



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI

CAUSE NO. 2393 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 17th September, 2020)

PHOEBE ATIENO.....CLAIMANT

VERSUS

CREATIVE CONSOLIDATED

SYSTEMS LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant herein filed a Memorandum of Claim dated 21st November, 2016 and filed in Court on 24th November, 2016, in which she seeks compensation for wrongful, unfair and unlawful termination of her employment by the Respondent herein as well as its failure to pay her terminal dues & compensatory damages.

2. She states that she was employed by the Respondent on or about 16th May, 2015 and was earning an initial monthly salary of Kshs. 9,800/- only. She further maintained that she performed her duties diligently and to the Respondent's satisfaction until on or about 21st July, 2016, when the Respondent unfairly and unlawfully terminate her employment without prior notice or payment in lieu thereof.

3. Aggrieved by the decision to terminate his services the Claimant filed the instant Claim seeking the following reliefs:-

a) A declaration that she was wrongfully and unfairly dismissed from her employment.

b) Unpaid dues totalling Kshs. 42,630/- comprising of the following:-

i. Unpaid Leave Kshs. 9,800/-

ii. Unpaid Overtime

Kshs.9,800/30 x 1.5=490 x 37 days

Kshs.18,130/-

iii. Service

Kshs. 9,800 / 30 days = 326.66 x 15 days Kshs. 4,900/-

iv. Unpaid salary for July - Kshs. 9,800/-

c) Notice period of one month – Kshs. 9,800/-

d) 12 months' salary as compensation for wrongful and unfair termination.

Kshs. 9,800/- x 12 = 117,600/-

e) Punitive and aggravated Damages for breach of the Claimant's Constitutional rights.

f) Costs and incidentals to this suit

4. The Respondent despite being served with the summons as well as the Statement of Claim herein failed to enter Appearance or file an appropriate Response to the Claim. The matter was subsequently certified ready to proceed as an undefended Claim and the Claimant directed to fix the matter for hearing.

Evidence

5. The matter proceeded for hearing on 16th July, 2020 with the Claimant, CW1 testifying. She sought and was allowed to have her Witness Statement filed in Court on 24th November, 2016 adopted as her evidence in chief. In her statement, the Claimant reiterates the averments made in her Memorandum of Claim.

6. In brief the Claimant in her statement states that she was on 21st July, 2016, issued with a letter by the Respondent herein dated 11th July, 2016 purporting to terminate her employment despite her protest and in complete disregard to her right to be heard.

7. The Claimant further averred that the Respondent's actions were unlawful, unfair and contrary to the provisions of the Employment Act and as a result urged this Court to allow her claim in terms of the reliefs sought therein.

8. The Claimant was thereafter directed to file his written submissions to the Claim.

Claimant's Submissions

9. It is submitted on behalf of the Claimant herein that her termination from employment was unfair and wrongful as the Respondent failed to adhere to the mandatory provisions of Sections 43 and 45 of the Employment Act, 2007.

10. It is further submitted that failure by the Respondent to enter appearance or defend its claim that her Claim was unchallenged and that her evidence should be upheld by this Court. To buttress this argument the Claimant cited and relied on the case of **Benjamin Ochieng Angaga Vs George Ombego (2020) eKLR** where the Court held that the Claimant's employment was terminated wrongfully and unfairly in a case where a Respondent failed to tender evidence to discharge its burden of proof as provided in the Employment Act, 2007.

11. The Claimant maintained that she is therefore entitled to the reliefs sought in her Claim and urged this Court to allow the same as prayed. For emphasis she cited and relied on the provisions of Sections 35 (5) and (6), 49 (2) and 51 of the Employment Act, 2007 and the cases of **Pamela K. Butalanyi Vs University Council for the Kenya Polytechnic University College (2015) eKLR** and **John Mwanzia Mbithuka Vs Mr. Mukesh Malde (Managing Director) & Another (2014) eKLR**.

12. In conclusion, the Claimant urged this Court to allow her Claim in its entirety in terms of the reliefs sought therein.

13. I have examined the evidence and submissions of the Claimant herein. This claim proceed exparte the Respondents having been served and having failed to file any defence.

14. The Claimant contends that she was employed by the Respondents on 16/5/2015 and was terminated on 21/7/2016. She exhibited her termination letter as evidence that she had been employed by the Respondent.

15. There is no evidence to show how she was dismissed. There is no evidence that she was subjected to any disciplinary hearing. It therefore follows that the termination of the Claimant was unfair and unjustified as envisaged under Section 45(2) of the Employment Act 2007 which states as follows:-

(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".

16. In terms of remedies, I find for the Claimant and I award him as follows:-

1. 1 month salary in lieu of notice= 9,800/=

2. Unpaid leave pay for 1 year = 9,800/=

3. *Service pay* = $\frac{1}{2} \times 9,800 = 4,900/=$

4. *Unpaid salary for 1 month* = 9,800/=

5. *10 months' salary as compensation for unlawful and unfair termination* = $10 \times 9,800 = 98,000/=$

TOTAL = 132,300/=

6. *The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in Chambers via zoom this 17th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant