



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA

AT NYERI

CAUSE NO. 434 OF 2017

RAHAB SHEILA NYANJAU KARUGA.....CLAIMANT

VERSUS

MURANG'A COUNTY GOVERNMENT.....RESPONDENT

JUDGMENT

1. The Claimant, an administrative assistant sued the Respondent for wrongfully and unlawfully terminating her services. The Claimant was employed by the Respondent as an administrative assistant on 28th October 2014. She avers that she served in that position up to 19th October 2015 when the Respondent wrongfully and unlawfully terminated her services. She averred that she was earning Kshs. 19,323/- per month. The Claimant avers that on 23rd October 2015 she received a call from one of her colleagues that her story had been published in the Standard newspaper. Later that same week, she received a suspension letter dated 19th October 2015 with a claim that she had presented a false document in support of her education in acceptance for her offer of employment. On 29th of October 2015 she responded to the letter and refuted the claims of forgery and misrepresentation as contained in the suspension letter. She received a letter from the Respondent on 19th November 2015 requiring her to appear before the Public Service Board but she could not attend since she was indisposed. Before the Claimant brought to the Board her reason for not attending the meeting, she was served with a dismissal letter. She avers that the ground for her dismissal cannot hold as the Respondent failed to accord her an opportunity to respond to the allegations and was not issued with a notice to show cause why her employment should not be terminated as provided for under Section 44(2) of the Employment Act. She further averred that her termination was contrary to Section 45 of the Employment Act. She thus sought a declaration that the suspension/termination from employment was unfair, one month's salary in lieu of notice, 12 month's pay for unfair termination as well as damages for unfair termination, a certificate of service and costs of the claim.

2. The Respondent filed a response and reiterated that the Claimant had presented to the Murang'a County Public Service Board a certificate purported to have been obtained from Egerton University showing that she had acquired a Bachelors of Commerce degree, a fact she knew was false and thus maintained that the Claimant obtained employment through fraudulent means. The Respondent averred that it thereafter suspended the Claimant pending a disciplinary hearing and that she was notified of the charges and an opportunity to defend herself. The Respondent averred that the Claimant wrote a letter denying that she had presented a fake degree certificate. The Respondent averred that the Claimant failed to appear for the disciplinary hearing and that the Respondent lawfully dismissed her from employment. She was given a right of appeal to the Public Service Commission as per Section 77 of the County Governments Act. The Respondent urged the dismissal of the Claimant's claim with costs.

3. At the hearing of the case the Claimant testified on her behalf while the Respondent did not call any witness. The Claimant testified that she worked for the Respondent for close to 1½ years and that she was unlawfully dismissed. She stated that she learnt about the dismissal from her colleague who called and informed her about the publication. She stated that there was no wrong doing or indiscipline committed by her prior to her dismissal. She testified that she received a suspension letter, disciplinary hearing notice and later a dismissal letter. She told the court that the dismissal was because of an allegation that she had given a fraudulent degree certificate which she refuted and testified that the job only required a diploma and testimonials which she had produced. She denied having presented a fake degree certificate and maintained that she only presented a diploma as that was the requirement for the administrative job. She further averred that she had not acquired a degree yet and stated that she is currently undertaking a degree course at Kenyatta University.

4. The Claimant filed her submissions and stated that the Respondent violated Section 41 of the Employment Act which lays down the procedure to be followed while terminating an employee. The Claimant relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** in which it was held that Section 41 is mandatory. The Claimant submitted that she was not informed of her termination and that she was not given an opportunity to be heard before being terminated. She further submitted that the Respondent alleged that her conduct amounted to gross misconduct, and therefore had the onus to justify the ground upon which its action was premised. She relied on the case of **Nicholas Otinyu Muruka v Equity Bank Ltd [2013] eKLR**. The Claimant submitted that the Respondent did not follow the law but instead elected to engage in a witch hunt and hastily dismissed her from service.

The Claimant maintained that her termination was unfair within the meaning of Section 45 of the Employment Act as the Respondent failed to prove the reasons for her termination as provided for by Section 43(1) of the Act. She thus submitted that she is entitled to payment of house allowance, payment in lieu of notice, payment for the leave days, issuance of a certificate of service, compensation for unfair termination and unlawful loss of employment.

5. The Respondent filed submissions and relied fully on the memorandum of response to the claim filed in Court on 6th March 2018. It submitted that it followed the laid down procedures before terminating the services of the Claimant. It submitted that it issued the Claimant with a notice to show cause letter setting out all the allegations of fraud and misconduct leveled against her, she was given an opportunity to appear before the board to defend herself but she failed to attend. A dismissal letter was issued to her in which the Respondent specifically indicated that the Claimant was entitled to a right of appeal but she also failed to exercise the said right. The Respondent asserted that the termination was fair; the disciplinary process was open, procedural and clear. It further submitted that the Claimant is not claiming that she did not understand what was required of her. It submitted that of interest is the fact that she did not respond to the allegations made against her that the documents she used to procure her employment were fake. The Respondent prayed to the court to dismiss the suit with costs.

6. Arising from the pleadings and testimony adduced as well as submissions of the parties, the issues for determination are:-

- i. Whether the dismissal was founded on a valid and fair reason.
- ii. Whether a fair procedure was followed before the dismissal.
- iii. Whether the reliefs sought should be granted.

As to whether the dismissal was founded on a valid and fair reason, under Section 45(2)(a) and (b) of the Employment Act, termination of a contract of employment of an employee is unfair if the employer fails to prove that it was founded on valid and fair reason(s). A valid reason is the matter the employer at the time of termination genuinely believed to exist and which caused the employer to terminate the services of the employee. It is therefore immaterial whether placed in the same circumstances; another person would not have deemed the said reason as gross enough to justify a dismissal and as such the duty rests upon an employer to prove the reason or reasons for the termination and failure to do so, such termination shall be deemed to have been unfair.

7. In the instant suit, the Respondent claimed that the Claimant had presented a forged Bachelor of Commerce Degree from Egerton University while seeking for employment as an assistant office administrator. The Claimant in her testimony denied having presented any degree certificate and maintained that at the time she was employed, the qualifications were a diploma certificate which she had presented and that she did not require a degree certificate to be employed. She maintained that she did not hold a degree and that she is in the process of acquiring one at Kenyatta University. The Respondent despite asserting that the Claimant had presented a fake degree certificate never presented any evidence. The Respondent had sought leave to file a witness statement which was allowed by the court, however when the matter came up for hearing the Respondent neither appeared nor file the statement or documents in defence of its position. Similarly, there is no evidence that the respondent carried out an investigation to ascertain the veracity of the allegations against the Claimant about documents produced at the time of employment. The Claimant's testimony thus remained uncontroverted and the reasons for termination of the Claimant remain mere allegations. The Respondent therefore having failed to prove the reason for the termination, the termination of the Claimant was unfair under Subsection 43(1) of the Employment Act.

8. As to whether a fair procedure was followed before the dismissal, Section 41 makes provision on the process to undertake in dismissing an employee. In the instant suit, the Claimant confirms that she was issued with a suspension letter which outlined the reason for suspension and in it she was required to show cause in writing why further disciplinary action should not be taken against her for the alleged offence. She also confirmed that she responded to the letter and refuted the claims therein. She also told the court that she received a disciplinary hearing notice requiring her to appear before the public service board and be heard in person. She however she failed to appear due to her alleged indisposition. It is worth noting that the Claimant did not inform the board that she was indisposed prior to the scheduled date of the disciplinary meeting. This therefore means that she was afforded an opportunity to defend herself but she squandered it and did not give reasons in advance to allow the board to afford her another date if it deemed fit. Upon dismissal, the Respondent communicated its decision to the Claimant through the dismissal letter. I opine that the employer followed the laid down procedure in dismissing the Claimant as provided for under Section 41 of the Employment Act and the Respondent should not be faulted in that regard.

9. As the Respondent failed to prove that the reason for termination was valid, fair and just, it is my finding that the Claimant's termination was unlawful and unfair to that extent. The Claimant is entitled to compensation which I cap at 3 months. She sought notice but that is superseded her inability to attend the disciplinary hearing. The Claimant is entitled to a certificate of service and cost of the suit. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. compensation for unlawful dismissal from service 3 month's salary – Kshs. 57,969/-
- ii. a certificate of service and
- iii. cost of the suit assessed as 30,000/-.
- iv. Interest on the sum in i) above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar