



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1208 2016**

**(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2019)**

**ALEXINA MUKASIALI MUTSAMI.....CLAIMANT**

**VERSUS**

**THE INSTITUTE OF THE DAUGHTERS OF MARY HELP OF CHRISTIANS**

**(SALESIAN SISTERS OF ST. JOHN BOSCO)**

**MARIA ROMERO CHILDREN'S HOME.....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Alexina Mukasiali Mutsami, filed a Statement of Claim dated 21/06/2016 for unfair termination of employment against the Respondent, The Institute of the Daughters of Mary Help of Christians (Salesian Sisters of St. John Bosco) Maria Romero Children's Home.

2. She avers that she was at all times an employee of the Respondent serving as a House Helper and that she was employed by the Respondent on 02/01/2015 on contract basis renewed annually as evidenced in her annexed Contract marked **AMM 1**.

3. That she was summarily dismissed by the Respondent on 11/05/2016 on the grounds of alleged absence without lawful cause and negligence in performing her work and that at the time of her termination, she was earning a gross salary of Kshs. 14,423/=. This is evidenced in the annexed copies of salary vouchers for the months of March-May 2016 marked **AMM 2**.

4. That she was at all material times honest, diligent, faithful, committed and hardworking and always complied fully with the terms and conditions of her employment and that the Respondent had no reason, justification or right to summarily dismiss her.

5. She avers that the procedure the Respondent adopted in summarily dismissing her was irregular because: the Respondent has not established a valid reason for terminating her employment as required under **Section 45(2) of the Employment Act** and there are no particulars as to her absenteeism and negligence; no hearing was afforded to her prior to terminating her employment as required by **Section 41 of the Act**; the Respondent failed to prove that the reasons for termination constituted valid and fair reasons as required by **Section 43 of the Act**; the Respondent was duty bound to justify the grounds of termination apart from the requirement in **Section 47(5) of the Act**; and **Section 41(2) of the Act** requires the Respondent to hear and consider any representations she may have wished to make but which was not done.

6. The Claimant avers that she is therefore entitled to compensation from the Respondent in terms of damages for unfair termination under **section 49 of the Employment Act**. She avers that as a consequence of the illegal and unfair conduct of the Respondent, she has suffered and continues to suffer loss and that despite demand and intention to sue being given, the Respondent has failed, refused and/or neglected to compensate her.

7. She contends that her dismissal was also discriminatory, unlawful and in contravention of the contract of employment and the rules of natural justice and she prays for judgment against the Respondent for:-

**a) Damages for unfair termination at (Kshs. 14,423 x 12months) = Kshs. 173,076/=.**

**b) A declaration that her summary dismissal was unfair.**

c) *An order compelling the Respondent to issue the Claimant with a Certificate of Service.*

d) *Costs of this cause.*

e) *Any other relief this Honourable Court will deem fit to grant.*

8. The Respondent filed its Reply to Statement of Claim dated 23/03/2017 admitting to having employed the Claimant and averring that the Claimant breached the express provisions of the contract of employment when she failed to report to work on 11/05/2016 without lawful cause.

9. That further, on diverse dates from 30/03/ until 18/04/2016, the Claimant was absent from her workplace without permission and that on 21/04/2016, its manager met with her to discuss issues concerning her work. That after the discussion, it was agreed that the Claimant proceed for leave from 22/04/2016 to 27/04/2016 but that she did not report to work as agreed and instead showed up on 01/05/2016.

10. That it then asked her to report on 03/05/2016, which date she did not show up and upon contacting her using all avenues, she came for discussions on 11/05/2016 without giving reasons for her absence from work. That it is from the discussions of 11/05/2016 that it made a decision to terminate her services and that being in breach of **Section 44(4) (a) of the Employment Act** warranted a summary dismissal.

11. It continues to aver that the Claimant was given a chance to read and understand the contents of the termination letter and that before she signed the letter she made a phone call and constantly communicated in her mother tongue while reading the said letter.

12. That the termination was therefore lawful and procedural and that it duly presented the Claimant with her April dues in full together with 5 months travelling allowance. That it prepared a clearance certificate containing a complete breakdown of all the Claimant's dues and that she was not entitled to one month's salary in lieu of notice on account of summarily dismissal. That she is not entitled to the prayers sought in the Claim and prays that the claim be dismissed with costs.

### **Evidence**

13. CW1, the 1<sup>st</sup> Claimant testified in Court that she recorded a Statement dated 21/06/2016 and wished to adopt it as her evidence in this case and that she also wished to produce the filed documents as exhibits. That she was not given any opportunity to be heard before she was dismissed and stated that anytime she needed to be away, she would talk to Sister Purity their manager who would orally permit her to be away. That she could not even be absent without permission due to the nature of the work she was doing and that she would get to work at 6 am and leave at 7pm.

14. She testified that she never neglected her work, never cooked raw food, she never stole any video as alleged and that they had a master roll where they signed in and out. That she was paid 3 months' salary when she was dismissed i.e. April and May 2016 and that she asks the Court to award her as prayed.

15. In cross-examination, she stated that Sr. Purity told her to sign the dismissal letter and confirmed she was not on duty that day and that she had been told to go away and wait for Sr. Roseta to call. That for the days the Respondent alleges she was absent, Sr. Purity had given her permission to be absent from duty and that she was not given any warning and was paid Kshs. 28,156/= upon termination. In re-examination, she stated that she was on leave from 21/04/2016 to 11/05/2016, which leave used to be given orally.

16. RW1, Sr. Purity Wawera Ndwiga testified that they gave the Claimant various warning letters but she did not change and that when she was absent from 28/04/2016 to 11/05/2016, she was not on leave. That on 11/05/2018, she sought advice from labour office at Upper Hill and met the department's DC Mr. Ndiho who advised her to present her case to the County Labour Office at Nyayo House, which she did.

17. That the Claimant then called her at 2.30pm asking whether she could meet her and when she came, she said she had been absent because her phone fell in water. That she then explained to her they were going to terminate her contract and got the termination letter for the Claimant to sign without coercion.

18. In cross-examination, RW1 stated that for the Claimant to be on leave, she had to write a letter to request the same and that the request was kept by them. That the various warnings they gave the Claimant was not recorded and confirmed that they have an **Employees Handbook** wherein **Clause 15** says that the 1<sup>st</sup> and 2<sup>nd</sup> warning letters are to be kept in an employee's file but which was not done.

19. She also confirmed that the termination letter was ready when the Claimant came to the office and that **Clause 16(2) of the handbook** provides for summary dismissal. That they issued her with a certificate of service and in re-examination, she stated that the minutes of the meeting are not in Court but they had them and that they also do not have any leave request forms.

20. RW2, Sr. Roseta Guanier testified that she had filed a witness statement on 23/03/2017 and that she produced it as her evidence. In cross-examination, she stated that when the Claimant picked the termination letter, she asked her to go and read it before signing it but that they declined. That she informally confronted the Claimant on the allegation of misconduct and had a meeting at the time of termination and that the custodian of employee documents is the office.

21. She confirmed they had not brought to Court the Claimant's attendance sheet. In re-examination, she stated that she was the Sr. in charge of the Respondent and was involved in signing of the contract and interviewing employees but was not a custodian of leave documents.

### **Claimant's Submissions**

22. The Claimant submits that on the issue of absenteeism without lawful cause, the Respondent failed to produce all the very crucial employment records, specifically the Attendance Register or the Annual Leave Records to support its allegations. That the Respondent also failed to produce any written and filed warning letters as required by its Employees Handbook and she submits that her summary dismissal was therefore baseless and irregular and was precipitated by witch hunt.

23. She relies on the case of **Samuel Uche Ajaegbu –v- Eagle Vet Kenya Limited [2018] eKLR** where Byram Ongaya J held that Section 41 of the Employment Act prescribes that in event of termination on account of misconduct or poor performance, the employee will be given a notice and a hearing. Hon. Ongaya J cited the case of **Shanker Sankhani v DHL Global Forwarding (K) Limited [2012] eKLR** where the Court thereat held that without such notice and hearing, it is difficult to show how the Respondent ascertained the allegations prior to summarily dismissing the Claimant. That in **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture & Technology [2014] eKLR**, the Court returned that the summary dismissal was unfair for want of compliance with Section 41 of the Act.

24. That the failure to keep the crucial employment records offends the provisions of **Section 74(1) of the Employment Act** and she further submits that she was not given any show cause notice by the Respondent or any notice inviting her to a disciplinary action or informing her of her right to a representative of her choice. She relies on the case of **Mary Chemweno Kiptui –v- Kenya Pipeline Company Limited [2014] eKLR** where the Court observed thus:-

*“Section 41 of Employment Act is couched in mandatory terms. Where an employee fails to follow these mandatory provisions, whatever outcome the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.*

*...The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”*

25. The Claimant submits that she seeks an order to be issued with a certificate of service as required under **Section 51 of the Employment Act** and contends that the Respondent has not discharged its burden as required under **Section 47(5) of the Employment Act**.

#### **Respondent’s Submissions**

26. The Respondent submits that the termination was justifiable and fair under **Section 44 of the Employment Act**, which lists absence from work without a justifiable reason and or authorization and notice to the employer as a subject for summary dismissal. It relies on the case of **Banking Insurance & Finance Union (Kenya) –v- Barclays Bank of Kenya Ltd [2014] eKLR** where Mbaru J ruled that summary dismissal was valid in the circumstances since the claimant failed to attend to his work without justifiable cause.

27. It is submitted by the Respondent that its home is a children’s home that relies on the donations of well-wishers and that it would be unfair to condemn it to pay damages for the Claimant’s termination, which was justifiable and proper. The Respondent prays that the Claim be dismissed with costs.

28. I have examined all the evidence and submissions of the Parties. The issues for the Court’s termination are as follows:-

*1. Whether there were valid reasons to warrant Claimant’s summary dismissal.*

*2. Whether the Claimant was subjected to a fair hearing before dismissal.*

*3. Whether the Claimant is entitled to the remedies sought.*

29. On the first issue, the Claimant was dismissed by the Respondent vide a letter dated 11.5.2016 which listed reasons for dismissal as absence from duty on various days and negligence of work and improper performance of duty.

30. The Claimant contends that she was never absent from duty without permission and that she performed her duties well.

31. The RW1 testified that they gave the Claimant various warnings on the acts or omissions but no evidence of such warnings was submitted to Court.

32. She also admitted that if there were any warnings against an employee, these were to be kept in the employee’s file as per Clause 15 of the Respondent’s Employee Handbook.

33. Concerning the absenteeism, the Respondent also failed to provide the muster roll kept by themselves, which would have shown the attendance or absenteeism by the Claimant. Infact RW1 indicated that she was not the custodian of the documents in question.

34. In the circumstances of the case, the Respondent failed to prove these reasons that warranted the Claimant’s dismissal.

35. Section 43 of Employment Act states as follows:-

*“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

***(2) The reason or reasons for termination of a contract 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”.***

36. It is indeed the Respondent to prove that they had proper reasons to warrant Claimant’s dismissal but in the current case, they failed to submit any evidence to prove the allegations against the Claimant and I therefore make a finding that the Respondent had no valid reason to warrant dismissal of the Claimant.

37. On issue No. 2 the Respondent RW1 conceded that the time they called Claimant to talk to her, the dismissal letter was ready. The import of this is that the decision to dismiss the Claimant was made without giving the Claimant an opportunity to be heard.

38. It is therefore my finding that the Claimant was dismissed without being heard as envisaged under Section 41 of Employment Act 2007.

39. It is therefore my finding that the dismissal of the Claimant was unfair and unjustified and I declare it so as per Section 45(2) of Employment Act 2007.

40. In terms of remedies, the Claimant prayed for compensation for unfair and wrongful dismissal. I find that the Claimant is entitled to the said remedies and I award her compensation equivalent to 12 months salary for unlawful and unfair dismissal;

$$= 12 \times 14,423 = 173,076/=$$

41. I also direct that the Claimant be issued with a certificate of service.

42. The Respondent will pay costs of this suit.

Dated and delivered in open Court this **17<sup>th</sup> day of September, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Chengo holding brief Miss Beacco for Respondent – Present

Claimant – Absent