



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1447 OF 2015

PHOEBE KWAMBOKA MATOYA.....CLAIMANT

VERSUS

SIMBA & SIMBA ADVOCATES.....RESPONDENT

JUDGMENT

1. This Cause was heard on 22 October 2019. Phoebe Kwamboka Matoya (Claimant) and Loise Muthoni, an Administrator with Simba & Simba Advocates (Respondent) testified.

2. The Claimant filed her submissions on 29 October 2019 while the Respondent filed its submissions on 27 November 2019.

3. The Court has considered the pleadings, evidence and submissions, and condensed the Issues for determination as examined hereinafter.

Unfair termination of employment

Procedural fairness

4. The Claimant was employed by the Respondent as a Secretary with effect from 3 September 2001.

5. On 10 September 2014, the Respondent's Managing Partner wrote to the Claimant to inform her of the termination of her employment.

6. The Respondent indicated in the letter that it was terminating the contract of employment in the exercise of its option under clause 6 of the contract and that the Claimant would be paid 1-month salary in lieu of notice. No other reason was given.

7. In Court, the Claimant testified that the termination of her contract was unfair because she was not issued with a *show-cause notice* or informed of any reasons for the termination of employment beforehand.

8. The Claimant also asserted that she was not afforded an opportunity to be heard before the termination and that the real reason for the action was her state of health.

9. Section 35(1)(c) of the Employment Act, 2007 contemplates an employer issuing a *written notice of termination of employment* at least 28 days in advance if the employee is paid by the month (unless in a case of summary dismissal). The Respondent did not issue such notice.

10. Apart from the *written notice of termination of employment*, section 41 of the Act imposes a burden on an employer to afford an employee an opportunity to make representations before termination of employment, if the decision is founded upon the grounds of *misconduct, poor performance or physical incapacity* on the part of the employee.

11. If it is a case of summary dismissal, section 41(2) of the Employment Act, 2007 obligates the employer to hold an oral hearing.

12. The Respondent did not demonstrate that it afforded the Claimant any opportunity to be heard before the decision to terminate was taken.

13. The Respondent's case on the question of procedural fairness was that it was exercising a contractual option to terminate and it cited the case of *Rift Valley Textiles Ltd v Edward Onyango Obanda* (1992) eKLR.

14. The legal framework which permitted an employer to dismiss an employee for no reason, a bad reason, a good reason or for cause provided that notice, as agreed in contract, was given (or pay in lieu of notice) is no longer the part of the law of Kenya (see Supreme Court decision, *Kenfreight (EA) Ltd v Benson K. Nguti* (2019) eKLR).

15. The Court states so because section 45(1) & (2) of the Employment Act, 2007 as read with section 43 of the Act make it incumbent for the employer to have valid and fair reasons before terminating an employment contract, and to prove the reasons in Court if there is a legal challenge.

16. From the foregoing, the Court finds that the termination of the Claimant's employment on account of a purported contractual power was not only invalid, but procedurally unfair. It was tainted.

Substantive fairness

17. With the conclusion that the decision of the Respondent was invalid and procedurally unfair, it is not necessary for the Court to examine whether the Respondent discharged the burden imposed on it by sections 43 and 45 of the Employment Act, 2007.

Appropriate remedies

Compensation

18. The Claimant served the Respondent for about 13 years and in consideration of the length of service, the Court is of the view that the equivalent of 10 months gross wages would be appropriate and fair (salary at separation was Kshs 41,000/-).

Pay in lieu of notice

19. The Respondent offered the Claimant pay in lieu of notice and she admitted receiving the payment. Nothing therefore turns on this relief

General and exemplary damages

20. The Claimant did not make a case for the award of general and exemplary damages and the relief is declined.

Conclusion and Orders

21. The Court finds and declares that the termination of the Claimant's employment was invalid and unfair, and awards her

(i) Compensation **Kshs 410,000/-**

22. The Claimant is awarded costs and interest from the date of filing the Cause.

Delivered, dated and signed in Nairobi on this 29th day of November 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Njomo instructed by Kamotho Njomo Advocates

For Respondent Mr. Cheluget instructed by Ochieng, Onyango, Kibet & Ohaga Advocates

Court Assistant Lindsey