



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 2227 OF 2017

ELIZABETH NJERI NJENGA.....CLAIMANT

VERSUS

WAIGANJO INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as Office Administrator on 3.3.2012 and worked continuously upto 6.7.2017 when she was dismissed, defamed and denied her terminal dues. She therefore brought this suit claiming declaration that the termination was unfair and unlawful, and prayed for general damages for defamation, Kshs.1,304,636 as terminal dues and interest.
2. The respondent admitted the employment relation with the claimant but contended that the claimant's salary was Kshs.20,000 per month and not Ksh.30,000. It further denied that the termination of the claimant's services was unfair and averred that the termination was due to the claimants misconduct and that it was done after following a fair procedure. It therefore prayed for the suit to be dismissed with costs.
3. The suit was heard on 22.11.2018 when the claimant testified as Cw1 and the respondent called in house Legal Officer Mr. Charles Irungu Weru who testified as Rw1. Thereafter both parties filed written submissions.

Claimant's case

4. Cw1 testified that she was employed as Office Administrator and later promoted to Chief Officer Administrator. That her duties included typing letters and other documents allocated her by the Manager, filing of documents, procurement and bank agency.
5. Cw1 further testified that on 8.7.2017, she reported to work as usual and the respondent's MD called her to confirm whether all the staff were on duty after which she left for the bank to collect bank balances. That when she returned to the office she found the MD's driver in the office with a letter addressed to her telling her that she had been dismissed summarily and that she should leave immediately.
6. Cw1 further testified that she handed over to the HR Manager Dr. Lucy Njeru and left without any dues being paid to her. That after 4 months, she requested for her terminal dues but it was not paid.
7. Cw1 denied the misconduct cited in the termination letter and contended that the allegations of misconduct were in bad faith. She further contended that she worked for 5 years without compromising her integrity. That she went beyond her call of duty to do shopping on behalf of the MD's family, outsourcing cooks and cleaners for their home.
8. In cross examination, Cw1 admitted that she never negotiated for house allowance and stated that she was never allowed to negotiate any terms by the employer. She contended that she started with a salary of Kshs.20,000 but after one year, it was increased to Kshs.21,000, in 2013 it was increased to Ksh.23,000, in 2014 it was increased to Kshs.25,000 and then Kshs.32,000 in 2015 after the MD's father died. That the last increment was in appreciation for the care she gave to the MD's father until he died in June or July 2015. She admitted that she used to take her annual leave.

Defence case

9. Rw1 admitted that the claimant was employed by the respondent as office Administrator earning Kshs.20,000 per month. That she breached her contract and company regulations by engaging in acts of defrauding and sabotaging the respondents financial resources in collusion with other people. That due to the aforesaid matters, the respondent lost trust in the claimant and terminated her services on

7.7.2017 after being accorded a hearing by the respondent's MD.

10. Rw1 further denied the alleged defamation and prayed for that claim to be dismissed. He further denied the claim for compensation and terminal dues and prayed for the entire suit to be dismissed save for certificate of service.

11. In cross examination, Rw1 contended that his evidence is based on the records from the office and denied that he had tendered hearsay evidence. He admitted that he never knew the claimant personally but only through the office records. He however produced no such records.

Claimants submission

12. The claimant submitted that her termination was unfair because the employer has failed to discharge its burden of proving and justifying the reason for the dismissal, and also that a fair procedure was followed as required by section 41, 43 and 45 of the Employment Act. She contended that Rw1 gave hearsay evidence which did not prove that the claimant had defrauded and sabotaged the respondent's financial resources and other misconduct cited in the termination letter. She contended that Rw1 alleged that his testimony was based on office records which he never produced in court to support his allegation.

13. In addition, she submitted that Rw1 never proved that the claimant was accorded a hearing as required by section 41 of the Employment Act. She contended that mandatory procedure of oral hearing under this section was not followed and relied on *Samson Owiti Vs Kenya Ports Authority [2013]eKLR* to urge the court to find in her favour.

14. Finally, the claimant submitted that due to the said unfair dismissal she was entitled to the reliefs sought in her suit. She prayed for compensation of 12 months gross pay and relied on *John Kiarie Ngangi Vs Naisula Holdings Limited (trading as Naisula School) [2018]eKLR* where the court awarded 12 months compensation to a claimant who had worked for 3 years.

Respondent's Submission

15. The respondent submitted that the claimant did not prove the alleged unfair termination of her employment as required under section 47(5) of the Employment Act and prayed for the suit to be dismissed. It further submitted that the alleged claims were not supported by documentary evidence and urged the court to deny the claimant the intended unjust enrichment.

Analysis and determination

16. There is no dispute that the claimant was employed by the respondent from 3.3.2012 until 8.7.2017. The issues in dispute are:-

- a) Whether the termination was unfair and unlawful.
- b) Whether the reliefs sought should be granted.

Unfair termination

17. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Fair and valid reason is one that relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand refers to but not limited to a fair hearing before the termination of the contract.

Reason for termination

18. The termination letter dated 6.7.2017 cited misconduct as the reason for the summary dismissal of the claimant's services. The misconduct ranged from financial impropriety to failure to report fraud, lying to the respondent's MD and also giving out company secret information to third parties. The MD never gave evidence in this case and his written statement was amended by deleting his name and substituting it with that of Rw1 who confessed that he did not even know the claimant personally but through office records, which he failed to produce as exhibits.

19. The claimant testified that she never committed the offences cited in the dismissal letter and denied that any hearing was given to her before the dismissal as required by section 41 of the Employment Act. In view of the foregoing, I am satisfied that the burden of prove shifted to the respondent to not only justify the reason for the dismissal but also prove that she accorded the claimant a fair hearing in the presence of another employee or union official of her choice. The said burden was not discharged by the hearsay evidence of the Rw1. He just relied on a statement filed by the respondent's MD and produced no employment records from the claimant's personnel file to prove the offences cited for her dismissal and prove that a hearing as required by section 41 of the Act was accorded to her. Consequently I return that, on a preponderance of evidence, that the summary dismissal of the claimant vide the letter dated 6.7.2017 was unfair and unlawful within the meaning of section 45 of the Employment Act.

Reliefs

20. In view of the foregoing finding, I make a declaration that the termination of the contract of service herein was unfair and unlawful.

21. Flowing from the said declaration, I award the claimant damages under section 49(1) of the Employment Act being one month salary in lieu of notice plus 12 months' salary compensation for unfair termination of her services. In awarding the said compensation, I have

considered the claimant's 5 years' service without any warning letter. I have also considered that she did not contribute to the termination through misconduct, and that nothing was paid to her after the separation. The award will be based on a salary of Kshs.20,000 per month as evidenced by the appointment letter. The salary increment pleaded by the claimant was not proved by evidence.

22. The claim for unpaid House Allowance is dismissed because the appointment letter described the Kshs.20,000 as gross pay. Likewise, the claim for Advocates debt collection fees is dismissed for lack of particulars. If the claimant meant the fees paid to his lawyer to pursue this claim, then the same cannot form part of the principal claim herein.

23. The claimant will also be issued with a certificate of service under section 51 of the Employment Act.

Conclusion

24. I have found that the dismissal of the claimant was unfair and unlawful and awarded her compensatory damages plus terminal dues. I therefore enter judgement for her in the following terms:

NoticeKshs. 20,000

Compensation.....Kshs.240,000

LeaveKshs. 20,000

Service pay.....Kshs. 50,000

Kshs.330,000

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The claimant will also get costs and interest at court's rate from today.

The damages awarded shall be paid less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 9th day of April, 2019

ONESMUS N. MAKAU

JUDGE