



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 474 OF 2019

LOISE NJERI.....CLAIMANT

VERSUS

DEVKAN ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. On 19.7.2019, the Claimant filed a Statement of Claim alleging that she was unfairly and unlawfully terminated despite diligently serving the Respondent from 10.5.2016 to 10.12.2018 as her HR Manager. She averred that during her employment she was not paid House Allowance and she did not take all her leave days as stipulated in the Employment Act. She further averred that after the dismissal, she was not issued with a certificate of service. She thus prayed for the following reliefs–

- a. Unpaid annual leave of 1 year 8 months at KShs. 176,920.00.
- b. Service gratuity at the rate of 15 days a year (2 x 109,818/26) amounting to KShs. 126,690.00.
- c. Loss of income upto (sic) age of retirement [109,818 x (60 years – 53 years)] x 12 totaling to KShs. 9,224,712.00.
- d. House allowance tabulated as follows–

2016

18/100 x 64,818 x 12 totaling to KShs. 140,066.88

2017

19/100 x 4/12 x 84881 x 4 totaling to KShs. 64,460.00

2018

19/100 x 7/12 x 99,818 x 7 totaling to KShs. 132,757.94

2018-2019

19/100 x 109,818 x 12 totaling to KShs. 250,380.00

- e. Compensation for unfair termination [Gross pay (109,818 x 12) + House allowance (20,865 x 12) amounting to KShs. 1,568,196.00

- f. Together with cost and interest of the suit.

2. The Respondent filed a Memorandum of Response on 13.8.2019, in response to the Claim, contending that the Claimant's employment was terminated vide the letter dated 10.12.2019 as a result of her absenteeism and negligence in performing her duties. She further contended that the Claimant was paid an all-inclusive allowance which sufficiently covered her house allowance. The Respondent stated that she prepared a Certificate of Service but it was not collected by the Claimant. Finally, she averred that the Claimant was paid all her rightful dues and benefits, in accordance with the law.

3. The suit went to full hearing whereby both parties tendered evidence and thereafter filed written submissions.

The Claimant's Case

4. The Claimant testified as CW1 and adopted her witness statement as her evidence, which was a reiteration of the averments made in her claim. She further told the court that on 5.12.2018, she attended Court to represent the Respondent in a case concerning safety issues. Thereafter, she went back to the office and reported what transpired in Court to the General Manager and requested for permission to be off work for she was feeling unwell. On the same day she visited a doctor who recommended one day for sick off and she sought permission from the General Manager to report to work on Monday 10.12.2018 because she had high blood pressure. However, when she reported to work on that day, she was informed by the same General Manager that her services had been terminated.

5. The Claimant further testified that she was not issued with a termination letter that day as the Managing Director had been absent but it was agreed that a copy of her termination letter would be sent to her via WhatsApp, which was done on 12.12.2018. Upon receipt of the termination letter dated 10.2.2019, she wrote to the Managing Director seeking clarification on the reason for her termination because none was cited, but this was in vain. Thereafter she instructed an advocate to serve a demand letter, but again no response was made and no terminal dues were paid to her. Finally, she prayed for the reliefs sought in the Claim contending that she never authorized the respondent to pay her Sacco loan using her terminal dues.

6. On cross examination, she contended that she informed the Managing Director of her ill health via SMS, while on her way home. She confirmed that the Certificate of Incapacity dated 6.12.2018 was not stamped by the doctor and it was for 6.12.2018 only. However, she reiterated that she had called the general manager to inform him that she had high blood pressure, hence she could not come to work on 7th and 8th December 2018. She contended that she was never served with any warning on account of absconding duty or at all. Finally, she clarified that her outstanding leave days were earned from 5.3.2018 and that she had calculated house allowance using the formula outlined in the CBA.

The Respondent's Case

7. Mr. Meehir Shah, the Respondent's Director, testified as RW1. He also adopted his witness statement together with the bundle of documents as his evidence, which was basically a reiteration of the averments made in the statement of defence. He further told the Court that the Claimant was of fond of taking off days; would conduct her dealings through SMS and always lagged behind in the performance of her duties. For instance, he stated that, as at 10.12.2018 the claimant had not prepared payment for November 2018 salaries.

8. However, he admitted that he never issued the Claimant with any warning letter but stated that he served the letter dated 10.12.2018, being a two months' termination notice. He admitted that the reason for the termination was never given but contended that the Claimant had absconded work from 7.12.2018 and even ignored his calls.

9. As regards the reliefs sought, he contended that, the Claimant only had a leave balance of 10 days and she was paid of KShs. 52,196.00, plus leave travelling allowance of KShs. 5,000.00 and service gratuity of KShs. 97,867.00 totaling to KShs. 155,063.00. However, he clarified that the said dues were paid to the Sacco towards claimant's outstanding loan which had been guaranteed by the respondent.

10. On cross examination, he admitted that the leave forms produced indicated that the Claimant had only taken 13 days out of the 24 days that she was entitled to. However, he also conceded that the number of the days that the Claimant had absconded duty were not deducted from her leave days. Finally, he stated that the Claimant had failed to raise her concerns regarding the termination. He reiterated that he never served the claimant with any warning despite the numerous days she absconded duty. He further admitted that he did not bring the Attendance Record to court to prove the alleged numerous days she absconded work.

The Claimant's Submissions

11. The Claimant submitted that though the Respondent's case is that her employment was terminated because of absconding duty, negligence and poor performance, she was never issued with any warning or subjected to a performance appraisal during the subsistence of her employment. She further submitted that the Respondent dismissed her without according her any disciplinary hearing. For emphasis, she relied on the case of *Liz Ayany vs. Leisure Lodges Limited [2018] eKLR* where the Court held that termination of employment on account of poor performance without according the employee a hearing, was in breach of section 41 of the Employment Act and therefore unfair. She also relied on the case of *Jared Aimba vs. Fina Bank Limited [2016] eKLR* where the court was of a similar view.

12. The Claimant further submitted that the Respondent's act of paying her terminal dues to the Sacco where she had taken a loan without her consent was malicious, unfair and meant to deny her the enjoyment of her terminal dues.

13. The Claimant submitted that she is entitled to twelve months' compensation for unlawful termination as she was never afforded a hearing or given a reason for the termination of her employment. She contended that were it not for the termination of her employment, she would have served the Respondent until her retirement hence she is entitled to compensation for loss of income until the age of retirement.

14. She further submitted that she is entitled to a Certificate of Service and contended that the Respondent is bound to issue her with a Certificate of Service by dint of section 51 (1) of the Employment Act. She relied on the case of *Angela Wokabi Muoki vs. Tribe Hotel Limited [2016] eKLR* where the Court was of the view that an employer is guilty of an offence for failing to issue his employee with a certificate of service after separation.

15. Finally, the Claimant submitted that the Respondent never provided her with accommodation or paid her house allowance as required by section 31 of the Employment Act and urged this Court to award the house allowance as prayed. She further prayed for leave travelling allowance contending that she did not take all her leave days. She also prayed for service pay contending that she is entitled to the same

under section 35 of the Employment Act and the CBA.

The Respondent's Submissions

16. The Respondent submitted that she terminated the Claimant's employment on account of poor performance and absenteeism, and that she was given due notice and paid all her dues. She, contended that, the Claimant has admitted during cross examination that, he absented herself from work on sick leave until 10.12.2018.

17. The Respondent submitted that the Claimant is not entitled to payment in lieu of leave as claimed, because she was paid her pending leave days upon the termination of her employment. She further contended that the claimant is not entitled to service gratuity because it was not provided for in her contract and under section 35 (6) of the Employment Act it is only paid to those with no social security. She contended that the Claimant was a member of NSSF and therefore disqualified for claiming gratuity. Nevertheless, she contended that she paid the claimant KShs. 97,867.00 as gratuity after her termination and maintained that the claim for gratuity must fail.

18. The Respondent further submitted that the claimant is not entitled to salary until the age of retirement and relied on the case of **Mary Mutanu Mwendwa vs. Ayuda Ninos De Africa-Kenya [2013] eKLR** where the court held that compensation for unfair termination of employment contract is capped at 12 months' salary.

19. Finally, Respondent submitted that the allowance paid to the Claimant from 2018 was adequate for her to obtain reasonable accommodation. She further disputed the said claim contending that the Claimant did not demonstrate how she arrived at the amount claimed for house allowance.

Issues for determination and analysis

20. I have carefully considered the pleadings, evidence and submission by the parties, and it is a fact that the Claimant was employed by the respondent and that she did not report to work from Thursday 6.12.2018 to Saturday 8.12.2018. It is also common ground that the Claimant's employment was terminated by the respondent on 10.12.2018. It is now trite law that termination of employment by the employer is unfair if the employer fails to prove that it is was grounded on a valid and fair reason, and that a fair procedure was followed. The issues for determination are –

- a. Whether there were valid reasons for summary dismissal of the Claimant.*
- b. Whether due process was followed before the Claimant was summarily dismissed.*
- c. Whether the Claimant is entitled to the reliefs sought.*

Valid and fair reason for the termination of employment.

21. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment–

- (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*
 - (iii) that the employment was terminated in accordance with fair procedure.*

22. The Respondent contended that the Claimant's employment was terminated on account of poor performance and absenteeism from work. Section 44 (4) of the Employment Act sets out the circumstances under which an employer can summarily dismiss an employee to include *inter alia*–

- a. If without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*
- b. If an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

23. On the allegation of poor performance, the Claimant testified that she was never issued with a warning letter regarding the same, put under performance management or had her performance appraised. This evidence was not rebutted by the Respondent. Consequently, the Respondent has not proved that alleged poor performance was a valid reason for terminating the Claimant's employment. I am guided by decision in **Jane Samba Mukala vs. Oitukai Lodge Limited [2010] LLR 225** where the Court observed that–

“Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.”

24. As regards the Claimant’s absenteeism from work, it is a fact that she absented herself from work from Thursday 6.12.2018 to Saturday 8.12.2018 and reported back on 10.12.2018, when her services were terminated. Although she had a sick off from her doctor, the same was only for 6.12.2018 and did not extend to 8.12.2018. Further she did not avail any written proof of the permission from the respondent’s MD. Without any evidence that she had obtained leave of absence from the employer or any medical certificate of incapacity from her doctor or medical institution, I am satisfied that the respondent has proved that there was a valid and fair reason for termination as envisaged under section 44(4) (a) of the Employment Act.

Whether a procedure was followed

25. Section 41 of the Employment Act provides

“(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 of 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.”

26. In the instant case, termination was on the ground of misconduct and poor performance but the claimant was not accorded any prior hearing by the employer in the presence of another employee as required by the above provision. Rw1 did not adduce any evidence to rebut the claimant’s allegation that she was dismissed without being heard or being told the reason. Consequently, I find and hold that the termination of the Claimant’s employment was done without following a fair procedure and as such it unfair within the meaning of section 45 of the Employment Act.

Reliefs Sought

Compensation for Unfair Termination

27. In view of the foregoing finding that the termination of the claimant’s employment was unfair, I award him 4 months’ salary as compensation. In making the said award, I have considered that she served for just over 2 years but also that she has not secured any alternative employment since the impugned termination. I have further considered that she contributed to the termination through misconduct. Applying her gross salary of kshs. 109,818.26 she will get kshs. 439,273.04.

Leave

28. The Claimant sought unpaid annual leave of 1 year 8 months being KShs. 176,920.00 but during cross examination, she admitted that her outstanding leave was 18 days from 5.2.2018. consequently, she is awarded $18/26 \times \text{kshs.}109,818.26 = \text{kshs.} 76,028.03$.

Service Gratuity

29. The Claimant prayed for an award of service gratuity of KShs. 126,690.00 being 15 days’ pay per year of service for two years. The respondent paid her KShs. 97,867.00 based on 15 days’ salary per completed year of service. However, my calculation of Kshs. $109,818.26 \times 15/26 \times 2 = \text{kshs.}126,713.37$ and not Kshs. 97,867. However, because the claimant prayed for Kshs.126, 690.00, that is what I award to her.

Loss of Income to the Age of Retirement

30. The Claimant sought compensation for loss of income until the age of retirement. However, in my view the award of compensation for unfair termination given above is sufficient in the circumstances of this case. I gather support from the case of *Mary Mutanu Mwendwa vs. Ayuda Ninos De Africa-Kenya* [2013] eKLR where it was observed as follows–

“109. My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months’ gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or ‘permanent’ contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently. Of course, parties in exercising their party autonomy can make provision for payment of such agreed sums for wrongful dismissal or unfair termination where fixed term contracts have been agreed on and the Court would be able to enforce such contractual terms.”

House Allowance

31. The Claimant sought house allowance for the years 2016, 2017, 2018 and 2018/2019; on the basis that she was not been paid the same. However, the Respondent contended that the allowance paid to the Claimant in addition to her basic salary was meant for housing and it was adequate for her to obtain reasonable accommodation. In the absence of any evidence to the contrary from the Claimant, I find that the gross pay of 109818.26 included house allowance and as such the claimant is not entitled to claim any further compensation for housing.

32. The respondent contended that she paid the claimant kshs. 155,063 as her final dues less statutory deductions plus Sacco loan which she had guaranteed the claimant. The claimant admitted that she had a Sacco loan but she contended that she had not defaulted in her repayment instalments and she had not authorized the respondent to pay any of her terminal dues to the Sacco. The respondent did not produce any receipts from the Sacco acknowledging payment of the kshs. 114,188 indicated in the Claimant's Payslip for March 2019. She also did not furnish this Court with the loan agreement or show proof of the Claimant's default in repaying the loan. I therefore find and hold that the claimant is entitled to payment of all damages awarded herein less statutory deductions and any other amount she has authorized the respondent in writing.

33. I gather support from the case of *Martin Kirima Baithambu vs. Jeremiah Miriti* [2017] eKLR as where the role of a guarantor was explained as follows–

“[6] As a general rule, a guarantor is not entitled to relief until the guaranteed debt has become payable by him. He may not, therefore, call upon the principal debtor to make provision for payment of the debt before the debt is due. However, this does not mean that the guarantor does not have rights to call upon the principal debtor to pay the guaranteed debt until and unless he has paid the guaranteed debt. Needless to state that guarantor's rights accrue from the relationship created by the guarantee, and not merely when he discharges the principal debtor's obligations. Therefore, it is not the law that the guarantor has no rights-equitable or otherwise- until he has paid the guaranteed debt... As a matter of the law, Guarantor's liability will not arise before the default by the principal debtor to pay the debt.”

34. Similarly, the Court of Appeal in *Robert Njoka Muthara & Another v Barclays Bank of Kenya Limited & Another* [2017] eKLR observed as follows–

“23. A guarantee by definition is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance. The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty.” [Emphasis Added]

Conclusion and disposition.

35. I have found that the summary dismissal of the claimant from service by the respondent was unfair within the meaning of section 45 of the Employment Act. I have also found that the claimant is entitled to some of the damages sought in her suit. Consequently, I enter judgment for the claimant in the following terms: -

Leave kshs. 76,028.03.

Compensation kshs. 439273.04.

Gratuity Kshs.126, 690.00.

Total kshs. 641,991.07

The Claimant is awarded costs of the suit together with interest at court rates from the date hereof.

Dated and delivered at Nairobi this 1st day of October, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE