testified that there was a pigeon hole where the stamped forms were kept to be collected by the community volunteers.

The claimant testified that there were instances when forms were taken to the office without her knowledge and such information was not keyed into the system.

The claimant further testified that she used the old forms until April/May 2016, since she was yet to go for training on use of the new forms. On the charge that she failed to invoke the whistle blower policy the claimant testified that the problem was protocol. She testified that she reported the information she received to her immediate boss.

The claimant testified that she was issued with a notice to show cause and called for a disciplinary hearing. That she was dismissed on the same date that she went for disciplinary hearing.

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

JACKLINE ONGUKA, RW1 testified that the Respondent had a good reason for terminating the Claimant's employment and followed due process. She testified that an investigation was conducted and a report prepared.

On cross examination, she testified that the respondent detected inconsistencies from the data collected by the Claimant. She stated that all forms went through the systems operator to ensure all the children are monitored and the data is up to date. It was her testimony that where a form was filed before entry into the system, the systems operator was to detect the same from the system and seek out the information from the physical form which had been filed. Where there was discrepancy, the claimant was required to report the same to the management at the time of such discovery. RW1 testified that the failure to detect discrepancies was a performance issue of the systems operator.

It was the testimony of RW1 that investigations confirmed that the Claimant had been using outdated forms, to which she admitted and apologized. She further testified that by the time the Claimant's performance review was done for purposes of renewal of contract, the issues that led to the termination of her employment had not been discovered.

On re-examination, she stated that the Claimant had admitted to training the community workers on the new forms but had lagged behind in rolling out the same. She clarified that the renewal of the Claimant's contract was done in 2015 while the investigations were conducted in 2016. She further clarified that the issues that led to the dismissal of the claimant were raised by her manager and had been documented as part of her performance review.

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

The Claimant submits that the termination of her employment was unlawful as the reasons relied upon were baseless and unfounded. She further submits that the Respondent has not discharged the burden of proof set out in Section 43(1) and 47(5) of the Employment Act. She relies on the cases of **Bamburi Cement Limited v William Kilonzo [2016] eKLR**, **Moses Ochieng v Unilever Kenya Limited [2018] eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** to fortify this position.

It is submitted that the Claimant deserves the maximum compensation for unlawful termination as she had worked for the Respondent for 15 years. She relies on the cases of **Angela Shiukuru Ilondanga v Airtel Networks Kenya Limited [2018] eKLR** and **Pamela Nelima Lutta v Mumias Sugar Company Limited [2017] eKLR**. It is also submitted that the Claimant is entitled to payment of salary for the remainder of her contract period as she was only left with 6 months until the lapse of her contract.

### **The Respondent's Submissions**

The Respondent submits that the Claimant has failed to adduce sufficient evidence to prove her case on a balance of probabilities. She failed to prove that due procedure had not been followed and that the termination of her employment was not based on valid reasons. As such, she is not entitled to the reliefs sought as was held in the case of **Naftali Ayot Okanja v Ria Plywoods Kenya Limited [2017] eKLR**.

### **Analysis and Determination**

I have carefully considered the pleadings, evidence and submissions before this Court. It is not in contention that the Claimant was issued with a show cause letter, responded to the same and subjected to disciplinary proceedings. As such, the issues for determination are:-

- a. Whether the termination of the Claimant's employment was lawful and whether the Respondent had a valid and justifiable reason for terminating the Claimant's employment.
- b. Whether the Claimant is entitled to the reliefs sought.

#### **1. Reason for Termination**

Section 43(1) of the Employment Act requires an employer to prove the reason(s) for termination, and where they fail to do so the termination shall be deemed unfair within the meaning of section 45. Section 47(5) lays the burden of justifying the grounds for the termination of employment on the employer.

The Claimant's termination letter laid out the reasons for terminating her employment as follows –

*“May 9, 2016*

*Lily Yeko*

*C/o Osiligi ADP*

*Osiligi*

*Dear Lily,*

**RE: TERMINATION**

*We regret to inform you that you have been terminated from WVK employment, effective May 9, 2016. This is due to your failure to adhere to quality assurance for sponsorship operations, having inconsistencies in RC data in the system and in the individual files, and failure to whistle blow on child protection issues.”*

*The following will compose your terminal benefits;*

- i) Salary up to your last day of work.*
- ii) One month’s salary in lieu of notice.*
- iii) IPP/Gratuity savings.*
- iv) Accrued leave days.*

*You will be required to clear with WVK within two calendar months after the last day of work. Failure to this, WVK will acquire the right to undertake the clearance process on your behalf and recover all the monies due to it from your terminal dues. You are also required to hand over all WV Kenya’s property in your possession before departure.*

*On behalf of World Vision’s management, I take this opportunity to thank you for the services you have rendered this organization.*

*Yours Sincerely*

**SIGNED**

*Jeremiah Nyagah*

*Operations Director”*

From the Claimant’s job description, it is evident that she had the responsibility to-

- a. Provide capacity building for all staff engaged instep and SD+ data collection to ensure that all STEP and SD+ data meets or surpasses the minimum standards of integrity.*
- b. Carry out quarterly global RC count and annual and biannual RC reconciliation for the ADP/IPAs.*
- c. Ensure all monitoring forms are keyed into step I and reports generated to inform IPA/ADP to inform staff of those that haven’t been visited as per the standard.*
- d. Ensure STEP I and SD+ are maintained as per the standard.*
- e. Periodically inform the IPA manager, project officer- sponsorship and child wellbeing officers on RC level for sound RC management.*

In light of the foregoing duties, the charges made against her were within her purview.

As regards the reasons for her termination: on the ground of using outdated forms, the Claimant stated that it was not a justifiable ground for termination as the new forms were introduced after disciplinary action had been taken against her. She did not adduce any evidence to buttress this assertion. Further, in her first response to the show cause letter, she admitted that she had delayed adopting the new forms.

On the ground of inconsistencies in RC data in the system and in the individual files, the Claimant had been struggling with data discrepancies and it was something she had been working towards improving as per her letter at page 18 of the Respondent’s bundle of documents. Though RW1 admitted that they recovered certain forms which had been stamped by different people, it was the Claimant’s duty

to ensure that such discrepancies did not arise. This had also been an issue in her performance appraisal of 2015.

On the ground of failing to whistle blow on child protection issues,

I have examined the Whistle Blower Protection Policy and the same does not relate to whistle blowing on such issues. It was intended to protect employees who wanted to report suspected misconduct, illegal activity, fraud, harassment, waste, abuse or some other malpractices in the organization; from intimidation.

However, from the trial it emerged that the Respondent conducted investigations regarding the charges raised against the Claimant but failed to adduce evidence that proved that the same had been availed to the Claimant, yet the findings seemed to have influenced the decision to issue her with a show cause letter and to finally terminate her employment. As such, the Claimant did not have the benefit of interrogating the charges as against the investigation findings.

In her evidence, RW1 placed reliance on the investigation findings which were not presented in Court but contended that there was a summary of the things discussed and concluded. What was filed were minutes of the disciplinary hearing held on 9<sup>th</sup> May 2016. Min. 3.5.2016: Disciplinary Hearing for four Osiligi ADP Staff read as follows-

*“MIN.3.5.2016: DISCIPLINARY HEARING OF FOUR OSILIGI ADP STAFF*

*This case arose following the several sponsorship issues that had arisen in Osiligi ADP following investigations into the cases of registered children who had dropped out of school due to pregnancy or after having given birth. Earlier, members had been given a report by a taskforce that had been formed to investigate the incident.*

*The four staff had been asked to show cause on several issues that had already been put to their attention. They had responded in writing, and had been invited for a face to face meeting (in line with our HR Policy Manual) to expound further on their responses...*

*The staff were invited individually and each explained their responses further. After all these, the decisions were made as follows:*

- a. Lily Yeko: Termination effective 9<sup>th</sup> May 2016.*
- b. Evanson Nyambura Njonge: Termination effective 9<sup>th</sup> May 2016.*
- c. Gideon K. A. Kimosop: Termination effective 9<sup>th</sup> May 2016.*

*These decisions were communicated to the staff in the meeting and each issued with their termination letter. The committee thanked them for the service they have given to WVK.”*

There is no record of whether the Claimant was issued the report

or given the opportunity to interrogate the findings therein. Only the committee members had the benefit of perusing the investigation report. To that extent the termination was unfair, within the meaning of section 45 of the Employment Act for lack of substantive justification. In the case of **Walter Ogal Anuro v Teachers Service Commissions [2013] eKLR** the Court observed as follows-

*“22. In light of the foregoing, I find that Respondent had a genuine reason for terminating the Claimant's employment as required under Section 43 of the Employment Act. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”*

## **2. Termination Procedure**

The Claimant admitted that she was issued with a letter to show cause, responded to the same and was accorded a hearing. Further, the Claimant was given another chance to respond to the show cause letter when her initial response was found to have inadequately addressed the issues raised. There is however no evidence that the claimant was informed of her right to be represented by a fellow employee at the disciplinary hearing. Further, in the email from Bernadette to Jeremiah at page 19 of the respondent's bundle, it appears a decision had been made to dismiss the claimant even before the hearing. In the last paragraph of the email, the last sentence states *“I am therefore requesting your office to take disciplinary action against her. For the purpose of clean up in the ADP summary dismissal could be an option.”* This will explain the fact that the claimant was issued with the letter of termination immediately after the hearing. I thus find that there was no genuine hearing but rather the respondent made up its mind then followed up with a hearing to fulfil the requirements of the law. I find the termination unprocedural and therefore unfair.

## **Reliefs**

The Claimant sought an order for reinstatement but because more than 3 years have passed since the termination of her employment, the same was abandoned.

In the alternative, she sought payment of pension dues and gratuity. The Claimant has not adduced any evidence to justify an award for pension. However, the pay slips annexed at pages 35 to 37 of her bundle of documents indicate that gratuity of Kshs.10,442.00 formed part of her monthly gross pay. The same was deducted and never formed part of her net pay; the Respondent also admitted that it had not paid her

dues. As such, she is entitled to the gratuity accumulated at the time of her termination as set out in the letter of termination.

The Claimant also sought 12 months' salary as compensation for unlawful termination. It has been established that the termination was unfair. For this, the Claimant is entitled to compensation which the court must assess based on the grounds set out under Section 49(4) of the Employment Act. I have considered the fact that the Claimant worked for the Respondent for a period of 15 years with a clean record, the circumstances surrounding the termination of her employment, the untenability of issuing an order for reinstatement, her inability to find alternative employment; and award her 12 months' compensation for unfair termination.

The Claimant sought payment of arrears of salary from the date of termination to the date of expiry of the contract. She is not entitled to the same as this is not justifiable in law and the claimant's contract did not provide the same. In the case of **Robert Kennedy Moi v Attorney General and Another [2014] eKLR** the Court observed as follows-

*"The Claimant prayed for payment of salary for the unexpired period of contract.*

*Payment for Salaries for the unexpired period of contract are not due as the law does not provide for anticipatory income. Section 49(4)(e) requires that employees mitigate their losses. Being able bodied, the Claimant was expected to move on with his life after the termination of his employment. This was the decision of Rika J. in **D.K. Njagi Marete V Teachers Service Commission [2013] eKLR, High Court Civil Case No. 1139 of 2002 Menginya Salim Murgani V Kenya Revenue Authority and Industrial Court Cause No 87 of 2011 Olgha Auma Adede V New Kenya Cooperative Creameries Ltd.**"*

## **Conclusion**

**In conclusion, I award the claimant Kshs.1,053,534.00 as compensation. In addition, the respondent shall pay her terminal dues as set out in the letter of termination.**

The respondent shall further pay the claimant's costs of this suit. The decretal sum shall accrue interest at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

## **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**