



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 339 OF 2018

BETWEEN

CAROLINE KHWAKA WAFULA.....CLAIMANT

VERSUS

SONIC FRESH COMPANY LIMITED ... RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

Musesya & Company Advocates for the Claimant

Muttisya & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 22nd May 2010. She states, she was employed by the Respondent as a Branch Manager, Mombasa, on 1st September 2014. Her first monthly basic salary was Kshs. 15,000, later reviewed to Kshs. 17,000. The Respondent placed her on compulsory leave, on 22nd January 2018. She was still on compulsory leave, when the Respondent arbitrarily, through a letter dated 1st March 2018, summarily dismissed her. She was not heard. She was not give a valid reason justifying the decision. She did not have notice. She worked excess hour without compensation. She was denied salary for the month of February 2018; service pay; and house allowance. She seeks Judgment against the Respondent for: -

- a. 1-month salary in lieu of notice at Kshs. 17,000.
- b. Salary for 20 days worked in January 2018 at Kshs. 13,076.
- c. 12 months' salary in compensation for unfair termination at Kshs. 204,000.
- d. Unremitted N.S.S.F contributions for 3 years and 4 months at Kshs. 20,000.
- e. House allowance at 15% of basic salary, for 3 years and 4 months at Kshs. 102,000.
- f. Annual leave for the entire period worked at Kshs. 73,230.
- g. Overtime pay, at 10 hours per month for 40 months, at Kshs. 32,692.
- h. Service at 15 days' salary for each complete year of service at Kshs. 39,230.

Total...Kshs. 435,322.

i. A declaration that termination was unfair.

j. Certificate of Service to issue.

k. Costs.

l. Interest.

2. The Respondent filed its Statement of Response on 27th June 2018. Its position is that termination was fair and lawful. The Claimant was paid all her dues. She did not suffer any loss. Termination was in accordance with Sections 35 and 36 of the Employment Act. The Claimant was given an opportunity to be heard. She received a notice of termination. The Respondent urges the Court to reject the Claim with costs.

3. The Claimant testified and rested her case, on 1st October 2019. Operations Manager, Enoch Mailu testified for the Respondent on 13th October 2020, closing the hearing.

4. The Claimant told the Court that Mailu owned the business. She was employed as the Branch Manager, Mombasa. The Respondent carries out the business of clearing and forwarding. The Claimant's role was to ensure that customers' consignments were received and forwarded at the Port of Mombasa. She was diligent, working for 4 years without a single warning. She would put in excess hours, to ensure customers' consignments were cleared.

5. Her boss gave her a letter of compulsory leave. No reason was given for the decision. She was told to hand over. She was on compulsory leave when she received a letter of summary dismissal, dated 22nd January 2018, from the Respondent. She was not called for a disciplinary hearing. Notice did not issue. She was not paid terminal dues. Certificate of Service was not released to her. She suffered economic loss. She was at the time of testifying, still unemployed. The accusations contained in the letter of summary dismissal are baseless. She was on probation for 3 months and confirmed in the end. She sat exams at KRA, and costs for the exercise deducted from her salary. The exam result did not have any bearing on her continuity in service. There was no requirement that she had to pass the exam to continue working.

6. Cross-examined, she testified that she was on probation for 3 months. The contract was to be renewed based on performance. The Respondent wrote to her on 3rd April 2018, alleging that she was incompetent. The letter of compulsory leave alleged she was incompetent. It was indicated that the Claimant had a warning letter. She did not engage in her own side business. She did not refuse to hand over. She handed over to her boss. She returned her port pass to KPA. She obtained the pass through the Respondent. The instruction on the pass was that it was returnable to KPA. There was no complaint about her performance. She was not issued a letter of appointment after probation. She did not have evidence of excess hours worked. She did not have evidence of N.S.S.F non-remittance. She never went on annual leave. She was not paid her terminal dues. Redirected, she told the Court that details of alleged incompetence were not given to her. She handed over to Director Mailu himself. She had collected the KPA pass in person. The nature of her work required she put in excess hours. She cannot have been on probation for 4 years.

7. Mailu told the Court that the Claimant was not delivering. She was placed on compulsory leave, to enable the Respondent investigate. She was summarily dismissed after investigations.

8. Cross-examined, Mailu told the Court he has discretion in hiring and firing of staff. He is aware the law requires him to hear his Employees, before dismissing them. His witness statement refers to warnings issued the Claimant. He did not have any warning letter in Court. The contract did not have a clause for compulsory leave. Leave was to last 31 days. She was not paid salary for the period she was on compulsory leave. Mailu appraised Claimant's performance. He did not have document showing appraisal was done. He had proof of poor performance – the warning letters. The letters were not exhibited in Court. The letter of summary dismissal shows dismissal was effective the same date – 1st March 2018. The Respondent gave her a hearing, before sending her on compulsory leave. He did not have the minutes of the disciplinary meeting. She was not a permanent Employee. She was not issued notice of termination. There was no investigation report generated after the Claimant was placed on compulsory leave. Mailu asked the Claimant to hand over Respondent's assets. It amounted to dismissal. Port pass belongs to KPA. She was to return the pass to KPA, through the Respondent. She did not do so. He was not aware, that she surrendered the pass to KPA directly. The Respondent did not pay her terminal dues. It did not pay house allowance and N.S.S.F contributions. She did not work excess hours. She was not paid salary for January 2018.

9. Redirected, Mailu told the Court that the letter of compulsory leave, disclosed all the reasons justifying termination. The Respondent did not refuse to pay her terminal dues. It was waiting for the Claimant to clear. The port pass issued through the Respondent. The Respondent expected it is returned to KPA through the Respondent. The Respondent expected the port pass would be returned through the Respondent. The Claimant could not be traced after she left employment. She had switched off her phone. She did not communicate about return of the port pass. She was ignorant and arrogant. She rushed to Court. She never worked excess hours. She was issued written and verbal warnings. She did not respond to any warning.

The Court Finds: -

10. There is satisfactory evidence to establish that the Claimant was employed by the Respondent, a clearing and forwarding business, as the Branch Manager, Mombasa, on 1st September 2014. She exhibits an Employment Contract, which is dated 1st September 2014.

11. The assertion by the Respondent that the Claimant was not its Employee, or was not a regular Employee, is completely discounted by the Employment Contract.

12. Her first salary was Kshs. 15,000, and Kshs. 17,000 as of the date of termination. She worked up to 1st March 2018, when the Respondent summarily dismissed her.

13. Before the Court examines whether termination was based on valid reason, and executed fairly under Sections 41, 43 and 45 of the Employment Act, it is in order to deal with certain concessions made by the Respondent, through the evidence of Director Mailu.

14. Mailu stated, on cross-examination: -

- We did not pay house allowance.
- We did not pay N.S.S.F contributions.
- We did not give the Claimant notice of termination.
- We did not pay her salary for January 2018.

15. The result of these concessions is that, the following prayers are successful, and granted accordingly:

a. House allowance for 40 months at 15% of the basic salary, at Kshs. 102,000.

b. Unremitted N.S.S.F contributions at Kshs. 20,000.

c. 1-month salary in lieu of notice at Kshs. 17,000.

d. Salary for January 2018 at Kshs. 13,076.

16. Having received back unremitted N.S.S.F contributions, the Claimant cannot receive service pay, under Section 35 of the Employment Act. She is free to forward the contributions to the N.S.S.F in order to draw pension benefit from her social security account.

17. The Claimant on her part, conceded on cross-examination that she did not have evidence of overtime worked. The prayer for overtime pay is declined.

18. The Claimant testified that she never went on annual leave. Mailu did not supply the Court with any annual leave records, showing that the Claimant utilized her annual leave days, or if she did not, was paid cash in lieu of leave. The contract did not have a specific provision on annual leave days. **The Court adopts the statutory minimum 21 days of annual leave, between 1st September 2014 and 1st March 2018 [71.75 days] and allows the prayer at Kshs. 46,913.**

19. Was termination fair? The Claimant was sent on compulsory leave around 22nd January 2018. Director Mailu was not able to explain which clause in the contract, or provision of the law, compulsory leave was founded. The Respondent charged that, "due to your continuous incompetence and carelessness which has grossly affected the company operations, you are hereby instructed to proceed on a 31 days' compulsory leave effective immediately, while we conduct investigations and evaluate your performance...we will communicate to you on or before 5th March 2018..."

20. Cross-examined, Director Mailu gave the following evidence: -

- I do not have documents showing appraisal.
- I do not have proof of her poor performance.
- I have not produced any warning letter.
- The contract does not have a clause on compulsory leave.
- The letter of summary dismissal was effective the same date it issued.
- I do not have any investigation report following the letter of compulsory leave.

21. The letter of summary dismissal repeated the same allegations against the Claimant, contained in the letter of compulsory leave. There were variations, such as the accusation, that the Claimant failed her KRA exams 'miserably.' The generalized accusations about incompetence, arrogance and inability to perform, were restated.

22. As can clearly be seen from paragraph 20 above, nothing was done by the Respondent, after sending the Claimant on compulsory leave, to authenticate the accusations contained in the letter of compulsory leave, as rehashed in the letter of summary dismissal. The evidence by Director Mailu, summed above, gives the picture of an Employer who was completely unaware about his obligations to his Employee, in undertaking a process of termination. The allegations about incompetence, arrogance and poor performance, were not established through investigations carried out by the Respondent. There was no report of any investigations. The accusations remained hasty generalizations.

23. Procedure as confirmed by the evidence of Director Mailu, was shambolic. There was no hearing of any form. The Respondent totally disregarded the requirements of Section 41 and 45 of the Employment Act on fairness of procedure.

24. Termination was unfair for lack of valid reason[s] and fair procedure. It did not meet the statutory standards of fairness, prescribed under Section 41, 43 and 45 of the Employment Act.

25. The Claimant deserves compensation for unfair termination under Section 49 of the Employment Act. She worked for 3 years and 5 months. No warnings given to her, were exhibited before the Court. Her contract was open-ended. She was confirmed after 3 months' probation, based on performance and commitment to her duties. She was paid nothing on termination. She had not, at the time of giving

evidence, secured another job. She was a young lady, about 32 years old, on the date she was unfairly dismissed. She had many working years ahead of her. She did not contribute in any way, to the circumstances leading to termination. She was not paid terminal dues. The Court has acceded to most of her prayers on terminal dues. **She is granted 3.5 months' salary in compensation for unfair termination, at Kshs. 59,500.**

26. Certificate of Service to issue.

27. Costs to the Claimant.

28. Stay of execution of this Judgment is granted for 30 days from the date of delivery.

29. Interest allowed at the rate of 16% per annum from the end of the stay period.

IN SUM, IT IS ORDERED: -

a. It is declared that termination was unfair.

b. The Respondent shall pay to the Claimant: arrears of house allowance at Kshs. 102,000; N.S.S.F deductions at Kshs. 20,000; notice at Kshs. 17,000; January 2018 salary at Kshs. 13,076; annual leave at Kshs. 46,913; and compensation for unfair termination at Kshs. 59,500 – total Kshs 258,489.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Stay of execution of this Judgment is granted for 30 days from the date of delivery.

f. Interest allowed at 16% per annum from the end of the stay of execution period.

Dated, signed and released to the Parties electronically, under Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 15th day of December 2020.

James Rika

Judge