



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 19 OF 2018

LUCY MAKENA.....CLAIMANT

VERSUS

XPLICO INSURANCE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant avers that she was an employee of the Respondent and that she was employed as a secretary since 1st August 2011. She earned a basic salary of Kshs. 21,000/- a month. Her salary was later reviewed to Kshs. 46,200 in the year 2014. She has sued the Respondent for unfair, unprocedural, biased and constructive termination and asserts that she was maliciously charged with the offence of stealing by servant and her salary withheld. She avers that in September 2014 she received a letter sending her to compulsory leave with effect from 1st October 2014. She asserts that the Respondent's Branch Manager reported to the Police that she had stolen some Kshs. 308,491/-. After an audit done on 9th and 10th October 2014, the figure was amended to read Kshs. 685, 892/-. In a meeting held on 7th October, 2014 at the head office where the principal officer and human resource officer attended, she was advised to go back to work. She averred that on 8th October 2014 before she arrived at work she was arrested at her house and was held for two days at the Police Station without being taken to court. She was later charged with an offence of stealing by servant vide Meru Criminal Case No. 1960 of 2014. In a ruling given on 20th September 2017, the court found that there was no evidence adduced against her and consequently acquitted her under Section 210 of the Criminal Procedure Code. She seeks a declaration that her termination was unlawful and unfair, an order for the payment of salary for the period as from 30th September 2014 to date plus interest thereon. She also seeks special damages, general damages and compensation under section 49(1)(c) of the Employment Act.

2. The Respondent in its memorandum of response denies the Claimant's averments and puts her to strict proof thereof. It avers that the acquittal of the Claimant in the criminal case does not exonerate her of breaching her duties at the Respondent's offices and/or engaging in the unethical conduct contrary to her terms of employment. The Respondent further denies that it constructively terminated the Claimant and that it withheld her salary but states that she breached her own terms of employment contract.

3. In his statement, the Respondent's branch manager stated that the Claimant was working as a customer service assistant/cashier. He stated that she deposited Kshs. 50,000/- instead of Kshs. 358,491/- that she had received from various clients on 29th September 2014 which led him to report the matter to the Police culminating in the charges preferred against the Claimant.

4. The matter proceeded *ex parte* on 5th February 2019. The Claimant told the court that she was employed by the respondent from August 2011 to 30th September 2014. In support of her evidence she produced a bundle of documents to buttress her claim. She testified that she was charged for misappropriation of funds in the criminal case but she was acquitted under S. 210 of the Criminal Procedure Code. She also averred that she was sent on compulsory leave on 30th September, 2014 and she has never been reinstated nor paid her dues. She said that she was earning Kshs. 46,200/- a month.

5. She filed submissions on 12th February 2019 and submitted that she was unfairly terminated without payment and was not given a chance to defend herself according to the Respondent's laid down procedures. She relied on the case of **Lydia Kaguru Makathimo v Consolidated Bank of Kenya Ltd [2019] eKLR** where the court stated that "*the claimant was not guilty of any of the reasons advanced by the respondent to justify the termination thus disentitling the respondent to the protection of section 43 and 45 as the dismissal was not for valid reasons*" She urged the court to grant her prayers as sought in the statement of claim. The Respondent did not file any submissions.

6. From the pleadings and testimony adduced as well as the submissions advanced, the following issues fall for determination:-

- a. Whether the Claimant engaged in gross misconduct thereby justifying summary dismissal.
- b. Whether the Claimant's termination was fair or unfair.

c. Whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.

7. As to whether the claimant engaged in gross misconduct thereby justifying summary dismissal, Section 44(3) of the Employment Act provides as follows:

An employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

The acts that may amount to gross misconduct are set out in Section 44(4)(g) which provides that an employer will be justified for dismissal if an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property. From the facts of the case and the evidence adduced, the Claimant was issued with a letter sending her on compulsory leave upon discovery of the theft of Kshs. 358,491/-. There is no evidence to show whether any investigations were carried out and the Respondent's witnesses never testified in court to adduce any evidence incriminating the Claimant. The pattern before the criminal court was one of halfhearted attempts at mounting a trial leading to the acquittal of the Claimant as witnesses would be bonded and not appear or where they appeared would fail to return to testify at the time allocated by the court. Further the Respondent contradicts itself by stating that the amount that got lost is Kshs. 358,491/- which amount was allegedly collected by the Claimant on 30th September 2014. No evidence in the form of receipts or such are produced to show that indeed the Claimant collected the said amount on that day. Curiously it states that upon an internal audit being carried out, it was established that Kshs. 685,892/- was lost and not Kshs. 358,491/- but there was no evidence in support of the same. In my considered view therefore, the Claimant was not guilty of theft as alleged by the Respondent and her termination cannot thus be justified. This disentitles the Respondent the protection of section 43 and 45 as the dismissal was not for a fair or valid reason.

8. As to whether the Claimant's termination was fair or unfair and whether she is entitled to the remedies as prayed for in the memorandum of claim, Section 45(2) of the Employment Act provides that failure to prove that the reason for termination is valid and that the reason for termination is a fair reason, relating to the employee's conduct, capacity or compatibility and that the employment was terminated in accordance with fair procedure renders such dismissal *ipso facto* unfair and unlawful. Prior to dismissal, an employer has to give an employee the safeguards under Section 41 of the Employment Act. Section 41 in *parre materia* provides as follows:-

41. (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. (underline mine)

The employer is however required to abide by the procedural requirements of the law set out under section 41(2) of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance to a hearing. In the case of **Titus Musau Ndivau & another versus Waridi Limited [2012] eKLR** Ongaya J. held that upon a misconduct being reported the employer must make an enquiry into the matter and allow the employee to show cause why employment should not be terminated and ensure the employee is given a hearing under the provisions of section 41 of the Act. The Claimant herein was not issued with any notice and neither was she taken through any disciplinary hearing according to the Respondent's laid down procedures. The Claimant was thus unfairly dismissed and thus entitled to compensation.

9. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. One month's salary in lieu of notice – Kshs. 46,200/-
- b. 5 months salary as compensation – Kshs. 231,000/-
- c. Costs of the suit
- d. Interest on a) and b) above at court rates from date of judgment till payment in full
- e. Certificate of service.

It is so ordered.

Dated and delivered at Nyeri this 19th day of March 2019

Nzioki wa Makau

JUDGE