



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2388 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

VIOLET WANJIRU KANYIRI.....CLAIMANT

VERSUS

KUKU FOODS LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Violet Wanjiru Kanyiri instituted this suit vide a Statement of Claim dated 1st December 2017 alleging wrongful and unfair termination of employment, unfair labour practices, discrimination and defamation against the Respondent, Kuku Foods Limited. The suit proceeded as an undefended Claim after the Respondent failed to file a Defence.

She avers that she was employed by the Respondent in December 2010 as a Trainee Shift Supervisor and underwent training in South Africa for three months from January, 2011 to end of March, 2011 at a weekly allowance of Kshs.4,000/-. That she then returned to Kenya and immediately started the recruitment and training of new staff for the Respondent while being paid a monthly basic salary of Kshs.70,000/-. That the Respondent opened its first store at Junction, Ngong Road in August, 2011 and in September or October 2011, she was re-engaged in the position of Trainer at the Respondent's Head Office but with no adjustment to salary or official communication on the said position. That she trained all the staff members who were employed in all the stores the Respondent opened periodically and was from time to time re-allocated duties to run the stores.

That she was confirmed as an Assistant Restaurant Manager on 1st August, 2012, at a monthly gross salary of Kshs.86,667/- at which point she started training Managers including those from Tanzania and Uganda. That she was sent to Tanzania to train the staff from January 2013 to March 2013 in readiness for opening of the first KFC store at Dar-es-Salaam and her salary was reviewed to Kshs.92,734/- per month in April, 2013. That she was then sent to Uganda on 13th October 2013 to train the staff and assist in the opening and running of the KFC store in Uganda which she also ran as the Restaurant General Manager and was paid a net salary of Kshs.111,967/-; with accommodation and transport being catered for by the Respondent.

That when she returned to the Respondent's office in Kenya at the end of July, 2014 her salary was reduced to a gross salary of Kshs.92,734/- per month and when she raised complaints on the same the Respondent refused, failed or neglected to make good her claim. That she nevertheless served the Respondent diligently and rose in rank to the position of Area Coach in charge of a number of Restaurants as shown in her Appointment Letter dated 5th December, 2015.

She avers that the Respondent wrongly and unlawfully summarily dismissed her from employment on 20th May 2016. Her last monthly salary was Kshs.221,576/-.

That the Respondent took her through a sham disciplinary process as it issued her with a Notice to Show Cause letter giving her 24 hours to respond to the charges of: gross negligence in handling a disciplinary matter resulting in loss of company funds; exposing the company to possible litigation; and attempting to dismiss an employee without following due process. That she responded to the same giving explanations against the charges levelled against her and the Respondent immediately issued her with an invitation for Disciplinary hearing dated 16th May 2016.

It is her averment that the Minutes of the disciplinary hearing held on 18th May 2016 do not capture what actually transpired at the said hearing. That her dismissal letter clearly indicates she was dismissed for allegedly falsifying documents and was further on a final Warning for insubordination issued on the 27th January 2016. That she wrote to the Human Resource Manager to appeal against the decision of the management and when she requested for copies of all materials presented as evidence, the Respondent failed, refused and/or neglected to provide the same to her. That the Respondent further failed to hear and determine the appeal and her complaints on the minutes of the

disciplinary hearing were also ignored. That the Respondent had purported to pay her terminal benefits through a cheque it later cancelled and she was consequently charged by the Bank for the cancelled cheque. That the Respondent has thus failed, refused and or neglected to pay her terminal benefits including her salary for the days worked up to the 20th May 2016.

The Claimant avers that the Respondent's actions amount to unfair labour practices and have caused her financial embarrassment and inconvenience. That in addition, the Respondent has maliciously made false and damaging reports/reviews to other employers by claiming that she was dismissed on integrity issues of theft and misappropriation of funds thus persistently and continuously frustrating her and prejudicing her efforts to secure another job. She particularises in the Claim the Respondent's malice, discrimination and unfair labour practices and prays for judgement in her favour against the Respondent as follows: -

- 1) *A declaration that the summary dismissal of the Claimant by the Respondent was unlawful, wrongful and unfair.*
- 2) *A declaration that the Respondent's actions towards the Claimant amount to unfair labour practices.*
- 3) *Payment to the Claimant of terminal benefits of Kshs.9,869,534.76 as set out in paragraph 31 herein above.*
- 4) *Interest on the above at Court rates from the date of cause of action of 20th May, 2016*
- 5) *General damages and compensation for Malice, defamation and discrimination.*
- 6) *Reinstatement with back pay for unfair dismissal*
- 7) *Costs of this suit.*
- 8) *Any other and further relief that this Court may deem fit to make and/or grant.*

The Claimant also filed her Sworn Statement/Affidavit dated 14th August 2020 wherein she states that her employment was also governed by terms and conditions contained in the Respondent's Employee Handbook and Workplace Rules, Disciplinary Grievance Policy and Procedures. She further states that when she was made Area Coach, she was not paid the salary of an Area Coach yet she carried out all the duties and responsibilities of an area coach and that she was paid a meagre acting allowance, which was an underpayment. That the Respondent did not carry out any investigations to verify the charges levelled against her before scheduling her disciplinary hearing.

She also states that the General Manager, Mr. Justin Melvin completely agreed with her at the disciplinary hearing upon hearing her submissions and said that the employee in question ought to indeed have been disciplined. That there was also no complaint from the said employee on the disciplinary matter and that in essence, all the actions/offences complained of were roles played by the General Manager and the Human Resource Manager. She states that her involvement as an Area Coach was facilitating the initial procedures and providing documentation in consultation with the said Human Resource Manager. That the Respondent included a new offence in her dismissal letter being that she had falsified documents but which charge she was not given an opportunity to defend herself against.

That the entire disciplinary process was without due cause and fair procedure and that the Respondent's intention was to throw her out which is evidenced by the fact that the Respondent did not demonstrate the loss of monies as explained and there was further no evidence of any risk of litigation as complained of or any of the documents she had falsified. She contends that she had no disciplinary issue during the entire 5 years of her employment with the Respondent, had not been issued with any previous warnings and that the final warning letter cited in the dismissal letter was issued contrary to **Clause 2.5.4 of Part II of the Respondent's Workplace Rules, Disciplinary & Grievance Policy & Procedures.**

She states that due to the nature of her work, she did not go on leave from 2012 up to the time of termination and that she also occasionally worked on weekends and on Public Holidays when working as an Area Manager at the stores. That her contract with the Respondent also had a confidentiality clause and 6 months' competition clause restricting her from working at similar franchises, which was prejudicial to her as it restrained her from obtaining employment in such establishments. She prays for house allowance for 5 years as the Respondent did not provide any accommodation as evidenced in her payslip. That she is entitled to maximum compensation for unfair dismissal since the Respondent had no valid reason to terminate her services and the grounds given did not warrant a dismissal as provided under the Employee Handbook and Grievance Procedures. She further prays for general and aggravated damages of Kshs.5 Million for malice, defamation of character, discrimination and unfair labour practices.

Claimant's Submissions

The Claimant submits that the Respondent did not have any valid reasons warranting her dismissal under **Section 43(1) of the Employment Act** and has not proved the same as required under **Section 45 of the Act**. On the fairness of the disciplinary process, she relies on the principles set out under **Section 7 of the Fair Administrative Actions Act** which provides for the scenarios when a court may review an administrative action. Further, that the Respondent did not comply with the provisions of **Section 41 of the Employment Act** because the charges levelled against her consistently metamorphosised. That the Respondent failed to follow fair procedure contrary to **Article 47 of the Constitution** and **Section 6 of the Fair Administrative Actions Act** with **Section 6(4)** particularly providing that:

"Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason".

She relies on the case of **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR** which pronounced that:

"The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in Ridge v Baldwin (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under Article 47(1) as the latter encompasses several duties-duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in Article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice."

It is the Claimant's submission that she has set out the particulars of malice and discrimination in her sworn statement to demonstrate how the Respondent acted maliciously and discriminated against her whilst the Respondent has not provided any defence or contrary evidence to rebut the same. That it is therefore evident within a balance of probability that her claim is genuine and true.

She submits that against **Article 41 of the Constitution of Kenya**, she was subjected to unfair labour practices when the Respondent unlawfully and contrary to its own policies gave her a final warning letter without any basis or foundation and further reached a harsh and severe sanction without providing a fair process to her. That the Respondent also failed to provide her with a job profile/job description specifying her roles and duties and further victimized her by alleging that she falsified documents yet the actual persons who prepared and signed the said documents were still working for the Respondent and were neither questioned nor disciplined. Further, that her contract of employment and the pay-slips clearly demonstrate there was no difference between the basic pay and the consolidated pay.

The Claimant submits that she is entitled to one month's salary in lieu of notice as under **Section 36 of the Employment Act** since she was unfairly and wrongfully dismissed. That contrary to **Section 28 of the Employment Act** and **clauses 5.9.2 and 5.9.4 of the Employee Handbook**, she was not afforded her leave days in the 5 years she worked and that she was also entitled to overtime as per **clause 5.7 of the Employee Handbook**. She prays that this Court awards her as per the Respondent's Policy for all the public days and rest days worked as prayed because the said benefits are truly due and owing. She further submits that her monthly salary being reduced and not being paid the same as those holding similar positions as hers is contrary to **Section 5(5) of the Employment Act** which provides that an employer shall pay his employees equal remuneration for work of equal value.

She further claims house allowance under **Section 31 of the Employment Act** whose non-payment she submits is evidenced by the Respondent's contract, Policy and pay-slips. That the Respondent attempted to maliciously escape liability when it started to indicate in the payslips that the pay was consolidated without implementing the salary amount and that house allowance is not contained in the Employee Hand Book nor the Contract. She claims maximum compensation under **Section 49(1)(c) of the Employment Act**. That since the Respondent has not discharged its burden of proving that discrimination did not take place as alleged as per **Section 5 (7) of the Employment Act**, she is entitled to damages as prayed in her claim.

The Claimant submits that **Section 12(4) of the Employment and Labour Relations Court Act** gives the court discretionary powers to award costs as it considers just and prays that this Court grants her the costs of the suit and interest on the claims as prayed.

Analysis and Determination

The issues for determination are whether the Claimant was unlawfully, wrongfully and unfairly dismissed from her employment by the Respondent and secondly whether the Claimant is entitled to the reliefs sought in her Claim.

In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & another [2018] eKLR**, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

In **Elijah Kioko Kitavi v Allied Plumbers Limited [2019] eKLR**, the court found that because the respondents had not rendered any evidence in Court, the claimant's claim remained uncontroverted. The Court cited the case of **CMC Aviation Limited v Cruisair Limited (NO1) 1978) KLR 103, (1976-80) 1 KLR 835** wherein Madan J. (as he then was) rendered himself thus: -

"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them, or any of them, by the parties, they are not evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, until their truth has been established or otherwise, they remain unproven..."

In the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR**, the court noted that the respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent. The Court also held that the claimant had been unfairly terminated.

The instant claim is an undefended. The Respondent entered appearance but despite being granted leave by the Court to file its response to the Claim, it failed to file a Defence. The Claimant on her part has established existence of an employment relationship with the Respondent through a copy of her Payslip which is evidence of payment of salary periodically by the Respondent. She also produced an appointment letter dated 5th December 2015 among other employment records.

Under **Sections 43(1) and 45(2) of the Employment Act**, it is the duty of the employer to prove that the reasons for termination are justifiable. Since the Respondent herein did not respond to the proceedings, no explanation for the Claimant's summary dismissal has been given. As such, the burden placed on the Respondent was not discharged. The Respondent did not tender any evidence or produce documents to counter the Claimant's arguments. The Claim as pleaded therefore remains uncontroverted. It is also noteworthy that the Claimant has produced an extensive list of documents to support all her averments in relation to her services being wrongfully and unfairly terminated by the Respondent.

In the case of **Samsung Electronics East Africa Ltd v K M [2017] eKLR** the Court of Appeal observed that:

“29. In a claim such as this, the burden of proving there was an unfair termination of employment or wrongful dismissal rests on the employee, while the burden of justifying the grounds for the termination of employment rests on the employer.

See Section 47(5) of the Employment Act. Whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair. See CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR...”

The summary dismissal letter dated 20th May 2016 states that the Claimant was summarily dismissed for gross misconduct under **section 44 of the Employment Act** and **Section 2.4.1 of the Respondent’s Workplace Rules, Disciplinary & Grievance Policy & Procedures**. It is the Claimant’s case that she was unlawfully, wrongfully and unfairly dismissed from service by the Respondent. She has filed the documents issued to her prior to the said summary dismissal. She was required to show cause and was notified of a hearing through a letter where she was informed of her right to be accompanied by a fellow employee to the said hearing if she so wished. The Claimant has pleaded that she took issue with the minutes of her disciplinary hearing which means she did not agree with the proceedings of the hearing as had been recorded.

I find that the Claimant has discharged her burden and proved that she was unfairly terminated by producing the minutes of the disciplinary hearing and emails showing her dissatisfaction with the hearing proceedings; she also duly appealed the management’s decision to dismiss her but the Respondent never rendered its decision to the said appeal. Her evidence is uncontroverted. I thus find that the Claimant was unfairly dismissed by the Respondent.

The Claimant is therefore entitled to compensation as under **Section 49 of the Employment Act** having concluded that she was unfairly dismissed by the Respondent. Proceedings before Court show that the Respondents admitted to the terminal dues as prayed by the Claimant in the sum of Kshs.221,576/-. This issue was however resolved by an order of this court made on 20th December 2017 directing the Respondent to pay the terminal dues.

On the prayer for discrimination, an employee must prove differential treatment between the employee and other employees. The claimant did not adduce any evidence to prove differential treatment to her detriment. Section 5(7) of the Employment Act provides that:

In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

In **Leonard Gethoi Kamweti v National Bank of Kenya Limited [2020] eKLR**, the Court of Appeal at Nairobi held:

“...the mere fact that an employer pays one employee more than another does not in itself amount to discrimination. We do not know whether the appellant and the said Mr Mworira were similarly circumstanced as pay differentials are justified due to levels of responsibilities, expertise and skills among other considerations. This ground of appeal therefore fails.

Underpayment and discrimination are not the same thing. All the particulars set out in paragraph 52 of the witness statement under the heading *“Particulars of the Discrimination”* do not disclose discrimination

The claimant further did not give any particulars for defamation for which she also seeks general damages in prayer 5 of her claim. I find no proof of defamation.

For the forgoing reasons, I make the following orders in respect of the prayers of the Claimant –

a) Salary for 20 days worked in May 2016

This has been paid pursuant to this court’s orders of 20th December 2017.

b) Notice pay in lieu of Notice

The Claimant having been unfairly terminated, is entitled to one month’s salary in lieu of notice which I award her at **Kshs.221,576.25**.

c) Leave pay @ 21 days for 5 years 5 months

The Respondent did not adduce evidence prove that the Claimant took annual leave. I award her the prayer at **Kshs.849,375.62** as prayed.

d) Salary underpayment (Aug. 2015 Nov, 2015)

The Claimant did not prove any underpayment of salary. The fact that she was paid a higher salary while out of the Country which reverted to her earlier salary while in the Country is not proof of underpayment. She did not adduce evidence of salary paid to other staff of her grade that was higher than hers. The prayer is dismissed for want of proof.

e) Salary underpayment as area coach (Jan – May 2016)

This prayer was like (d) above not proved and is dismissed.

f) House allowance @ 15% for 5 years

The Claimant's contract states her salary was consolidated meaning it was inclusive of house allowance. This prayer thus fails and is dismissed.

g) 54 Public Holidays (for 5 years)

The Claimant stated that she worked on "some" public holidays but did not specify which ones. She thus did not prove this prayer and the same is dismissed.

h) 24 Rest days (Sundays)

As with prayer (g) above, this prayer was not proved and is dismissed.

i) 12 months' compensation

Having found the termination unfair, the Claimant is entitled to compensation. I have considered the factors set out under Section 49(4) of the Employment Act and especially the length of service and the circumstances under which the termination took place. It is my view that compensation equivalent to 8 months' gross salary is reasonable in the circumstance. I accordingly award the Claimant **Kshs.1,772,610** being 8 months' gross salary as compensation.

j) 6 months' pay for confidentiality agreement

The prayer was not proved and neither was it justified. The same is accordingly dismissed.

k) Charges for cancelled cheque

The claimant is entitled to the bank charges, the Respondent having deliberately stopped the cheque after it was banked. I award her **Kshs.2,151.75** as prayed.

l) Overtime (6 hours x 140 days in 2015 – 2016)

The Claimant did not prove that her terms of employment provided for overtime payment or that she worked overtime either as prayed or at all. The prayers is thus dismissed for want of proof.

General damages and compensation for Malice, defamation and discrimination

The Claimant did not prove the claims for malice, defamation or discrimination. She is therefore not entitled to damages in respect thereof with the result that the prayer fails and is dismissed.

Reinstatement with back pay for unfair dismissal

The claimant is not entitled to this prayer by virtue of Section 12(3)(vii) of the Employment and Labour Relations Court Act, having been terminated more than 3 years ago. In any event, the Claimant did not justify reinstatement in terms of Section 49(4)(c) and (d) of the Employment Act.

In conclusion, judgment is entered in favour of the Claimant against the Respondent in the total sum of **Kshs.2,845,713.62**.

Costs of this suit

The Respondent will pay the Claimant's costs of this suit. Interest shall accrue on the decretal sum from date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH 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 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, 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