



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 228 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MILLICENT OWADE.....CLAIMANT

VERSUS

ESSENTIALS MANUFACTURING COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Millicent Owade filed a Memorandum of Claim dated 17th February 2016 alleging wrongful and unfair termination of her services by the Respondent, Essentials Manufacturing Company Limited. She avers that the Respondent employed her on 6th March 2015 as a Sales Manager at an initial monthly salary of Kshs.120,560. That on 5th October 2015, the Respondent called her for a meeting and terminated her employment for unsatisfactory performance and asked her to immediately hand over and leave the Respondent's premises.

She avers that all efforts to get proper explanation for the termination of her services have failed. That she was not given an opportunity to defend herself. That the said termination of her services was improper as she felt bullied, intimidated and suffered financial shock as no notice was issued to her prior to termination of her services. In her witness statement, she states that she was informed that her September salary would be paid in due time but the same has never been paid. That the Respondent further breached mandatory provisions of the law, the principles of natural justice and her constitutional right to fair labour practices. She states that she is entitled to the following tabulated terminal dues and damages:

Category A;

Salary for September 2015 Kshs.120,560.00

5 days salary of October 2015 Kshs.20,093.30

Payment in lieu of Notice Kshs.120,560.00

House Allowance (120,560 x 0.7 Kshs 12,658.80)

Total Kshs.273,872.00

Category B:

Damages for wrongful/unfair termination

(120,560 x 12 months) Kshs1,446,720

Grand Total Kshs.1,720,592

She prays that this Court awards as follows:

- a) A declaration that the Respondent's dismissal of the Claimant from employment was unfair and the Claimant is entitled to payment of her terminal dues and compensatory damages as pleaded.

- b) An order for payment of the Claimant's terminal dues of Kshs.273,872 and damages totalling to Kshs.1,446,720
- c) The Respondent do issue a certificate of service to the Claimant as required by law.
- d) An order for the Respondent to pay costs of this suit plus interest thereon.
- e) Any other relief as the Court may deem just.

The Respondent filed a Defence on 4th April 2016 denying in toto all the averments made by the Claimant in the Memorandum of Claim averring that the Claimant's claim for damages for wrongful and unfair termination is bad in law as it lacks particulars. The Respondent also filed a Witness Statement made by its Director, Khadija Kuria who states that on or about the month of October 2015, the Claimant was unable to perform her duties as required of her and put the company in a position where it was unable to meet its financial obligations. She states that the Claimant consequently left employment willingly.

Evidence

The Claimant testified that she had no reason to resign or quit her job especially given the fact that she had financial obligations. She testified that upon termination, she made follow-ups for payments of her dues through phone calls and emails.

During cross examination, she stated that she signed a contract of service to commence in March 2015 but was not given a copy of the contract even after she finished her probation. She also stated that she was not issued with a termination letter. That on 5th October 2015, she was called by the Managing Director, Ms Khadija who informed her that her services were terminated and she was asked to leave. She testified that the follow-up emails she wrote to the company and copied to the Managing Director were well received as she had previously been using the said email addresses during her employment.

RW1, KHADIJA KURIA testified that she tried to warn the Claimant about her poor performance twice; the first time being after 3 months of working for the Respondent and the second time after 6 months of working for the Respondent. The last warning was on 23rd September, 2015 when she called the Claimant for a meeting and informed her of her poor performance. That the Claimant said the products the Respondent was dealing in were still new in the market. She denied terminating the employment of the Claimant contending that the Claimant abandoned work on 23rd September, 2015 on her own volition, and without notice.

Claimant's Submissions

The Claimant submits that pursuant to **Section 43 of the Employment Act**, the employer has a legal and evidential burden of proof of reasons for termination where an employee alleges that the employment was terminated without a sound legal justification. That the Respondent's allegation that she willingly left employment are untrue and not supported by any evidence. That the Respondent is required to keep records of employment such as warning letters and performance under **Section 74(1) of the Employment Act**. That the Respondent did not provide evidence of having paid her final dues. She relies on the case of **Patrick Chebos v Stokman Rozen Kenya Limited [2016] eKLR** where the court in finding that the respondents had not established their counter-claim against the claimant held that:

"The allegation that the Claimant resigned is therefore not supported by any evidence and the only inference this Court can make was that the Claimant was dismissed by the Respondents who wanted it to appear as a resignation by the Claimant himself."

She submits that the procedure followed to terminate her employment was not fair within the meaning of **Sections 41, 43 and 45 of the Act** as she was never afforded any hearing. She cites **Industrial Cause No. 146 of 2012, Alphonse Maghanga Mwanchanya v Operations 680 Limited** where Radido J. stated that;

"The doctrine of natural justice on procedural fairness is now essential part of the employment relationship. An employer must comply with procedures set out in section 41 even in circumstances under summary dismissal or what the Respondent referred to as instant dismissal is contemplated."

It is submitted by the Claimant that **Section 49(1) of Employment Act** provides remedies for wrongful dismissal and unfair termination. That she has annexed payslips which were never disputed by the Respondent and that she is therefore entitled to payment of her September salary and the 5 days she worked in October 2015. That she is also entitled to notice pay as prayed pursuant to Section 49(1)(a). Further that since the Respondent failed to prove her particulars for accommodation she is entitled to the claim for house allowance as prayed. She contends that she has proved her employment was maliciously terminated without justification and she is therefore entitled to 12 months' salary as compensation. She relies on the case of **Joshua Otiego Apiyo v Modern Coast Express Limited [2019] eKLR**, where the court awarded damages of 12 months after finding that the respondent failed to follow the procedure under section 41 and section 43 of the Employment Act.

Respondent's Submissions

The Respondent submits that this is a classic case of voluntary negation with the Claimant ignoring calls to come back to work and acting on the assumption that she had been unprocedurally terminated from employment. That the Claimant never denied in her testimony that she had poor performance because of her inability to meet sales targets. The Respondent points out the email the Claimant sent on 6th October 2015 as seen from her bundle of documents where she hands over all the company property in her possession and all of her accounts to one, Doreen. That this clearly showed she had no intention of returning to work and which amounts to absconding of duty without justification and or notice to the Respondent. That the Claimant's actions warrant summary dismissal under **Section 44(4) of the Employment Act**, as was held by the court in **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR**.

It submits that the claimant has not adequately proved a case of termination of employment and has further failed to provide any witnesses to confirm that the alleged meeting of 5th October 2015 took place. That in evidence he who asserts must prove and under **Section 47(5) of the Employment Act**, the burden of proving that an unfair termination of employment has occurred rests on the employee.

The Respondent submits that RW1 testified she tried contacting the Claimant in vain and that she only came back 14 days later demanding her September salary. It relies on the case of **Simon Mbithi Mbane v Inter Security Services Limited [2018] eKLR** where the court stated that:

“an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such employee without success.”

It submits that since the Claimant is liable for misconduct for wilfully absconding duty, she is not deserving of the reliefs sought in her Memorandum of Claim. That she is however entitled to 23 days' unpaid salary in September 2015. On the claim for house allowance, the Respondent submits that the Claimant did not tender any evidence demonstrating she was not being paid house allowance and that the same should fail. That the claim for damages for wrongful/unfair termination should also fail as the Claimant failed to prove she was unfairly terminated from employment. That should this Court find in the alternative, it should consider relevant factors such as the misconduct of the Claimant. That this position was upheld in the civil appeal case of **Oi Pejeta Ranching Limited v David Wanjau Muhoro [2015] eKLR** which was cited with approval in **Moi Teaching and Referral Hospital v James Kipkonga Kendagor [2019] eKLR**. It further submits that in granting the compensatory award, this court should balance the needs of the Claimant, the Respondent and the society in general.

It is submitted by the Respondent that costs follow the law and that **Rule 28(1)(e) of the Employment and Labour Relations Court (Procedure) Rules, 2016** grants the Court the discretion to make an order for the payment of costs. That since the Claimant has failed to prove her case on a balance of probabilities, she should consequently bear the costs of the suit. That if however, this Court finds that the Claimant's dismissal from employment was unfair, each party should bear its own costs.

Analysis and Determination

The first issue for determination is whether the Claimant wilfully absconded work or was summarily dismissed by the Respondent. The second issue for determination is whether the Claimant was wrongfully and unfairly dismissed from employment by the Respondent. The third issue for determination is whether the Claimant is entitled to the reliefs sought.

Section 74(1) of the Employment Act provides that:

74. Records to be kept by employer

(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

- (a) of a policy statement under section 6(2) where applicable;**
- (b) specified in section 10(3);**
- (c) specified in section 13;**
- (d) specified in sections 21 and 22;**
- (e) of an employee's weekly rest days specified in section 27;**
- (f) of an employee's annual leave entitlement, days taken and days due specified in section 28;**
- (g) of maternity leave specified in section 29;**
- (h) of sick leave specified in section 30;**
- (i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;**
- (j) of food rations where applicable;**
- (k) specified in section 61;**
- (l) of a record of warning letters or other evidence of misconduct of an employee; and**
- (m) any other particulars required to be kept under any written law or as may be prescribed by the Minister.**

The Respondent did not file any documentary evidence with regards to the employment records of the Claimant and neither did RW1 provide any evidence or records of the warning letters she alleged were served upon the Claimant during the period of her employment. The Claimant on the other hand tendered emails to demonstrate she was terminated from employment by the Respondent and how she followed up on her unpaid dues. To that extent, it is my finding that the Claimant did not wilfully abscond work as alleged by the Respondent who failed to discharge its burden of proof by providing this court with a record of the warning letters as under **Section 74(1)(l) of the Employment Act**. The inescapable conclusion is therefore that the Claimant was summarily dismissed having not been given any prior notice by the Respondent before her services were terminated. The court agrees with and relies on the holding in **Patrick Chebos v Stokman Rozen Kenya Limited (supra)** relied upon by the Claimant that –

“The allegation that the Claimant resigned is therefore not supported by any evidence and the only inference this Court can make was that the Claimant was dismissed by the Respondents who wanted it to appear as a resignation by the Claimant himself.”

Under **section 47(5) of the Employment Act**, the burden of proving that an unfair termination of employment has occurred rests on the employee and it is my opinion that the Claimant has discharged the said burden in her case before this court. The procedure followed to terminate the claimant’s employment was not fair within the meaning of **Sections 41, 43 and 45 of the Act** as she was never afforded any hearing nor given any notice. In **Donald Odeke v Fidelity Security Ltd, Cause No.1998 of 2011**, the court observed that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is ipso facto unfair. The Respondent was required to have complied with procedures set out in Section 41 of the Act before dismissing the Claimant and for that reason this court finds that the Claimant was unfairly dismissed from her employment by the Respondent.

The Claimant is thus entitled to compensation for wrongful dismissal as stipulated under **Section 49 of the Employment Act**. Taking into account the manner in which her services were terminated, the casual manner in which the respondent handled the termination and this case, the fact that the claimant had not been warned in writing and all other relevant factors under Section 49(4) of the Act, I award the claimant 4 months’ salary as compensation. She is further entitled to notice pay as prayed pursuant to Section 49(1)(a). She is also entitled to her claim for the September 2015 salary which the Respondent partially admits. She is further entitled to 2 days worked in October 2015 based on her email dated 6th October 2014 in which she states she handed over to Doreen on 2nd September 2015.

Section 10(7) of the Employment Act provides that:

If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

The claimant did not produce her employment contract or other proof of entitlement to house allowance. Section 31 of the Employment Act permits payment of a salary inclusive of house allowance. The respondent would only be required to prove the payment after the claimant has proved entitlement thereto. I find no proof that the claimant’s salary did not include house allowance. The claim for house allowance therefore fails and is dismissed.

The claimant is further entitled to a Certificate of Service as provided for under **Section 51 of the Employment Act**.

From the foregoing, the court declares that the respondent unfairly terminated the employment of the claimant and awards her the following –

- (i) Salary for September 2015 Kshs.120,560
- (ii) Salary for 2 days worked in October Kshs.9,274
- (iii) Pay in lieu of notice Kshs.120,560
- (iv) 4 months’ salary as compensation Kshs.482,240
- Total Kshs.732,634**
- (v) Certificate of service.
- (vi) Costs
- (vii) Interest 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