



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 90 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JACQUELINE MORAA RATEMO.....CLAIMANT

VERSUS

IMPALA CLUB.....RESPONDENT

JUDGMENT

The Claimant, Jacqueline Moraa Ratemo instituted this claim vide a Memorandum of Claim dated 27th January 2015 against the Respondent, Impala Club suing for unlawful termination of employment and non-payment of terminal dues. She avers that she was employed by the Respondent on 1st September 2011 and that she diligently and competently worked as a Club Manager earning a gross monthly salary of Kshs.100,000.

She avers that she was summarily dismissed from employment on 30th September 2013 on grounds that she had inter-alia approved transfer of various monies from an Mpesa Account operated by the Club to herself and other persons without proper accounting to the benefit of the club. She contends that the Respondent’s actions were unfair, unlawful, irregular and based on unfounded and unsubstantiated grounds and that the Respondent got rid of her while she was on sick leave after being involved in an accident. She particularises the unfair dismissal as follows:-

- a) The Claimant was never summoned or allowed to make any representation to defend the allegations levelled against her contrary to Section 41 and 45 of the Employment Act.
- b) The termination was in breach of the rules of natural justice.
- c) The Respondent's actions were biased and actuated by malice.
- d) No attempt was made by the Respondent to establish the veracity of any accusations levelled against her.

The Claimant avers that the Respondent owes her the following terminal dues:

- a. Three months’ salary in lieu of notice.....Kshs.300,0000
 - b. Salary for the remaining contractual period (4 months).....Kshs.400,000
 - c. Compensation for unlawful termination (5 months).....Kshs.500,000
- Total** **Kshs.1,200,000**

She prays for judgment against the Respondent for:

- a) The award of Kshs.700,000 representing terminal dues owed to the Claimant.
- b) Damages for unlawful termination of employment under Section 49 of the Employment Act totalling to Kshs.500,000 representing 5 months’ salary.
- c) A declaration that the termination was unfair, unlawful and in breach of the Section 41 and 45 of the employment Act.

d) Costs of the suit and interest thereof.

e) Any other or further relief as this court deem fit.

The Respondent filed its Memorandum of Response dated 9th May 2016 averring that it contracted the Claimant for 2 years 4 months and that her contract was renewable at the option of the Respondent. It avers that a forensic audit uncovered that the Claimant had failed in her fundamental duties of supervising all departments of the Respondent, leading to accounting malpractices in the accounts department. That the Claimant further permitted the operation of a procurement process that flouted the respondent's procurement procedures. It denies that in dismissing the Claimant it acted illegally and/or otherwise and avers that the Claimant's employment was terminated in accordance with her employment contract. The Respondent prays that the Claimant's suit to be dismissed with costs.

At the hearing the claimant testified on her behalf. The respondent did not call any witness. Mrs. Githae, Counsel for the respondent informed the court that the respondent did not wish to call any witness as the audit firm which it intended to call to submit the audit report had given it a very exorbitant invoice. She thus closed the respondent's case.

The Claimant testified that she worked for the Respondent from 2008, that her last payment was in August 2013 while on suspension and further, that the audit report that led to the termination of her employment was not shared with her. She testified that after her accident in December 2012, she resumed work in April 2013 and was given light duties by the Respondent. That the Respondent did not have policies on financial procedures and specifically on procurement.

During cross-examination, the Claimant stated that she did not appeal against the Respondent's decision as she was still indisposed and bedridden. She stated that the Respondent issued her with a letter sending her on compulsory leave. That the Respondent operated an Mpesa account which was opened in her name as Club Manager using her number 0725428080 and that the handset was in the possession of the cashiers at the reception. That members made payments and when the account got full, she emptied the same and remitted the cash to the accountant or cashiers who would then record the amounts received. In re-examination, she stated that from 2008 to the time of termination no issue was raised about her ability or qualifications and that her contract did not provide for appeal.

Claimant's Submissions

The Claimant submits that whereas she led both documentary and oral evidence, the Respondent did not call any witness to contradict or discount her testimony. That the termination letter evidently shows that the termination was in the nature of a summary dismissal. She urges this court to note that no witness was called to authenticate the forensic report filed by the Respondent. She submits that any reliance on the same would be prejudicial to her as the right to cross-examine the maker was taken away.

She submits that the Respondent did not sufficiently demonstrate that she was involved in embezzlement and/or that she perpetrated accounting malpractices that led to loss of money as required of it under **Sections 43 and 45(2) of the Employment Act**. That it is fundamental to note that the Respondent did also report the allegations of embezzlement to the police when these were serious allegations of a criminal nature. Further that she was dismissed before conclusion of the forensic audit. She urges this Court to find that there was substantive unfairness and that the reasons advanced by the Respondent were illusory and unfounded. The Claimant relies on the case of **Fredrick Otieno Okeyo v Menengai Oil Refineries Ltd [2015] eKLR** where Justice Radido held that on substantive fairness, an employer should prove the reasons for dismissing an employee (section 43 of the Employment Act, 2007) and that the reasons are valid and fair (section 45 of the Act).

On procedural fairness, it is submitted by the Claimant that the Respondent flouted the procedure contemplated under **Section 41 of the Employment Act** as it summarily dismissed her from employment without hearing her response to the allegations in the termination letter. She cites the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the court held that 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. The Claimant further relies on the Court of Appeal case of **Daniel Ouma Okuku v Kenya Plantation & Agricultural Workers Union & Others [2019] eKLR** where it was held that;

"Section 41 of the Employment Act 2007 requires that an employee be notified of allegations made against him and be heard before termination can issue on grounds of misconduct. Such employee is to be informed in a language that he understands; the reason for which the employee is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice to be present during explanation. The employer must hear and consider representations which the employee may have."

On her claim for 3 months' notice pay, the Claimant submits that the same is provided for under **Clause 7 of her contract of employment**. On the claim for accrued salary, she submits that since her employment was for a fixed period of 2 years and 4 months but was unfairly terminated on 30th September 2013, she is entitled to the remaining 4 months in the contractual period. The Claimant further prays for 5 months' pay as compensation for unfair termination pursuant to **Section 49 (4) and 50 of the Employment Act** with the consideration that she had just returned from a long sick leave following a serious accident and had further expected her contract to run the full term. She lastly prays for costs of this suit as a demand letter was issued to the Respondent to make good the Claim.

Respondents' Submissions

The Respondent submits that it summarily terminated the Claimant's employment under **Clause 7(b) of her last employment contract**. That the Claimant admitted under cross-examination that she did not respond to the termination letter, which implies she did not wish to contest or appeal the decision. That she further did not seek any documents to substantiate the Respondent's claims alluding to her gross misconduct and to that extent, it did not breach the law. That by her own admission in court, the Claimant confirmed she was paid full salary during her long period of sick-off and was even given light duties as per the doctor's recommendations. That it is therefore untenable for the Claimant's

Counsel to insinuate that the Claimant was treated unfairly during her period of sickness.

The Respondent submits that the Claimant has not made out a case for terminal dues and that the only claim she would be entitled to was the remainder of the contractual period of 4 months. It submits that the Respondent has met the test for summary dismissal and it relies on the decision of the court in **Consolata Kemunto Aminga v Milimani High School** where it was held that summary dismissal is allowed under the provisions of **Section 44(3) and (4) of the Employment Act, 2007** for a fundamental breach of the employment contract and for gross misconduct.

Analysis and Determination

The issues for determination are whether the Claimant was unfairly

terminated from employment by the Respondent and whether the Claimant is entitled to the reliefs sought.

Section **41 of the Employment Act** provides that,

(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 on 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.

Under **Section 45 of the Employment Act**, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure as under Section 41 of the Employment Act.

In the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** Mbaru J. held:

“Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical Incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow (or an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.”

In this case, the Claimant was not given a chance to be heard before she was summarily dismissed as required under **Section 41(2) of the Employment Act**. The Respondent has submitted that it summarily dismissed the Claimant from employment due to gross misconduct as under the law and it had a fair and valid reason. The respondent did not call any witness to tender evidence that is pleaded in its defence. Further the Respondent did not bother to tender the *letters it alleges to have issued to the Claimant dated 14th June 2013 and 27th August 2013*, referred to in the claimant’s letter of termination annexed to her claim as **JMR3**. To that extent, the Respondent did not discharge its burden of proof that it accorded the Claimant procedural fairness. The Claimant stated in her testimony that she was under suspension in August 2013 before the said dismissal at the end of September 2013. There is no evidence that she was subjected to a hearing before the dismissal.

I thus find that the Claimant’s dismissal from employment by the Respondent was unfair.

The Claimant is entitled to compensation as under **Section 49 of the Employment Act** for want of procedural fairness.

Having found the termination of the claimant’s employment unfair, she is entitled to compensation. Taking into account the manner in which her employment was terminated while on sick leave after a serious road accident, the fact that she was not subjected to a disciplinary hearing, the length of her service as well as the fact that her contract was due to lapse in 4 months, I award the claimant 5 months’ salary as compensation in the sum of **Kshs.500,000**.

The claimant is entitled to notice in accordance with her contract which provided for 3 months’ salary in lieu of notice. I thus award her **Kshs.300,000** in lieu of notice.

She is not entitled to payment for the unexpired term of her contract as compensation is supposed to cover the same, and payment for the unexpired term would constitute a double compensation.

In the end, I declare the termination of the claimant’s contract unfair and enter judgment for the claimant against the respondent in the total sum of Kshs.800,000.

The respondent shall pay claimant’s costs for the suit and interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 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 15th March 2020 and subsequent directions of 21st 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, the 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 the 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