



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 302 OF 2017

EDITH KAARIA NJERU.....CLAIMANT

VERSUS

TUUNGANE TIJENGE SACCO.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking relief for what she framed as illegal, unfair, unlawful termination; constructive dismissal and non-payment of terminal dues. She avers that she was employed as a messenger from 1st April 1998 and that she served the Respondent and was confirmed into the permanent and pensionable employment of the Respondent on 1st September 2012. She was promoted to serve as an accountant and in October 2015 was promoted from accounts clerk III to credit officer earning Kshs. 47,078.80. She asserts that she was served with a show cause letter on 16th March 2016 and she comprehensively responded to the show cause letter. She was re-designated to support staff on 7th June 2016 to evaluate her performance in three months beginning June to August 2016 within which negligence of duties or unsatisfactory performance would lead to disciplinary action as per the Respondent's code of conduct. The Claimant avers that on 25th July 2016 without any reason or lawful justification the Respondent summarily dismissed her. The Claimant asserts that the letter of clearance she was issued was contrary to the provisions of Section 51 of the Employment Act. She avers that upon dismissal she was unable to service the loan she had with the Respondent and thus subjecting her to distress and economic hardship. She thus sought one month's salary in lieu of notice – Kshs. 47,078.80, twelve month's salary as compensation – Kshs. 564,945.60, unpaid leave for 18 years 3 months – Kshs. 604,177.93, severance pay – Kshs. 423,709.20 making a total of Kshs. 1,639,911.53. She also sought general damages for unfair and illegal termination, a certificate of service, costs of the suit plus interest thereon.

2. The Respondent filed a defence in which it averred that the Claimant was employed as a messenger and was later re-designated as an accounts clerk III and later to credit officer. The Respondent avers that the Claimant was served with a show cause letter on 15th July 2016 for her persistent poor performance. It was averred that she refused, failed or neglected to respond to the show cause notice or attend the scheduled disciplinary hearing on 23rd July 2016. The Respondent asserts the reasons for the dismissal were well articulated in her letter of dismissal and that it was a decision arrived at after carefully and adequately monitoring her performance. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant testified as did the operations manager of the Respondent Mr. Timothy Mwangi. The Claimant stated that she was employed as a messenger and was later promoted to accounts clerk and then credit officer. She testified that no meeting was called to discuss disciplinary issues and that the deployment letter from accounts to cleaner was a demotion. In cross-examination she denied being called to a meeting and that she never received the internal memo. She stated that she replied to the show cause notice. In re-exam she stated that she was not given all the show cause letters and that there was no performance tool used.

4. The Respondent's witness testified that he deputized the CEO and supervised the Claimant and that on promotion in July 2001 the Claimant did not perform very well as the SACCO was rapidly expanding leading to a backlog in the credit department. The loans portfolio was not well managed and the Respondent decided to reassign her position of credit officer on 22nd October 2015. She was given a list of areas of concern and her duties in the new role. He testified that the Claimant did not satisfactorily handle the matters of concern and she gave an incomplete list to the committee and stormed out of the meeting on 22nd February 2016. He stated that the warnings were verbal and the Respondent then reassigned her a new role with lighter duties after receiving her reply to show cause a day late. He said that her salary and allowances were retained in her new assignment. He stated that she did not respond to the final show cause letter issued and the board decided to summarily dismiss her. In cross-exam he said that she was given the same amount in pay in her new position and the performance was poor per the minute book. He conceded there were performance reports not produced in court.

5. The parties filed submissions and in her submissions the Claimant asserts that the Respondent did not adduce evidence in support of its allegations against her. Section 107 and 119 of the Evidence Act were cited for the proposition that there was no proof of poor performance and because the fact was for the Respondent to prove, the Respondent failed to prove the same. The minutes of the board produced were attacked for being unsigned and undated thus lowering their probative value. The Claimant quoted Section 43(1) of the Employment Act in

support of her contention that the Respondent had failed to prove there were valid reasons for the dismissal. The Claimant cited the cases of **Samuel Owili v Kenya Ports Authority [2013] eKLR**, **Everline Kagendo v Statpack Industries Limited [2013] eKLR** and **Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR**.

6. The Respondent submitted that the Claimant was dismissed for insubordination. It cited the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** where the court held that insubordination was a constant or continuing intentional refusal to obey direct or implied order reasonable in nature and given by and with proper authority. The Respondent asserts that the dismissal of the Claimant was justified for her poor performance and failure to heed the directions of the Respondent in the internal memo. The Respondent cited the provisions of Section 44 of the Employment Act and emphasized the provisions of Section 44(4)(c) and (e). Reliance was placed on the case of **Kenya Reinsurance Corporation Ltd v Eliud M. Ndirangu [2006] eKLR** where Mutungi J. held that an employer before dismissal should hear the employee in line with the principle of *audi alterum partem*. The Respondent submitted that the Claimant was called for the board meeting and informed of the concerns of the Respondent and that she remained silent and walked out of the meeting. The Respondent asserts that the dismissal thus passed the test of fairness as stated in the case of **John Rioba Mugo v Riley Falcon Security Services Limited [2016] eKLR**. The case of **Christopher Kariuki Gikonyo v Cargo Services Centre East Africa BV t/a Swissport Cargo Services Kenya [2015] eKLR** and **Jane Frances Ominde Muniyako v Imaging Solutions Limited [2013] eKLR** were cited for the allegation the Claimant was guilty of insubordination. The Respondent relied on the case of **Raphael Juma Juma v Armed Forces Canteen Organization [2014] eKLR** where Ndolo J. held there was a valid reason for the claimant's termination. The Respondent cited the case of **Kairu v Shaw & Others [1986-1988] EA 221** where Madan CJ held that when interpreting a contract the court ought to give effect to the intention of the parties as far as possible and in particular avoid deviating interpretations however easy or plausible they may appear to be. This was buttressed by the case of **Osman v Mulungwa [1995-998] 2 EA 275** which held that courts will not make contracts for parties but courts will give effect to the clear intentions of the parties. The Respondent urged the dismissal of the claim with costs.

7. The Claimant was no doubt dismissed by the Respondent at a time she was serving as a subordinate staff. The Respondent's minutes of the management meeting held on 23rd July 2016 per minute 25/16 indicate that the Claimant was not present and a determination was made that she be summarily dismissed. The Respondent had invited the Claimant to the meeting while she was on leave. There is no evidence of receipt of the letter. This was the opportunity that the Respondent availed the Claimant and it is unclear why the Respondent chose to proceed without ascertaining the opportunity to be heard defend herself was actually availed to the Claimant. The Respondent did not avail the measuring tool used to ascertain the performance of the Claimant. Taken as a whole it seems the Respondent failed to follow its own code. It is stretching the bounds of reason to suggest as the Respondent does that the failure by the Claimant to prefer an appeal against her termination precluded her from approaching the court for relief. The code cannot oust the jurisdiction of the court to hear disputes between employees and employers. If an appeal is so crucial the Respondent should have made it an automatic consequence of the dismissal of all its employees under the code of conduct. Be that as it may, the Claimant was not dismissed for a valid reason in terms of Section 43. The Claimant was not proved to have been insubordinate as these were allegations made but there was no substance. The board minutes speak of a pattern yet no documents were availed to prove this. In the final analysis I find that the dismissal was not proper in terms of the law and should have been averted through the issuance of a warning or reprimand. She is not entitled to severance pay and leave for any period exceeding the 3 years preceding the filing of the suit. I therefore enter judgment for the Claimant against the Respondent for

- a. One month's salary as notice – Kshs. 47,078.70
- b. 5 month's salary as compensation – Kshs. 235,395.50
- c. Unpaid leave for 3 months – Kshs. 141,236.10
- d. Costs of the suit
- e. Certificate of service
- f. Interest on (a), (b) and (c) from date of Judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 21st day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar