



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 653 OF 2012**

e) Any other relief the court may deem fit to grant.

In her Statement dated 20<sup>th</sup> April 2012, she states that despite explaining her reasons for being absent, the management was determined to dismiss her on flimsy grounds. She avers she has the constitutional right to work and not to be subjected to discrimination. That the Respondents ought to be restrained or she will suffer irreparably considering she also has a family.

The court heard matter *ex parte* and issued interim injunctive orders on 20<sup>th</sup> April 2012 but on 17<sup>th</sup> May 2012, the 1<sup>st</sup> Respondent terminated the services of the Claimant. The Claimant avers that the Respondent maliciously issued her with a further show cause letter dated 4<sup>th</sup> July 2012 in disregard of the court orders considering her employment had already been unlawfully terminated. That the Respondents then further summarily dismissed her on 20<sup>th</sup> September 2012 for the second time on alleged grounds of absenteeism, lateness and falsifying records related to her KCSE academic results thus demonstrating bad faith by the Respondents.

The Respondents filed a Memorandum of Reply dated 9<sup>th</sup> May 2012 admitting that the Claimant was indeed summoned to attend a disciplinary committee in accordance with the procedure of the 3<sup>rd</sup> Respondent's code of conduct. The respondent avers that despite the claimant being on the travel list to the burial, she did not travel with the rest of the staff, never indicated whether she would be travelling by her own means and also did not return with the other staff or indicate her whereabouts. That she also failed to report to work the following day without any explanation and that as per **Chapter 2.10 of the Code of Conduct Manual 2012**, absence from duty without leave requires a show cause letter upon such employee. That **Chapter 2.11** also clearly sets out the procedure for absence on grounds of ill health. That being unsatisfied with the Claimant's response, she was summoned to the staff disciplinary committee. That **Chapter 3.16** gives an employee the option to appeal to the Board for a review if dissatisfied with a decision regarding their case.

That the Claimant in total disregard of the 3<sup>rd</sup> Respondent's internal structures and mechanisms of handling disciplinary issues hurriedly without sufficient cause lodged this claim thus leading to the disciplinary hearing not taking place. That the Respondents adhered to the rules of natural justice as it afforded her sufficient notice and followed procedure as per the code of conduct. That it is the Claimant who frustrated the process by not exhausting the available means of solving the issue before coming to court. That this suit does not meet the standard for grant of injunctive relief as it is based on apprehension and unfounded fear. That the claimant will not suffer any irreparable harm since all her salaries had been paid up to date.

The Respondents also filed a Witness Statement dated 28<sup>th</sup> September 2018 by the 3<sup>rd</sup> Respondent's Deputy Director of Enforcement and Legal Services, Johnson Odera who states that the inclusion of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the suit is malicious and scandalous because they have never in their individual capacities interfered with the case before the 3<sup>rd</sup> Respondent. That this suit is only meant to confound issues and frustrate the disciplinary process initiated by the 3<sup>rd</sup> Respondent.

### **Evidence**

The Claimant testified in court that after the burial at 5 pm, they were dropped by the company bus in town at Teleposta Towers and since she was unwell, she took a matatu to KNH to see her doctor. She produced the list of funeral attendees and the sick off sheet in court as proof of reasons for her absence from work on the two days.

RW1, JOHNSON ADERA adopted his witness statement as his evidence together with the Respondents' pleadings. He testified that when the Claimant was engaged, she indicated she had obtained a mean grade of B+ at secondary level but after due diligence, it was established that she had actually attained a D+. In cross-examination, he stated they had not annexed the documents on due diligence while in re-examination he stated that the court orders did not permanently injunct the 3<sup>rd</sup> Respondent from subjecting the Claimant to further and or subsequent disciplinary processes in case of indiscipline.

### **Claimant's Submissions**

The Claimant submits that her claim is premised on Sections 41,42,43,44 and 45 of the Employment Act on validity of reasons for dismissal from employment and Section 49 on the remedies available to her. That the reasons for termination of her employment in her second termination letter of 20<sup>th</sup> September 2012 were neither valid or proved in court as required by Section 43 of the Employment Act. That the Respondent did not adhere to Section 41 when it failed to give her a statement setting out the allegations against her or giving her a fair hearing and maliciously sacking her 3 times in a span of 5 months.

The Claimant relies on the following cases: Cause No. 1601 of 2011: Pamela K. Butalanyi –v- The University Council for and on behalf of Kenya Polytechnic University College where Rika J. reinstated the claimant back to her job years after her wrongful dismissal. That in Cause 293/2015: Pamela Nelima Lutta –v- Mumias Sugar Co. Ltd, the court awarded the claimant the sum of Kshs.12,274,577/= as compensation for unfair dismissal and accrued benefits.

That since it may be impossible for the court to reinstate her, she prays that it considers awarding her:

- (i) A declaration that the Claimant suffered an unfair dismissal at the hands of the Respondent.
- (ii) Maximum compensation of 12 months' salary at the rate of Kshs. 87,481/= per month.
- (iii) Pecuniary damages for discrimination, humiliation, frustration and/or inhuman treatment she suffered at the hands of the Respondent at the proposed sum of Kshs. 5 Million.

(iv) Exemplary damages at Kshs. 1 Million

(v) Costs and interests.

#### Respondents' Submissions

The Respondents submit that when they received the court's interim orders on 20<sup>th</sup> April 2012, the Claimant continued being absent until 23<sup>rd</sup> April 2012 when she reappeared at work and that the 3<sup>rd</sup> Respondent then directed her to go on leave due to the uncomfortable atmosphere that had been created with her institution of this suit. That she refused to go on leave and reported to work until 26<sup>th</sup> April 2012 but continued absconding work without permission for almost a month and that she was then summarily dismissed via a letter dated 17<sup>th</sup> May 2012 as per Section 44(4) (c) of the Employment Act. That she was however given another chance and the termination was revoked but when it was discovered that she had falsified her documents, she was issued with a show cause letter, which she did not respond to, was suspended and finally dismissed on the 20<sup>th</sup> September 2012.

They submit that the Claimant's final termination of employment was lawful and predicated as outlined in the notice to show cause of 4<sup>th</sup> July 2012. That the 3<sup>rd</sup> Respondent duly followed the provisions stipulated in Sections 41 and 43 of the Employment Act. That there were no pay slips attached to the claim to prove how much the Claimant was paid and that she raised further prayers in her written submissions. That this court should only restrict itself to the prayers set out in the Claim and disregard the prayers in the Claimant's two submissions. They rely on *Patrick Wabwile Pamba & 7 others -v- Equity Bank Limited & 5 others* [2017] eKLR where the court stated at paragraph 42 that the plaintiffs were bound by their pleadings and could only be granted reliefs they pleaded for specifically, subject to them proving the said specific reliefs. Further, that in the case of *Daniel Otieno Migore -v- South Nyanza Sugar Co. Ltd* [2018] eKLR, the court stated that

“...Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded...”

It is submitted by the Respondents that a claim for unfair termination on the notice to show cause of 05/04/2012 is premature while a claim for unfair termination on the final summary dismissal is unmerited. That since the Claimant was summarily dismissed in accordance with the law this suit should be dismissed with costs to the Respondents.

#### Determination

The first issue for determination is whether the Claimant was unfairly dismissed from her employment. The second issue for determination is whether Claimant is entitled to the reliefs sought in the Claim, including the prayers made in her submissions.

Section 47(5) of the Employment Act provides that the burden of proving unfair dismissal rests upon the employee while the burden of justifying the grounds for the termination of employment rests upon the employer. The Claimant furnished this court with documents demonstrating why she was absent on 4<sup>th</sup> and 5<sup>th</sup> April 2012 while the Respondent failed to produce any evidence on the allegation that the Claimant falsified her academic documents. The Evidence Act provides that he who alleges must prove and since the Respondents have failed to prove the allegation on false documents, the same must fail.

Section 41 of the Act provides that before an employee is summarily dismissed under Section 44(4), the employer must adhere to procedure thereof. The Respondent did not follow due procedure in terms of calling the Claimant for another disciplinary hearing even though the Claimant did not respond to the show cause letter leading to her final dismissal. The Court in *Donald Odeke -v- Fidelity Security Ltd, Cause No. 1998 of 2011* observed that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is ipso facto unfair. I find that the termination of the employment of the claimant was without valid reasons making it unfair under Section 43 and 45(2) of the Employment Act. It was also not just and equitable under Section 45(4).

For the claim of reinstatement, Section 49(4)(d) provides that specific performance in a contract for service except in exceptional cases. The Claimant has not demonstrated exceptional circumstances. In fact, the relationship between the claimant and respondents had become so strained that it would be difficult for her to work with the respondent. I will therefore substitute the prayer with compensation. Taking into account all the circumstances of the case including the fact that she failed to respond to the show cause letter, **I award her compensation of 3 months' gross salary. The respondent will also pay claimant's costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**