



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1893 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

RUTH AKINYI OBIERO.....CLAIMANT

VERSUS

HOT POINT APPLIANCES LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed suit seeking damages for unlawful termination from the Respondent. She avers that she was employed by the Respondent on 4th April, 2007, as a general worker and with time due to her outstanding performance she was promoted to the position of clerk earning a salary of Kshs.16,472.

She avers that on 16th April 2015, the respondent on the allegation that the Claimant had deserted duty, terminated her services whereas she was on sick leave sanctioned by the Respondent's own medical doctor. At the time of termination the Claimant contends that she was sick and pregnant and as such her dismissal was unjustifiable.

It is the Claimant's averment that the dismissal was carried out without

following due process of law and the principles of natural justice as she was never heard before termination. That the Respondent has refused to settle the claimant's terminal benefits to date. She prays to be paid compensation for the unlawful termination and damages for discrimination on account of gender and race.

The Respondent filed a statement of defence wherein it admits the employment relationship and states that the Claimant habitually absented herself from work. That she was absent for 67 days in 2014 and for 29 days in 2015 out of which only 15 were sanctioned by doctors. That she exhibited disobedience when she failed to respond to letters to show cause issued by the Respondent. Several warning letters were issued to the Claimant as exhibited by the respondent in its appendix 1 and appendix 2.

The Respondent avers that it has policies on employee management and in the instant case the Respondent engaged the County Labour Office prior to during and after dismissing the Claimant to ensure that the Claimant was accorded her rights.

That it followed due process and the Claimant's final dues were calculated in compliance with the directions of the labour officer but the Claimant refused to collect the same. That the claims for discrimination and racism are serious allegations which have not been supported by specific cogent particulars and are based on falsehood. The Respondent urges the Court to dismiss the claim with costs.

At the hearing the respondent was absent although properly served. The respondent did not attend court on previous hearing dated being 8th May 2018 and 11th June 2018. On 18th December 2018 the case proceeded in the respondent's absence after the court certified that it was properly served.

Issues of Determination

1. Whether there was a reason for termination
2. Whether due process was followed
3. Whether the claimant is entitled to the orders sought.

The Claimant in her pleadings and evidence states that she was terminated on account of pregnancy complications which caused her to be

absent. The Claimant also attaches sick notes to show that she had not attended work for medical reasons. The Respondent however attached a series of warning letters addressed to the Claimant on the issue of lateness and absenteeism. The Respondent has argued that the Claimant was absent for a total of 84 days and only 29 of those were accounted for. Although there was evidence of a number of disciplinary incidents involving the claimant, the timing of the termination of her employment was suspect, being just two weeks before she was due to deliver. She was further not subjected to a disciplinary process.

In the case of **Standard Group Limited v Jenny Luesby [2018] eKLR** Court of Appeal agreed with the superior Court's decision where it was stated:

"There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal. That hearing is as important as the law made it mandatory even in the worst case scenario where an employee grossly misconduct oneself. The right to hearing is what amounts to meeting the true tenets of natural justice. Such a hearing in an employment relationship should be conducted in the presence of the affected employee together with another employee of her choice as this is the true meaning of a fair hearing. However senior an employee is, where the case is that of misconduct, the seniority is not justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employee to uphold. This was denied of the claimant and I find this to be an unfair labour practice."

From the pleadings and documents presented to Court, there is no evidence that the Claimant was invited for a hearing or given an opportunity to state her case. Without such evidence, the process of termination is wanting in terms of fairness of process and thus the termination was unfair.

Remedies

The Claimant has sought for exemplary damages and compensation for wrongful and unfair termination. Exemplary damages are payable in very specific circumstances and are generally not recoverable for breach of contract as they are *quasi-criminal* and intended to punish for wrongdoing. I do not find justification for the same in the present case.

The claimant is however entitled to compensatory damages for unfair termination. Taking into account all the circumstances of the case. I award the claimant 8 months' salary as compensation, 3 months to cater for the termination just before maternity leave and 5 months for the unfair termination.

The Claimant has also prayed for severance pay, which in this case does not arise as this is not a redundancy.

The upshot is that I find the termination of the claimant's employment unfair and award her Kshs.131,776 being 8 months' salary at Kshs.16,472 per month and a further Kshs.16,472 in lieu of notice.. In addition the respondent will pay her terminal dues of Kshs.26,370 as offered in the respondent's letter dated 21st April 2015 addressed to the labour officer and costs of the suit. Interest shall accrue at court rates from date of judgment.

The total award is thus –

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|---------------------------|---------------------|
| 1. 8 months' compensation | Kshs.131,776 |
| 2. Notice | Kshs.16,472 |
| 3. Terminal dues | <u>Kshs.26,370</u> |
| Total | Kshs.174,618 |
| 4. Costs of the suit. | |
| 5. Interest | |

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE