



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 94 OF 2018**

**GLADYS WAMBUI MWAI.....CLAIMANT**

**VERSUS**

**HIGHLAND PLANTS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent seeking recompense for the alleged unlawful termination from employment. The Claimant averred that she was employed by the Respondent as a human resources and compliance manager on 1<sup>st</sup> February 2013. She averred that she worked as such for the Respondent until 18<sup>th</sup> December 2017 when she was dismissed from employment. At the time she was earning a salary of Kshs. 79,580/- a month. The Claimant averred that the dismissal was unfair, unlawful and unconstitutional as the show cause letter was served on her when she was nursing her health and the Respondent knew that she was on sick off. She averred that the dismissal letter was served on her by the Respondent's driver when she was still on her sick leave which action reeked of bad faith, utterly inhumane, she was not afforded an opportunity to be heard, she was unlawfully targeted for refusing to unlawfully sack an employee, the claimant was psychologically and emotionally tortured for being subjected to sham disciplinary proceedings while admitted in the hospital with her baby, which information was within the Respondent's knowledge, and that she was not paid her dues including her service pay and/or gratuity. The Claimant averred that she was subjected to unfair labour practices contrary to Articles, 28, 29(d) & (f), 41, 47, 50 of the Constitution of Kenya and the Employment Act. The Claimant thus sought payment of 3 month's salary in lieu of notice – Kshs. 238,740/-, gratuity for 5 years –Kshs. 278,530/-, general damages for unfair and unlawful termination equivalent to 12 months – Kshs. 954,960/-, payment of damages for violation of the Claimant's constitutional rights, costs and interests of the suit.

2. In its defence, the Respondent averred that on diverse dates it was made aware that the Claimant was selling clothes to the Respondent's employees and she would demand that the employees pay upon being paid their salary. It averred that in default the Claimant would order security not to allow them to work until they paid up. The Respondent averred that it commenced investigations and recorded statements from 5 employees such as Stephen Mwangi who recorded a statement and stated that he was sold a bag in April 2017 and once he was unable to pay he was instructed not to report to work. The Respondent averred that he stated that he had to borrow Kshs. 100/- from the stores office assistant to pay, while Fredrick Njoroge had bought a shirt for Kshs. 600/- and in default of payment he was threatened by the Claimant and was accused of promiscuity in the farm, Teresiah Wanjiru was sold a dress for Kshs. 700/- and had to pay upon being threatened by the Claimant, while John Mbugua was sold a jacket and threatened that if he did not pay the debt would be deducted from the payroll and lastly for John Maina Wangari it was stated that he was sold a black trouser and leather jacket by force and ordered to pay. The Respondent averred that the Claimant occupied a senior and influential position and could threaten to take action including dismissal to anyone who dared object to her business proposal. The Respondent averred that as a consequence she was suspended to allow further investigations and to avoid harassment of the complainants against her and she was required to report back on 30<sup>th</sup> November 2017. It was averred that on 30<sup>th</sup> November 2017 she was issued with a show cause letter and required to appear before a disciplinary panel on 4<sup>th</sup> December 2017. The Respondent averred that the Claimant responded to the show cause letter on 1<sup>st</sup> December 2017 but she refused to respond to the allegations of selling clothes and instead introduced the subject of one where she alleges to have been instructed to dismiss for engaging in union activities. The Respondent averred that on the date of the hearing the Claimant through an email indicated that she had been sick and had been allowed 7 days sick off from St. Carmel Medical Clinic. The Respondent averred that it wrote back on 5<sup>th</sup> December 2017 and rescheduled the meeting to 14<sup>th</sup> December 2017 and made clarifications of allegations that the Claimant needed to respond to. The Respondent averred that its director clarified that he was aware of the case surrounding Mr. Mutambo but clarified that the same ought to have been raised as a separate grievance and that the allegations against Mr. Mutambo were those of incitement. The Respondent averred that on 12<sup>th</sup> December 2017 which was two days to the hearing, the Claimant once again forwarded a discharge summary from J.M, Kariuki County Hospital indicating that she had been admitted alongside her daughter who was being treated for pneumonia. The Respondent averred that in good faith once again postponed the hearing to 16<sup>th</sup> December 2017. The Respondent averred that it is the Claimant who used to instruct the driver on where to serve the letter and she is the one who requested to be given the letter from the hospital. The Respondent averred that at the time of delivery of the letter dated 13<sup>th</sup> December 2017, the Respondent was only aware of the sickness of the Claimant's daughter and not of the Claimant. The Respondent averred that on 15<sup>th</sup> December 2017 a day prior to the disciplinary meeting, the Claimant wrote an email indicating that she was still unwell and was considering to go back to the hospital on 16<sup>th</sup> December 2017 the date set for disciplinary hearing. The Respondent averred that it met on 16<sup>th</sup> December 2017 in the absence of the Claimant but resolved to allow her

time to submit medical documents after the intended visit to the hospital. The Respondent averred that on the morning of 18<sup>th</sup> December 2019, the Claimant wrote an email informing the Respondent that she was still on medication and would report once she felt better. The Respondent averred that she did not attach any medical documents to support the same and the Respondent was convinced that the Claimant was refusing to attend the constituted meeting to exonerate herself and resolved to summarily dismiss her on the same day. The Respondent averred that a dismissal letter, a certificate of service and her terminal dues were computed and the same were hand delivered and emailed to the Claimant. The Respondent averred that the right to appeal was expressly stated in the dismissal letter but the Claimant never considered an appeal. The Respondent denied receiving a purported sick off dated 16<sup>th</sup> December 2017 from the Claimant and believes that the same was generated as an afterthought. The Respondent denied that the Claimant is entitled to the prayers sought and averred that the notice payable is one month which is not in any event payable on summary dismissal; that the Claimant was not entitled to gratuity at the rate of 21 days or at all as she had not attained the five years threshold and was summarily dismissed for gross misconduct; that she was not entitled to compensation as the dismissal was based on valid grounds as she frustrated and squandered her chance to be heard and cannot claim to have been unfairly dismissed; and lastly the employer did not in any way violate the Claimant's constitutional rights. The Respondent thus prays that the claim be dismissed with costs to the Respondent.

3. The Claimant filed a reply to the defence and denied each and every allegation in the defence and put the Respondent to strict proof thereof. The Claimant denied having been informed verbally and/or in writing of the accusation that she sold clothes to the Respondent's employees. She denied owning a boutique or selling clothes. The Claimant denied having authority to enforce payments or deductions to employees and also denied having threatened any employee and/or given any instructions written or verbal to security not to authorize entry to the company premises as she did not own a boutique and/or sell clothes. The Claimant averred that she never refused to discuss the issue of selling clothes but rather was unlawfully dismissed without a hearing because of employees joining KPAMU which she was not directly involved in. The Claimant maintained that she was sick alongside her daughter and therefore could not attend the disciplinary hearing. She denied having given instructions for the letters to be delivered at the hospital and averred that upon receiving the letter her health deteriorated due to damage and exposure to an unfriendly letter from the Respondent. The Claimant averred that even after being discharged she still was unwell and her daughter was undergoing medication and therefore she could not attend a meeting in her condition. She averred that she however took responsibility to inform the employer of the same and attached some medical documents as she expected that after regaining her health she would go to the employer in person and submit medical documents as provided by law. The Claimant averred that it would have been fair if she had been given ample time to recover and be heard before any decision was made against her. She maintained that according to the Company's policy she is entitled to 3 month's salary in lieu of notice. The Claimant averred that the Respondent's defence comprised of mere denials and the same should be struck out and judgment be entered as prayed in the statement of claim.

4. The Claimant testified as did the Respondent's witness Andrew Kiongera. The Claimant testified that she was called by the accountant one Mr. Andrew Mungai on 28<sup>th</sup> November 2017 who informed her that one Martin Mutambo was recruiting employees to the union. She stated that he told her that he did not want to see Martin in the office and the Claimant explained to him the circumstances under which an employee can be dismissed and that the joining of a union was not one of them. She testified that Mr. Mungai took her to the director Mr. Paul Zinkle who asked her why she had refused to sack the employee and she reiterated that one cannot be dismissed for union activities. She stated that she was then ordered to go home on 29<sup>th</sup> November 2017 and report back on 30<sup>th</sup> November. She stated that on 30<sup>th</sup> November 2017 she was given a notice to show cause why she was selling clothes in the company. She testified that the hearing for the show cause was scheduled for 4<sup>th</sup> December 2017 but she however fell sick on 3<sup>rd</sup> December as she complained of headache and given 7 days sick off. She stated that she also went for blood pressure monitoring and was admitted alongside her child who was suffering from bronchial illness. She stated that she was served with another show cause letter which was not acknowledged while she was still in hospital. She stated that she was sick and could not respond to the show cause letter and a driver was sent to pick a discharge note after she was discharged on 16<sup>th</sup> December 2017. She testified that she then informed the director via email and SMS that she needed to see a doctor. She stated that she visited a hospital in Ol Kalou on 16<sup>th</sup> and on 18<sup>th</sup> she informed the director that she was still under medication. She testified that she was sent a dismissal letter while in hospital and she declined to accept it. In cross-examination she stated that the genesis of the dismissal was her refusal to sack Martin Mutambo but she was not allowed to explain the same in the show cause letter. She stated that she did not intend to call Martin Mutambo as a witness.

5. The Respondent's witness was its finance and administration manager Mr. Andrew Kiongera. He stated that the Respondent received complaints that workers were being coerced to make payments for clothes bought from the Claimant and that the Claimant thereafter claimed that she was unwell and could not attend a hearing. He testified that she was thus dismissed for gross misconduct. He stated that they responded every time she gave a reason but in the last instance she did not give any reason. He stated that she was summoned 3 times but she failed to attend and stated that the allegation that she was dismissed for refusing to dismiss Martin was false. He testified that they carried out investigations based on the statements recorded by the complainants and that they gave her a chance to defend herself but she failed to appear. In cross-examination he stated that the employer is the one who deducts wages and that the Claimant did not deduct wages but rather she used her position to coerce employees to pay her. He testified that it is illegal to sell items and coerce employees to make payments and that the sick off by the Claimant was not proper as it is the baby who was sick and not the Claimant. That marked the end of oral testimony and parties were to file submissions.

6. The Claimant filed submissions but the Respondent's submissions were not on record. The Claimant submitted that she was neither issued with a copy of an investigation report nor was she informed of any investigations committee that sat to investigate the allegations that were leveled against her about selling of clothes to the employees. She submitted that she had never sold any clothes or indulged in any business in the working premises apart from her usual duties in her contract. The Claimant submitted that she was not given a fair hearing or accorded due process as stipulated under Section 41 of the Employment Act but rather was dismissed while she was unwell which amounted to a serious violation of her constitutional rights. The Claimant submitted that her employment contract provides for 60 days sick off with full pay and 45 days with half pay which the employer would have considered and given her time to recuperate and be in a position to attend the show cause meetings. She submitted that instead the employer hurriedly dismissed her without any due cause. She submitted that the employer failed to engage a medical board to crosscheck her sickness and medical reports but rather it went ahead to be suspicious about her sickness. The Claimant submitted that her husband was trading with the company by selling clothes to employees leading to an allegation that she was selling clothes in the company and would facilitate payment to him through Equity Bank Ol Kalou Branch. The Claimant further submitted that she has never been served with any verbal or written warning with any offence in the course of her employment and therefore the Respondent was so harsh and quick to dismiss her without considering her employment history. The Claimant submitted that the Respondent admitted that it has a welfare and gender committee which has never raised any alarm that she was selling clothes by force and harassing employees. She submitted that the Respondent did not at any time provide the Claimant or the court with any document showing

deductions, forced payment from employees or blockage from accessing the company. She cited the case of **Newton Muriu Muriuki v Judicial Service Commission [2014] eKLR** and submitted that the dismissal was unprocedural, unlawful and unfair.

The case of **Benedict Ojou & 10 Others v A.J. Pejeira & Sons Ltd [2015] eKLR** was cited for the proposition that employees were paid gratuity for the services rendered in the Company using the prevailing prorated days and notice pay as per Company's practice policy. The case of **Elizabeth Mwende v Brinks Security Services [2016] eKLR** was cited in which case it was stated that Article 20 of the Constitution binds the court to observe, protect, respect and promote the rights and fundamental freedoms in the Bill of Rights. She submitted that Rule 3 of the Employment and Labour Relations Court (Procedure) Rules allows the Court to enforce constitutional rights and freedoms through a statement of claim or other suits. The Claimant prayed that the Court do order and award her as pleaded in the memorandum of claim.

7. The Claimant's dismissal was executed in a heartless fashion. The Respondent failed to accord the Claimant the safeguards under Section 41 of the Employment Act more so when it was aware that the Claimant was in hospital. It is asinine to postulate that she was not unwell and therefore could attend the disciplinary meeting when her child had been admitted at the hospital. Even if there was cause to dismiss, which cause the Respondent did not prove, there was no need to execute the dismissal without adherence to the law. In this case the employer woefully failed to apply the provisions of Section 41 and thereby rendering the dismissal unlawful and unfair. The Respondent failed to dispel the doubts created that the dismissal was because the Claimant had refused to dismiss an employee on account of union activities. The Claimant is therefore entitled to a judgment for:-

- a. 3 month's salary in lieu of notice – Kshs. 238,740/-,
- b. gratuity for 5 years –Kshs. 278,530/-,
- c. compensation for unfair and unlawful termination equivalent to 12 months – Kshs. 954,960/-,
- d. damages for violation of the Claimant's constitutional rights assessed at Kshs. 500,000/-
- e. costs of the suit
- f. interest on the sums above at court rates from the date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 13<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**