



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.180 OF 2016

LYDIA SARANGO MOMANYI.....CLAIMANT

VERSUS

MARIDADI FLOWERS LIMITEDRESPONDENT

JUDGEMENT

The claimant was employed by the respondent in May, 2008 as a general worker and later promoted to a greenhouse supervisor last earning a wage of Ksh.15,000.00 per month and a house allowance of Ksh.2,000.00 per month.

On 10th December, 2014 the claimant was accused of not supervising her juniors as they were undercutting flowers. The claimant in defence stated that there was one employee under her supervision who was undercutting flowers and she had given her a verbal warning. This information got to the managing director who was categorical that he did not want to see the claimant at the respondent any more.

The claimant was issued with a show cause letter and directed to appear for disciplinary hearing on 10th December, 2014. While before the committee the claimant was told not to argue and was never given a chance for a hearing and this was followed with a dismissal from employment and her dues paid. The claim is that the disciplinary hearing was just but a sham. A decision to dismiss the claimant had already been made.

The claim is also that the provisions of section 41 of the Employment Act were not followed. This resulted in unfair termination of employment under section 45 of the Act.

The claimant is seeking for the payment of compensation at 12 months wages; gratuity/severance pay; costs and any other dues the court may deem just and fit to grant.

The claimant testified that upon employment by the respondent she worked diligently and every two days she would receive training on how to cut flowers and was promoted to a greenhouse supervisor in the year 2012 a position she held until employment was terminated on 10th December, 2014.

On 10th December, 2014 the claimant was called by the human resource officer and was issued with a show cause notice and directed to attend disciplinary hearing the next day at 10am. At the hearing there were various officers of the respondent together with the welfare employee but the claimant was told her had not been cleared to attend at the hearing and the director was already decided on terminating her employment. The hearing minutes were ready and the claimant was required to sign. There were various warnings issued to the claimant and had to be signed failure to which a sanction could issue. The appeal procedures were not clear.

On 27th March, 2014 the claimant had signed warning promising to improve on her work. There was also another warning with regard to poor work performance. such letters were prepared and he claimant required to sign This resulted in unfair termination of employment and should be compensated and terminal dues paid.

Defence

In response the defence is the claimant was employed as a general worker and then became a supervisor on 30th May, 2012. Upon employment the claimant was trained on how to perform her duties and signed a certificate of participation. The last wage earned by the claimant was Ksh.18,904.81 per month.

The claimant was a habitual offender and failed to honour her contractual obligations and was issued with several verbal and written warnings. The claimant responded to the warnings issued by signing a performance agreement. On several occasions the claimant failed to obey lawful and proper command from her supervisor to which she failed to check and ensure that her juniors were undercutting roses

leading to loss of proper length of roses in the greenhouse. There are statements to this effect by Esther Kamau and the human resource manager Stella Wafula.

Following the claimant's gross misconduct, on 18th November, 2014 she was issued with a show cause notice and to which she gave a response. The respondent gave the claimant a chance to improve on her work performance but further failure led to a second show cause notice on poor work performance on 9th December, 2014 to which she responded on 10th December, 2014. A disciplinary hearing was conducted on equal date and present were the human resource manager, the greenhouse supervisor, the claimant and her witness.

Following the disciplinary hearing it was established that the claimant had grossly misconduct herself and acted contrary to the terms of her employment and the procedures contemplated under the collective agreement were followed. The claimant was cleared and paid her dues and Certificate of service was issued. The claims made are without justification and should be dismissed.

In evidence, Susan Wanjiru Kihara the human resource officer testified the claimant was a greenhouse supervisor and under her were 20 persons in the production of flowers which had to be cut properly which she failed to ensure was done. The claimant became a habitual offender and was issued with several verbal and written warnings on poor work performance in her are of supervision. In response the claimant would promise to improve but this was repeated severally and there was no improvement.

The claimant was issued with a notice to show cause and warning issued. On repeat of the same misconduct a second show cause note issued and the claimant was also invited to a disciplinary hearing where she had a written defence and admitted to her mistakes.

Ms Kihara also testified that where a supervisor fails to do her work properly or at all this results in huge losses to the respondent who is in the cut flower business. Each employee is trained and a certificate of participation issued. Undercutting of flowers is not allowed. Flowers with short stems do not sell.

Once the claimant was heard by the disciplinary panel she had a right of appeal which she failed to address. All her dues were paid and nothing is owing.

The respondent also called Esther Waithira Kamade a senior controller on quality and who testified that the claimant was a greenhouse supervisor and she failed to control her team in cutting the flowers correctly. At the claimant's greenhouse there was no good work and for this reasons a show cause notice issued and the claimant as given a chance to attend a hearing and her actions were found to be in gross misconduct.

The respondent also called Caroline Makhunu the workers representative on welfare matters and who testified that whenever there is a problem at the workplace the employee inform her and receive advice on how to address the problem. The welfare person then can decide to escalate to the human resource office.

The respondent has grievance procedures shared with employee and when a warning is issued and an employee is not happy there is provision for an appeal within 5 days. Upon employment these procedures are read to each employee and the same placed at the notice board for all to read.

Upon cross-examination the witness admitted the grievance procedures under reference relate to 1st January, 2015 while the claimant left her employment in the year 2014.

At the close of the hearing both parties filed written submissions.

The claim is that the claimant was employed by the respondent in May, 2008 and then promoted to greenhouse supervisor and which position she held until employment terminated on 10th December, 2014. This is confirmed by the respondent in the statement of defence at paragraph 3 where the respond avers that the claimant as a general worker and *later promoted to a supervisor on 30th May, 2012*. Upon such promotion and supervisor, the claimant was issued with several verbal and written warning in terms of her work performance.

By letter dated 10th December, 2014 the claimant was issued with letter terminating her employment on the grounds that;

We would like to inform you that you have been terminated and relieved from your duties as greenhouse supervisor in our company.

Reasons being:-

1. Poor performance and having more than three valid warnings letter based on poor work performance.

...

Prior to the issuance of letter terminating employment, the claimant was issued with a show cause notice dated 18th November, 2014 on the grounds that;

... we note with concern that you have more than three valid warning letters in your file and you are still performing poorly leading to poor cut points, a lot of buds, junks, poor crop maintenance in the greenhouse that you are in charge of. . your juniors have also been harvesting tight and open roses due to your poor supervision leading to rejection of roses. ...

On equal date the claimant replied and stated that;

Even though is signed the letter which states that my performance is poor I do not agree with the reason that I and my juniors have been staying behind up to 5pm to remove the buds. This is coz when there is a lot of flowers we have a lot of suckers and buds. So I don't [do not] understand why buds are ...

I was also surprised when I read about ... this is coz there has been no any complaint ...

Invariably the claimant therefore contested the reasons given in the notice to show cause.

This was followed by letter dated 19th November, 2014 when the respondent informed the claimant that she had been given a second chance and directed to ensure that maintenance in her work was done properly.

This is then followed by another show cause notice dated 9th December, 2014 and the disciplinary hearing directed for the 10th December, 2014. The claimant made her written response and observes among other details that;

... as a supervisor when I find my juniors with a mistake all am supposed to do is to warn them but what I don't [do not] understand is why I am the one to be disciplined. Now if management decides to discipline me let it not be because of my performance coz I improved a lot despite my health. Am sure that someone is behind this coz she warned me since the month of September.

Before termination of employment the employer is bound by the procedural requirements set out under section 41 of the Embayment Act, 2007 as the claimant has correctly submitted and as held in the case of **Kenfreight (EA) Limited versus Benson K Nguti [2016] eKLR**. upon the employer securing the procedural requirements, there must be a valid and genuine reasons leading to termination of employment pursuant to the provisions of section 43 of the Act.

The claimant was issued with a show cause notice with details of various allegations. In reply she opted to go on a tangent of her own and attack the findings of her employer with regard to her greenhouse and area of supervision being found poorly performing and producing flowers contrary to set specifications. Given a chance to defend herself the claimant shifts blame form herself as supervisor and avers that she had warned her team members in the greenhouse and in that case she should not be blamed and that there was somebody else who wanted to victimise her.

Far from it. The claimant was the supervisor in her greenhouse end had the duty and responsibility to ensure proper work performance and when this was brought to her attention not blame others but give an explanation as to why this was the case.

The claimant on her response to the show cause notice of 9th December, 2014 was invited to a disciplinary hearing and present was her witness. The reasons leading to termination of employment are given in the letter. In her evidence in court, the claimant did not make any effort to challenge the reasons given as not being true, correct and valid save to challenge her right to a fair hearing.

From the records the court finds the respondent acted on valid and justifiable grounds in terminating the claimant's employment. There was due process and the claimant was invited to attend at the hearing with her witness and had the chance to write her defences as well.

On the remedies south, on the finding that there were valid reasons leading to termination of employment and due process was followed compensation is not due.

On the claim for gratuity pay and severance pay, under the collective agreement attached to the respondent's records at clause 24 upon termination of employment an employee who has worked for the respondent for over 5 years is entitled to a gratuity pay for 23 days for each full year of service. this being a private treaty between the parties, they are bound.

The claimant was terminate din her employment and not dismissed. The claimant worked form May, 2008 to 10th December, 2014 a period of 6 full years. the claimant last gross wage was Ksh.18,904.81 and based on the provisions of section 49(2) of the Employment Act, 2007 such wage is applicable in assessing the gratuity pay due. in this regard the claimant is entitled to Kshs.86,962.13.

On the claim for severance pay, this was a case of termination of employment and not a redundancy.

Accordingly, save for the payment of gratuity at ksh.86, 962.13 other claims fail. The claimant is also awarded 50% of her costs.

Delivered at Nakuru this 17th day of October, 2019.

M. MBARU

JUDGE

In the presence of: