



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2135 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

LILLIANS NABWILE WAFUKHO.....CLAIMANT

VERSUS

GS1 KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimant was employed by the respondent as a Finance and Administration Manager in January 2015 and confirmed on 4th May 2015. She worked in that capacity until she was summarily dismissed on 4th July 2017. At the time of her dismissal she was earning a monthly salary of Kshs.170,000.00 and a travelling allowance of Kshs.12,000.00.

The Claimant instituted this suit on 24th October 2017, to challenge her dismissal and seek payment of her terminal dues. In particular, she sought the following reliefs–

a. A declaration that the Respondent's termination/ dismissal of the Claimant's employment was illegal, unlawful, unfair and inhumane and the Claimant is entitled to her terminal benefits

due and damages.

b. An order for the Respondent to pay the Claimant her terminal dues and compensation totalling Kshs.3,640,000.00 plus interest thereon. They are as tabulated below–

i. Salary for one month in lieu of notice of Kshs.182,000.00.

ii. 30 days untaken leave days of Kshs.182,000.00.

iii. 12 months' compensation for unlawful termination of Kshs.2,184,000.00.

iv. Gratuity (25% for 2 years annual income) totalling to Kshs.1,092,000.00.

c. An order directing the Respondent to issue to the Claimant, a Certificate of Service.

d. An order to the Respondent to pay the Claimant's costs of this claim.

The Respondent filed a Statement of Response to the claim contending that the Claimant was implicated in various financial malpractices, discrepancies and misappropriation of funds which led to her suspension and summary dismissal. The Respondent further contended that the summary dismissal was in accordance with the law and the Respondent's Human Resource Policy and Procedure Manual. The Respondent urged this Court to dismiss the claim.

The Claimant's Case

The Claimant avers that she was issued with two warning letters in a manner that was contrary to the Respondent's Human Resource Policy and Procedure Manual as she was never given an opportunity to respond to the same before they were sent.

She avers that the 1st warning letter related to insubordination and gross negligence of her duties for failing to attend a Board meeting, yet

she had received an email from the Vice Chairman to the Board that the agenda would be Board co-option and which was a reserve of board members. That she was not a board member. That she apologized for the same but the warning letter was never withdrawn.

The 2nd warning letter related to her failure to manage the finance department's risk. She requested for the Board's report that had culminated to the issuance of the warning letter from the Vice Chairperson to enable her respond to the allegations but it was never availed to her.

It is averred that the Claimant was sent on 18 days' compulsory leave on the following grounds: conflicting receipts, missing personal file and system audit discrepancies for 2016. She avers that the 18 days were deducted from her leave days' entitlement which act was malicious in her view. She avers that she had never been a custodian of her personal file neither did she have access to the same hence holding her accountable for another person's actions and omissions was unfair.

The Claimant avers that she was never given the opportunity to defend herself against the issues raised in the system audit. That the auditor had made another report for the year ended 31st December 2016 which did not find any discrepancies, mismanagement or financial pilfering by the Claimant.

The Claimant avers that she was summarily dismissed for contributing to the loss incurred by the Respondent yet she was never given the opportunity to defend herself against the allegations. Further, the termination letter did not explain the part the Claimant played in the loss of funds, as the audit regarding the same had not been complete at the time of her dismissal.

It is the Claimant's case that she was never paid for acting as the General Manager for the period she handled the duties in that capacity.

During trial, the Claimant testified and adopted her witness statement as her evidence. The witness statement and examination in chief were basically a reiteration of the averments made in her Memorandum of Claim, as outlined above.

Upon cross examination, the Claimant admitted that it was her duty to adhere to the laid down procedure. She further admitted that she had signed the document acknowledging that Tom Okoth the accountant, was to report to her during her tenure as the acting General Manager. She conceded that as the general manager, it was her duty to set up the meeting and ensure it went on as planned.

She maintained that she did not receive the email inviting her to attend a hearing neither was she informed of the same. Further that she did not receive the minutes of the meeting. She contended that she was never given the documentation on which the charges were based and the documents annexed in her list of documents were copies which she had. She further contended that she did not have possession of all the documents. She testified that she was only given documents during the conduct of the normal audit.

The Claimant contended that she was never given the opportunity to explain the unbanked money. She conceded that she had never gone to clear with the Respondent. She testified that at the time she was sent on compulsory leave she had just resumed work from her 15 days leave. She agreed with Counsel that gratuity payment accrued to an employee who retired.

Upon re-examination, it was her testimony that she was never given a new job description while she was the acting general manager. She maintained that she had been informed that she was not supposed to attend the impugned board meeting as the agenda was co-option. She contended that the reason for her summary dismissal stemmed from the forensic audit and not her failure to attend the board meeting.

She asserted that even if the normal audit had been the forensic audit, she ought to have been given an opportunity to respond. She contended that she had no knowledge of her missing personal file until she was informed of the same by the Respondent.

The Respondent's Case

The Respondent avers that the Claimant responded to her warning letters beyond the 48 hours' window provided in the Human Resource Manual, hence she lost the right of appeal.

It is contended that the Claimant's leave days were extended after a thorough audit process had been conducted. As regards the audit, the Respondent avers that no further documents were required from the Claimant as the Respondent availed all the requisite documents.

The Respondent avers that the Claimant was afforded a hearing in the disciplinary proceedings conducted on 23rd June 2017.

PETER OTIENO, the Respondent's director, testified on behalf of the Respondent as RW1. He testified that he was the Vice Chairman of the Board from 6th April 2017. He adopted his witness statement as his evidence. It was his testimony that the Claimant did not perform her job well as there were audit queries. He explained that the audit revealed that VAT was not filed well and that there were some monies and insurances which were beyond what the company had authorized.

It was his testimony that after the audit, the Board recommended a system and forensic audit whose findings were that there were a lot of discrepancies on how money was being received and disbursed. Further, there was an employee who was given per diem without reconciling earlier imprests. According to him, the Claimant was sent an email inviting her to see the auditor but she failed to appear. Thereafter, she was sent an email inviting her to appear before the Board but also failed to do so.

It was RW1's testimony that the Claimant appeared before a Committee of the Board on 23rd June 2017 where the Claimant was given an opportunity to shed more light on the audit findings and explain herself but never did. As such, the Board resolved to have her summarily dismissed. He clarified that the Claimant was summarily dismissed because she was un-cooperative. He also stated that the Claimant's

failure to attend the meeting of 6th April 2017 resulted in the Board's failure to transact the business of the day hence the warning letter.

On cross examination, he maintained that a normal audit was carried out and was followed by a second audit. He admitted that the Claimant's name was not mentioned in the audit report and neither did the report make any recommendation in respect of the claimant. He conceded that the letter of 24th April 2017 by Gatune and Associates made reference to a system audit report and that no reference was made to a forensic audit.

He conceded that the invitation by the Board had not been a disciplinary hearing but contended that the meeting of 23rd June 2017 was a disciplinary hearing and that the Claimant attended though her name was not in the list of attendees. He admitted that the Claimant did not have any documents at the hearing as she was only supposed to offer an explanation or offer a defence.

RW1 denied writing a letter excusing the Claimant from attending the meeting of 12th April 2017. He stated that the email relied upon by Claimant was not addressed to her and that she was supposed to inform others not to attend the same, not her. He concluded by conceding that there had been a system audit and not a forensic audit.

Upon re-examination, it was his evidence that the Claimant was implicated in the systems audit and that the issue of her performance had been raised in the same audit. He stated that the discrepancies unearthed by the audit formed the basis of her termination.

It was his position that the Claimant was aware that she was facing disciplinary issues having been sent on compulsory leave. He maintained that the minutes of the meeting were for the Claimant's disciplinary hearing. It was his admission that the dismissal letter did not refer to the warning letter. He stated that it was the Claimant's duty to convene the Board meeting yet she failed to attend.

The Claimant's Submissions

The Claimant submits that the 2016 General Audit did not implicate her or make recommendations for a forensic audit. It is her position that there was no nexus between the two reports. She further submits that she was not afforded the opportunity to respond to the audit queries raised despite requesting for the report, and relies on the cases of **Beatrice Nyambane Mosiria v Judicial Service Commission [2019] eKLR** and **Kennedy Ogeto v Republic [2019]** which placed emphasis on giving a person against whom an audit query has been raised an opportunity to explain the audit queries.

It is the Claimant's submissions that the systems audit report is inadmissible as it was produced by an incompetent witness as he was not the maker of the same. Further, the Claimant never had the opportunity to cross examine the auditor who had authored the same.

The Claimant submits that she was neither invited to a disciplinary hearing nor did she attend one. It was her position that the meeting held on 23rd June 2017 was not a disciplinary hearing, but a board meeting and that she had not been informed about the agenda of that meeting, issued with any documentation or charge nor was she informed that she could be accompanied by a colleague of her choice. As such, she was unable to prepare and present a defence at the meeting. She relied on the case of **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** to fortify her position.

It is the Claimant's submissions that the Respondent lacked valid reasons for terminating her employment. No forensic audit was conducted; the system audit was not brought to her attention neither was there a basis for the same. She relies on the case of **Postal Corporation of Kenya v Andrew K. Tanui [Supra]** to support her position. Finally, she urged this Court to grant her the reliefs as prayed.

The Respondent's Submissions

The Respondent submits that the reasons for terminating the Claimant's employment were valid and the procedure followed was lawful and fair. It is submitted that due process as envisaged in the Human Resource Manual was followed and the Claimant given an opportunity to be heard.

The Respondent submits that the Claimant testified that she had been issued with all the supporting documents in May 2017, before her disciplinary hearing and had been aware of the contents of the audit report but refused to respond to the same.

It is submitted that the audit report is admissible as the Claimant never protested its production at the hearing. The Respondent places reliance upon the case of **Crown Bus Services Limited v Geoffrey Mukoto Aweki [2016] eKLR** where the Court held that the Appellant was estopped by its inaction from raising this issue during submissions when it let the same be produced without a query.

It is the Respondent's submissions that the Claimant has failed to prove that her employment was terminated un-procedurally, unlawfully and unfairly and should be awarded cost of this suit together with interest thereon.

Analysis and Determination

I have carefully considered the pleadings filed by the parties, the evidence adduced as well as the submissions and it is my view that the following are the issues for determination before this Court—

- a. *Whether the termination of the Claimant's employment was lawful and procedural, and for a valid and justified cause.*
- b. *Whether the Claimant is entitled to the reliefs sought.*

Termination

Section 45 of the Employment Act provides as follows–

- (1) No employer shall terminate the employment of an employee unfairly.
- (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.

1. Reason for Termination

The Claimant’s summary dismissal letter of 4th July 2017, read as follows–

“4th July, 2017

To. Lilians Wafukho

Nairobi

Dear Lilians

REF: SUMMARY DISMISSAL

We wish to inform you that your services with GS1 have been terminated with effect from date of this letter.

This decision has been reached following the forensic audit carried out. You were also requested to shade light on the report by 30th June 2017 but no communication has been received to date.

Kindly note that funds were lost as per the report and this is a matter of criminal nature. We will forward the matter to investigation agencies to follow up.

Please hand back any property you may have belonging to the company.

Thank you.

Yours Faithfully

SIGNED

SIGNED

Michael Musembi

Charles Nduati

General Manager

Chairman, Finance and Staff Committee”

From the contents of the dismissal letter enumerated above, it is evident that the reason for the Claimant’s termination was vague. Any employee receiving the letter would wonder what aspect of the report or their conduct contributed to the termination of their employment. There is no record in the court file of a notice to show cause, which would have guided the Claimant by shedding light on the reason for disciplinary action.

Further, RW1 contended that the Claimant had been sent an email seeking her audience with the auditor but conceded that the invitation had not indicated the time and the date of the meeting. His explanation that the material non-disclosure was because the auditor was supposed to call her, was not backed by evidence. Additionally, this issue was not raised at the disciplinary hearing hence the Claimant never got the chance to make her representations regarding the same.

As such, the Respondent lacked a valid and justified reason to terminate the Claimant's employment on the basis of the audit report hence the same was unfair within the meaning of section 45 of the Employment Act. It is my view that the warning letters issued to the Claimant and the charge on the Claimant's missing personal file have no bearing in this case as they did not form the basis for the Claimant's termination.

2. Procedure for Termination

As regards the procedure followed before the termination of the Claimant's dismissal, rival and conflicting accounts have been given by the parties with the Claimant alleging that she never attended any hearing while the Respondent contends that the Claimant was afforded a hearing. Having examined the evidence adduced by both parties, there is on record an email of 21st June 2017 sent at 4:44 PM (page 26 of the Respondent's bundle of documents), requesting the Claimant to meet the Respondent's Board of Directors on 23rd June 2017 at Nairobi Club by 9:30 AM and minutes of that meeting (pages 28 to 31 of the Respondent's bundle of documents), which show that the Claimant was in attendance and was given an opportunity to make her representations. The Claimant did not challenge the validity of these documents or their content.

Nevertheless, the charges upon which the Respondent was contemplating to terminate the Claimant's employment were not communicated to her. The email requesting her to meet the Board of Directors did not indicate the purpose of the meeting or that she had the right to have a colleague present at the meeting. This was in contravention of the principles of natural justice, Sections 41 and 45(1) of the Employment Act.

A perusal of the systems audit report that formed the basis of the Claimant's termination shows that she was adversely mentioned in the same. The issues raised at pages 11 to 14 of the system audit report regarding delayed banking, running two bank accounts and understating VAT were attributable to the Claimant. Since the Claimant was terminated on account of that report, she ought to have been informed beforehand that the same would form the basis of her termination.

In light of the foregoing it is my view that the termination of the Claimant's employment failed the procedural fairness test. In **Alphonce Maghanga Mwachanya v Operation 680 Limited [2013] eKLR** the court held that –

13. Section 41 of the Employment Act, 2007 has now created a statutory obligation on an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity to explain to the employee the reasons for the termination and to listen to any explanations by the employee. The employee is also entitled to have a representative present. This is what is now referred to in employment law and practice as procedural fairness.

23. The Respondent in the pleadings, oral evidence and submissions was silent on who informed/explained to the Claimant that his termination was being considered/contemplated. It is not even clear what representations the Claimant made. In fact, the witness produced by the Respondent was not involved in the disciplinary proceedings or hold an office of authority over the Claimant to even know what proceedings were being contemplated or decisions were to be made.

The Claimant's submissions that the report is inadmissible because it was not produced by its maker is inconsequential at this point having only been raised in submissions and after the same had been produced at trial without any objection.

Reliefs Sought

The Claimant sought a declaration that her summary dismissal was illegal, unlawful, unfair and inhumane and that she is entitled to the reliefs sought. Having found the termination unfair, her summary dismissal is declared unlawful and unfair. The Claimant has failed to establish how her summary dismissal was inhumane hence this Court declines to make a declaration to that effect. The Claimant's entitlement to terminal benefits and damages is enumerated in detail below.

The claim for one months' salary in lieu of notice succeeds, the summary dismissal having been declared unfair. The Claimant's contract provided that she was entitled to 30 days' notice in writing or pay in lieu of the same. I award the claimant **Kshs.182,000.00** as notice.

The Claimant sought 30 days' untaken leave. However, under her contract she was only eligible to 24 days paid annual leave. Further, at paragraph 14 of her claim she stated that she went on leave from 2nd May to 31st May 2017 which translates to 30 leave days. The Claimant has not specified which period those leave days accrued or provided a basis for claiming the same having admitted to taking leave. As such, the claim being a specific one fails for want of particularization and proof.

The Claimant is awarded 4 months' salary as compensation for unfair termination in the sum of **Kshs.728,000.00**. In making this award, I have considered the criteria outlined in Section 49(4) of the Employment Act. Specifically, I have considered the length of service, the grounds and procedure in which her employment was terminated and value of terminal benefits she was entitled to.

Having found the termination of the claimant's employment unfair, she is entitled to gratuity. I am guided by clause K.4 (b) of the Respondent's Human Resource Policy and Procedure Manual which provides as follows–

i. The Gratuity Scheme is intended to cater for old age for all officers who have been confirmed in their appointments. The rate payable is 25% or as prescribed otherwise of the officer's yearly income. (Officers do not contribute to the gratuity scheme. An officer is free to run a pension scheme of one's choice without involving the Company)

ii. Where an officer resigns from the Company before attaining retirement age, he shall be eligible for such benefits as provided under the Scheme as will be formulated.

I award her gratuity in the sum of **Kshs.1,020,000.00** being 25% of her annual salary for the 2 years worked.

The Respondent is directed to issue the Claimant with a certificate of service whose contents are in line with the provisions of Section 51(2) of the Employment Act. The Respondent shall bear the costs of this claim.

In conclusion, judgment is entered for the claimant against the respondent in the total sum of Kshs.1,930,000.00, costs and interest at court rates from date of judgment.

The respondent shall also issue a certificate of service to the claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF AUGUST 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, 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