



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 129 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa 11<sup>th</sup> November, 2020)**

**MOLLY AUMA.....CLAIMANT**

**VERSUS**

**RICKSHAW TRAVELS (K) LIMITED....RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Memorandum of Claim on 3<sup>rd</sup> February, 2015. She avers that she was employed by the Respondent as a Visa Coordinator from 12<sup>th</sup> April 2014 to 10<sup>th</sup> October, 2014. She alleges that she was unfairly summary dismissed without any plausible reason and was not afforded a fair hearing contrary to Section 43 and 45 of the Employment Act.

2. She seeks the following reliefs:-

**a. A declaration that the respondent's action of terminating the Claimant's employment is unlawful, inhumane, unfair and contrary to fair labour practices and the Claimant is entitled to payment of compensatory damages.**

**b. An order that the Respondent do pay the Claimant's compensatory damages amounting to Kshs.360,000/-.**

**c. Interest on (b) above from the date of filing the suit till payment in full.**

**d. Costs of this suit plus interest therein on full indemnity basis.**

3. The Respondent filed its response on 28<sup>th</sup> April, 2015. It alleges that the Claimant had not entered into a written contract and as such her employment was reduced to a monthly contract which was to be terminated by either party giving one month notice or payment in lieu of notice.

4. It denies having unfairly terminated the Claimant. It avers that unlawful termination and summary dismissal are two different concepts of law and it cannot be expected to answer the allegations in respect of these contractions.

5. It avers that, without prejudice to the above, the Claimant's service was terminated due to her failure to perform duties satisfactorily which reasons were clearly explained to her in light of Section 45 of the Employment Act. It further avers that the Claimant was paid all her dues including one month's salary and she executed a discharge voucher.

**Claimant's case**

6. The Claimant, CW1, testified that the Respondent was her employer in 2014 and that she was handling visa travel and back up for air transport. She testified that her salary was Kshs. 30,000/-. She testified that she was terminated on a Friday when she was informed to go to the Human Resource (HR) where she was told that her services were not needed. She stated that the Human Resource wanted her to sign a letter dated 10<sup>th</sup> October, 2014 which she finally signed.

7. She testified that no reason was given for her termination. She contended that she was neither given a hearing nor issued with warning letter. She testified that she was claiming for damages for unlawful termination.

8. Upon cross-examination, she testified that she worked for the Respondent for 6 months from April 2014 to October 2014. She testified that she was not given a confirmation letter though she was very competent. She confirmed that she was paid one month salary in lieu of notice and was given a certificate of service.

9. In re-examination, she denied being sacked because she was incompetent. She further testified that she had the relevant qualifications.

#### **Respondent's case**

10. Purity Waweru the Respondent's Marketing and Public Relations Manager testified as RW1. She confirmed that the Claimant was a visa coordinator and her colleague for 6 months. She testified that on 10<sup>th</sup> October, 2014 the Claimant was issued with a recommendation letter and released. It was her further testimony that the Claimant's probation period ended and her contract was not signed. She testified that the Claimant was not served with a termination letter. She stated that the Claimant was paid all her dues.

11. In cross-examination, she testified that the Claimant had all qualification for the job but her performance was not good. She maintained that the Claimant was on probation but she was not confirmed.

12. She testified that no reason was given in the letter dated 10<sup>th</sup> October, 2014 and that she was also not given any warning letters or a verbal warning. She denied that the Claimant was given a certificate of service.

13. In re-examination, she testified that the letter dated 10<sup>th</sup> October, 2014 was the letter that ended her probation and is a recommendation letter.

14. The Parties were thereafter directed to file written submissions but only the Claimant filed her submissions.

#### **Claimant's submissions**

15. She testified that she was never informed that she had performed her duties unsatisfactorily. She therefore submitted that it is prudent to believe that she performed her duties satisfactorily. She averred that her termination was unfair since she was terminated without notice and without being accorded a reason for her termination. It was her submission that her termination was unfair as per Sections 43 and 45 of the Employment Act. She further submitted that the allegations of poor performance have not been proved contrary to Section 43 of the Act.

16. She submitted that the termination was unfair due to the fact that it came without prior notice and no reason was accorded thus it was in breach of her legitimate expectation and against the laws of equity.

17. She argued that arising from the unlawful/wrongful dismissal; she is entitled to compensatory damages. She submitted that it is not in dispute that the Respondent offered to pay Kshs. 26,000 for October and Kshs. 30,000 for November allegedly as her terminal benefits. She submitted that she refuted the amounts were her dues but signed the termination letter because she had no choice.

18. She relied on the cases of **Petronilla Katunge Muendo v Dominic Kinya Ngaba t/a Pinnacle Club [2020] eKLR** that termination is unfair under Section 45 if the employer fails to prove that it was grounded on valid and fair reason and that fair procedure was followed. She further relied on the case **Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR** that the adjudicating authority is enjoined to scrutinise the procedure adopted by an employer in reaching the decision to dismiss the employee.

19. She urged the Court to grant the prayers sought in the claim.

20. I have examined the evidence and submissions of the Parties herein. The Claimant was indeed employed by the Respondent as admitted but was never issued with any appointment letter.

21. On 10/10/2014, she was served with a letter of recommendation which also admits that she was employed on 12/4/2014 to 10/10/2014, a period of 6 months.

22. The Respondent admits employing the Claimant but deny terminating her.

23. Section 9(1) and (2) of the Employment Act states as follows:-

1. **"A contract of service: -**

**a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or**

**b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.**

**2. An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)".**

24. Indeed, the Respondent had a mandate to issue the Claimant with an appointment letter which they failed to do. In this regard, they breached the law. Without such appointment letter, the terms of engagement whether probationary or permanent and pensionable cannot be discerned.

25. Section 35 of the Employment Act 2007 gives details on notice before termination of a contract. Even if the contract was probationary as stated by the Respondents, the Claimant was still entitled to a notice period. Because the Respondent failed to issue a letter of appointment and termination to the Claimant, they breached her rights under the law. I therefore find for Claimant and I award her 6 months' salary as compensation for unfair termination =  $6 \times 30,000 = 180,000/=$  less statutory deductions.

26. The Respondent will pay costs of this suit plus interest at Court rates.

**Dated and delivered in Chambers via zoom this 11<sup>th</sup> day of November, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Rashmah for Claimant – Present