



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 684 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**ANITA NZISA KIVULU.....CLAIMANT**

**VERSUS**

**CANCER CARE KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

The claim herein was instituted vide the claimant's Memorandum of claim dated 9<sup>th</sup> October, 2019 and filed on 11<sup>th</sup> October, 2019. It is the claimant's averment in the Memorandum of claim that she was employed by the Respondent herein on or about 22<sup>nd</sup> August, 2018 in the position of Marketing Manager earning a monthly salary Kshs.160,000/-.

The Claimant averred that during the subsistence of her employment with the Respondent she performed her duties diligently and to the Respondent's satisfaction. She maintained that she proceeded on maternity leave on the 23<sup>rd</sup> June, 2019 and upon her return on 23<sup>rd</sup> September, 2019 she was asked to proceed on a further 11 days leave pending further instructions from the Respondent.

She further averred that on 1<sup>st</sup> October, 2019 she received a call from one Brigitta Ogechi, an Administrative Executive with the Respondent informing her to report back to duty on 2<sup>nd</sup> October, 2019.

On the 2<sup>nd</sup> October, 2019 the Claimant maintains that she was issued with a letter terminating her employment dated 1<sup>st</sup> October, 2019 on allegations of:

- i. Violation/failure to carry herself in a manner expected of her;
- ii. She refused/ignored on various occasions to carry out her duties as expected; and
- iii. She carelessly and improperly performed her work which she ought to have done/performed carefully and properly under her contract.

The Claimant further maintained that she was not accorded a fair hearing prior to the Respondent's decision to terminate her employment and that the purported disciplinary hearing of 23<sup>rd</sup> September, 2019 did not take place.

She contended that the decision to terminate her employment was unlawful, unfair and wrongful as the Respondent failed to comply with the mandatory provisions of Sections 45, 47(3), 49 and 50 of the Employment Act, 2007 and Sections 12(1), (2) and 15 of the Labour Institutions Act, 2007.

Aggrieved by the decision to terminate her employment the Claimant filed the instant Claim seeking the following reliefs:

- i. A declaration that the Claimant's termination of service was unfair, unlawful and illegal
- ii. Claimant to be paid terminal dues comprising of the following:
  - a) One year compensation for loss of employment..... Kshs.2,280,000

b) Gratuity.....Kshs. 380,000

c) 11 Leave days earned but not taken.....Kshs. 69,666

**Total** **Kshs. 2,729,666**

iii) Issuance of Certificate of Service

iv) Costs of the Suit

v) Any other orders and/or reliefs that the Court may deem fit to grant.

The Respondent in its Defence dated 20<sup>th</sup> December, 2019 and filed in Court on 30<sup>th</sup> January 2020, denies having engaged the Claimant as alleged in the Statement of Claim.

The Respondent further avers that the Claimant's employment was never terminated and that it does not owe her any terminal dues as claimed in her Memorandum of Claim. It is the Respondent's contention that the instant claim is an abuse of the Court process therefore urging this Court to dismiss the same with costs to the Respondent.

Parties agreed to dispose of the Claim by way of written submissions.

### **Submissions by the Parties**

The Claimant submitted that the termination of her employment was unfair, unlawful, illegal and amounted to unlawful summary dismissal. The Claimant maintained that the Respondent failed to follow fair procedure as provided under Section 41 of the Employment Act, 2007. The Claimant relied on the case of **Pamela Nelima Lutta v Mumias Sugar Co. Ltd (2017) eKLR** where the Court held that for a termination to be termed fair, it must satisfy two elements that is fair procedure and valid reason.

The Claimant maintains that she did not receive any notice to appear before any disciplinary Committee and/or Performance Review Committee regarding any allegations purportedly outlined in her termination letter dated 1<sup>st</sup> October, 2019.

She further maintained that in the documents attached by the Respondent referred to as Minutes of Disciplinary Hearing held on 23<sup>rd</sup> September, 2019, the only truth captured therein is discussion regarding her welcome back from leave.

The Claimant contended that there was no fairness in the purported hearing as she was neither privy to the agenda of the same nor was she accorded an opportunity to call another employee of her choice or union staff as her representative in the meeting.

The Claimant further contended that pursuant to Clause 18 of her Letter of Appointment she is entitled to three (3) warning letters prior to being issued with a final warning to warrant her dismissal. She further maintained that this was not done as no evidence of such communication was availed to this Court for scrutiny.

The Claimant submitted that the Respondent failed to demonstrate any valid reason to warrant the termination contrary to the provisions of Section 43 of the Employment Act thus making the termination unfair, unlawful and invalid. For emphasis the Claimant relied on the case of **Alex Wainaina Mbugua v Kenya Airways Limited (2017) eKLR**.

In conclusion the Claimant submitted that as a result of the unfair termination she is entitled to the reliefs sought in her Memorandum of Claim and urged this Court to allow the same as prayed.

### **Respondent's Submissions**

The Respondent on the other hand submitted that it followed due process in terminating the Claimant's employment as evidenced by the minutes of the disciplinary hearing where the Claimant was engaged on various issues touching on her performance and conduct as an employee.

The Respondent further maintained that it was justified in terminating the Claimant's employment and that the Claimant has failed to discharge the burden of proof that there was no fair procedure. The Respondent relied on the case of **Samson S. Maitai & Another v African Safari Club Limited & Another (2010) eKLR**.

The Respondent contended that it did accord the Claimant an opportunity to make her presentations as she was well aware of the process and did attend the disciplinary hearing voluntarily but failed to give a proper account. The Respondent further maintained that the Claimant was duly informed of her right to Appeal but elected not to appeal.

The Respondent further submitted that the Claimant was subsequently paid all her dues and that she signed to confirm receipt of the said funds on 8<sup>th</sup> October, 2019 and as a result she has no claim as against the Respondent herein.

It is on this basis that the Respondent argued that the instant Claim is devoid of merit and therefore urged this Court to dismiss it in its

entirety with costs to the Respondent.

## **Analysis and Determination**

I have considered the pleadings, the evidence and submissions together with cases referred to. The issues arising for determination are whether the termination of the Claimant's employment was fair and if she is entitled to the prayers sought.

For termination of employment to be fair an employer must comply with Section 41 and 43 of the Employment Act, 2007. Section 45 provides that no employer may terminate the employment of an employee unfairly and further that failure to comply with either of the two sections would render the termination of employment unfair. Section 41 provides as follows: -

### **Notification and hearing before termination on grounds of misconduct**

**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.**

In the present case the Claimant maintained that she proceeded on maternity leave and when she was due to return she was directed to proceed on leave without any explanation from the Respondent.

She further stated that she was later called on 1<sup>st</sup> October, 2019 and asked to report on 2<sup>nd</sup> October, 2019 only for her to be served with a letter of termination dated 1<sup>st</sup> October 2019 upon reporting as directed.

The Claimant denied any wrong doing and maintained that she was not accorded a fair hearing prior to her termination. It was her position that the Respondent further failed to follow due process as provided under the Employment Act, 2007 as well as the letter of Appointment in terms of issuance of warnings prior to one's termination.

The Claimant further maintained that she was not properly appraised of the meeting that the Respondent maintains was a disciplinary hearing. She averred that the minutes as portrayed by the Respondent as an account of what transpired was not accurate.

The Respondent on the other hand maintained that due process was followed in the Claimant's termination and that she was paid all her dues at the time of her separation as evidenced by the discharge voucher signed confirming receipt of the amounts.

The Respondent maintained that the Claimant has no claim as against it urging this Court to dismiss the Claim in its entirety with costs to the Respondent.

Did the foregoing comply with section 41? I find that the Respondent did not comply with the section.

In **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR**, the court observed that for termination to be termed fair, there are two elements to be satisfied by the employer; fair procedure and valid reason.

There is no evidence adduced by the Respondent to support proper service of a notice of a disciplinary hearing to the Claimant clearly highlighting the alleged accusations levelled against her for her to mount a defence for herself.

Section 45(4)(b) of the Act provides that a termination of employment shall be unfair if in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. I find that in the circumstances of this case, the Respondent did not act with justice and equity and that the employment of the Claimant was therefore terminated unfairly. I therefore find that the Claimant's termination was indeed unfair.

### **What remedies is the Claimant entitled to**

#### **i. Compensation for unfair and unlawful termination**

Having found the termination of her employment as unfair, the Claimant is entitled to compensation for unfair termination. I find that six months' gross pay is reasonable in the circumstances of this case. In arriving at this I have considered the duration of the claimant's service and the circumstances under which her employment was terminated, especially that she had just reported from maternity leave. I award her Kshs.190,000 x 6 months = **Kshs.1,140,000/-** as compensation.

#### **ii. Certificate of Service**

The Claimant is entitled to be issued with a Certificate of Service by dint of Section 51 of the Employment Act, 2007.

**iii. Gratuity and leave days earned but not taken**

The Claim for gratuity fails as it was not provided for in the claimant's terms of services.

The claim for leave days succeeds as the Respondent's minutes of the disciplinary hearing alluded to leave not taken. The Respondent did not prove that the Claimant took all her pending leave and did not specifically deny the prayer. I award her **Kshs.67,692.40** on account of leave days earned but not taken.

**The total award is Kshs.1,207,692.40.**

**iv. Costs**

The Claimant is awarded costs of this suit and interest shall accrued at Court rates from the date of judgment until full settlement.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**