



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 1200 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**JUDITH ADIKINYI OUMA.....CLAIMANT**

**VERSUS**

**APPOLO LANDINGS LIMITED T/A SENATOR CASINO...RESPONDENT**

**JUDGMENT**

The Claimant commenced this suit vide the Memorandum of Claim filed on 18<sup>th</sup> July 2014 in which she challenges the termination of her employment and seeks the payment of terminal dues and compensatory damages. She seeks the following reliefs:

- a. A declaration that the Respondent's action of summarily dismissing the Claimant from employment was unlawful and unfair and that the Claimant is entitled to payment of her terminal dues and compensatory damages.
- b. An order for the Respondent to pay the Claimant her due terminal benefits and compensatory damages totaling to Kshs.356,667 and computed as below:
  - i. One months' salary in lieu of notice being Kshs.25,000.
  - ii. Salary for 8 days worked in April 2008 being Kshs.6,667.
  - iii. Payment in lieu of untaken and unpaid leave for the duration worked (Kshs.25,000.00 x 1 year) being Kshs.25,000
  - iv. 12 months compensation for wrongful dismissal being Kshs.300,000.
- c. Interest on (b) above from the date of filing suit till payment in full.
- d. Cost of this suit plus interest thereon.

It is the Claimant's case that she was employed by the Respondent between April 2013 and April 2014 as an inspector. At the time of the termination, she was earning Kshs.25,000.00. She avers that she was suspended and later verbally dismissed for allegedly stealing her colleague's phone.

It is the Claimant's position that the termination did not comply with the mandatory provisions of the Constitution, the Employment Act and principles of natural justice.

During trial, the Claimant testified that when she resumed work from compassionate leave on 4<sup>th</sup> April 2015, Mr. Sasha informed her that the staff were contributing money to buy a phone for a colleague whose phone had been stolen. She enquired why money was required from her yet she had not stolen the phone and was sent home and told that the next cause of action will be communicated to her on Monday. This was on Friday 4<sup>th</sup> April 2015. When she reported to work on Monday, her services were terminated.

She maintained that she did not carry any of the Respondent's properties with her but admitted to having her work ID which was supposed to be surrendered upon termination. She denied having knowledge of any negotiation attempts between the Respondent and her advocates. She stated that she had no knowledge whether her demand letter was responded to.

The Respondent in its response filed on 23<sup>rd</sup> June 2015 contends that the Claimant's summary dismissal was due to gross misconduct after she insulted her manager and members of the disciplinary committee. The respondent further contends that due process was followed as the Claimant was issued with a notice to show cause and accorded the chance to be heard before the disciplinary committee.

It is the Respondent's case that the Claimant has never surrendered its properties or collected her dues. It is the respondent's position that the Claimant is not entitled to payment in lieu of notice.

The claimant's evidence was taken on 11<sup>th</sup> July 2018 and the case adjourned to 3<sup>rd</sup> October 2018 for hearing of the respondent's case. The respondent did not attend court on 3<sup>rd</sup> October 2018 and its case was closed.

Thereafter, parties were required to file their written submissions. Nevertheless, only the Claimant filed her submissions. The respondent did not file submission even though it was given opportunity twice to do so.

### **Analysis and Determination**

The issues before this court for determination are whether the Claimant's employment was unlawfully and unfairly terminated and whether she is entitled to the orders sought.

Under section 41(1) of the Employment Act 2007, before an employer dismisses an employee on the grounds of misconduct, the employer should explain the reason for which the employer is considering the termination in a language the employee understands. Under subsection (2), before the employer can summarily dismiss an employee's services, it is required to hear and consider any representations which the employee may make on the grounds of misconduct.

Section 43 of the Employment Act requires an employer to prove the reason(s) for the termination, and where they fail to do so, the termination shall be deemed to have been unfair. The Respondent's case is that the Claimant was dismissed for gross misconduct for disrespecting her manager and the disciplinary panel. The Claimant testified that she had enquired why she was required to contribute money towards buying a phone for a colleague which she had not stolen.

Under section 43(2) of the Act, the reason(s) for termination are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. The respondent did not call any evidence to prove its averments that the claimant was dismissed for gross misconduct when she insulted the Manager in front of other employees during her disciplinary hearing.

Section 107(1) of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 47(5) of the Employment Act vests the burden of proving that an unfair termination of employment has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The Respondent failed to controvert the Claimant's evidence that she had been summarily dismissed without a hearing or valid reason. There were no letters of invitation to a disciplinary hearing nor minutes of the disciplinary meeting to prove that indeed the Claimant had been accorded a hearing. As such, the Claimant has discharged her burden of proving her case. Therefore, the termination of her employment was unlawful and unfair.

On the issue of whether the Claimant is entitled to the prayers sought, the Claimant is entitled to payment in lieu of notice and days worked as the Respondent has admitted that the Claimant failed to collect her dues. The claim for untaken and unpaid leave succeeds as the Respondent has not provided evidence to prove that the Claimant went on leave. In the witness statement, the respondent's witness states that the respondent has no problem settling the claimant's leave days due and days worked. The Claimant is awarded 3 months compensation for unlawful termination bearing in mind her length of service to the Respondent of one year and the circumstances leading to the termination of her employment.

I therefore award the claimant the following –

- 1.. Days worked up to 8<sup>th</sup> April 2015..... Kshs.4,698.30.
- 2.. Leave 21 days..... Kshs.20,192.30.
- 3.. Compensation (3 months)..... Kshs.75,000

**Total                      Kshs.102,890.60**

Interest is awarded from the date of judgment until payment in full. Costs of this suit are awarded to the Claimant.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**