



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 70 OF 2016**

**(Before Hon. Justice Hellen S. Wasilwa on 4<sup>th</sup> December, 2019)**

**BEATRICE WANGECI WAWERU.....CLAIMANT**

**VERSUS**

**ALLPACK INDUSTRIES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Beatrice Wangeci Waweru filed a Memorandum of Claim on 22/01/2016 for unlawful and unfair termination against the Respondent, All Pack Industries Limited.

2. She avers she was employed by the Respondent as Stores Clerk in 2006 and that she worked for the Respondent for 9 years. That although the Respondent was mandated to pay her as stipulated in the employment contract, it did not abide by the said contract and that at the time her services were terminated, she was earning a monthly salary of Kshs. 49,654/=.

3. That on 20/08/2015, the Respondent's Human Resource Manager made several allegations against her which were never proved and that despite her clear explanation to the Respondent's officials, she was dismissed from her employment on 28/08/2015. That she has lost her dues which she now claims hereunder:-

**a) 12 months' pay as damage                      Kshs. 595,848.00**

**b) September to November salary      Kshs. 148,962.00**

**c) 16 days (annual leave)                      Kshs. 26,482.00**

**Kshs. 801,292.00**

4. She avers that the termination of her employment by the Respondent was irregular, unlawful and unfair because she was not afforded a fair hearing, no evidence was advanced to prove the allegations against her and that the allegations, disciplinary committee hearing and termination all took place within 7 days.

5. She was also not issued with a certificate of employment and her September, October and November salaries were not paid. She contends that the Respondent's actions violated the Constitution, the Employment Act, the Regulation of Wages and Conditions of Employment Act and her contract of employment. That despite demand and notice of intention to sue, the Respondent has refused and/or neglected to pay her and she thus prays for:-

**a) A declaration that the termination of her services was irregular and unfair and an order that the Claimant be paid her dues and compensation in the sum of Kshs. 801,482/=.**

**b) Costs of this claim and interest.**

6. The Respondent filed its Memorandum of Response on 06/06/2018 admitting to have employed the Claimant vide a letter of employment letter dated 20/03/2013 and at a basic monthly salary of Kshs. 17,476/= which was inclusive of house allowance of Kshs. 3,000/= and subject to statutory deductions.

7. It avers that depending on availability of work, the Claimant would at times work overtime and the same would be paid at the end of the month and that the amount on her payslip would therefore vary depending on the extra work she put in.
8. That if not this, the Claimant would be paid strictly according to the letter of appointment. It denies that the Claimant worked for it for 9 years and avers that the letter dated 28/08/2015 expressed its decision to terminate her contract and also issued a 3 months' notice that her services would be terminated on 30/11/2015.
9. It avers that on 12/08/2015, the Claimant unlawfully and without due regard to office protocols, issued payment amounting to Kshs. 14,000/= to Alpha Plumber and Sewer Services being payment for unblocking a sewer but which payment could not be verified by any of the supervisors.
10. That it thus conducted an investigation on 17/08/2015 through its security department and made a finding that the Claimant was negligent in her services. That when its employees rallied funds to help one of their own named Danson Ndolo Kioko with his medical bills, the Claimant who was placed in charge of the kitty, used the money for activities other than what it was intended for.
11. That these incidents prompted its Human Resource Manager to issue two interoffice memoranda both dated 20/08/2015 requesting the Claimant to give a detailed and satisfactory explanation against the said allegations. That the Claimants gave her explanation through letters dated 21/08/2015 and 14/08/2015 but it found the explanations unsatisfactory and decided that the claims would be addressed through a formal disciplinary hearing.
12. That the meeting was communicated to the Claimant vide a letter dated 21/08/2015 and the said disciplinary meeting was held on 24/08/2015 and that it decided to terminate her services after hearing her side of the story.
13. That after she cleared with the Respondent, her dues were worked out and given to her alongside a certificate of service and that the Claimant is thus guilty of material non-disclosure of facts and has approached this Court with very dirty hands.
14. That this suit has been filed in bad faith and is an abuse of the Court process with the Claimant seeking to unjustly enrich herself and denies that demand or notice of intention to sue was ever made. That the Claimant is not entitled to the reliefs sought as it is evident she was fairly and lawfully dismissed for gross misconduct and duly paid her terminal dues and it further denies the jurisdiction of this Court in determining this claim against it. It prays that the Memorandum of Claim be dismissed with costs to the Respondent and further annexes a **List/Bundle of Documents** in its Response support of its case.
15. The Respondent also filed a Witness Statement dated 04/06/2018 made by its Manufacturing Systems Co-ordinator, Mwacheda Robert who states that the Claimant volunteered to manage Danson Ndolo Kioko's medical bills kitty but later requested for funds from the cashier and stayed with the same thus failing to exercise due diligence in her expenditures which resulted to losses.
16. That after her services were terminated she did not object or challenge the same and that she was given notice pay, she handed over the required items and signed the discharge certificate and that he issued her with her terminal dues and certificate of service both dated 02/09/2015.
17. The Claimant then filed her Answer to the Memorandum of Response on 17/08/2018 denying the allegation contained in *paragraphs 4 - 23 of the Memorandum of Response* and prays that the said response be dismissed with costs and interests.

### **Evidence**

18. CW1, the Claimant testified in Court that she wished to rely on her filed documents and *App D* which she states is her evidence in this case. She stated that she was employed by the Respondent from 2007 to 2010 and then 2011 to 2015 and that at the time of termination, her basic salary was Kshs. 18,129/= per month while in August her net pay was Kshs. 49,654/= as shown in *App A*.
19. That she was shop steward at the Respondent's company and when Danson Ndolo got sick and admitted, she and the chief stop steward, Mr. Ochieng' requested the Operations Manager, Wekesa to request the management to stand for Danson but the management refused.
20. That the employees then contributed Kshs. 141,000 towards Ndolo's treatment and she and Ochieng' collected the money properly without complaints from anyone and Ndolo was treated and she denied that she collected money from the cashier. That she explained to the management how the money had been used and that the balance of Kshs. 86,470/= was given back to employees who had contributed.
21. That the disciplinary committee at *page 28* says minutes were to be signed but she did not sign the minutes and that the termination letter did not declare any reasons for termination. That the said letter did not talk of the Kshs. 14,000/= or the Kshs. 141,000/= or the allegation of defrauding the company and confirmed she was paid Kshs. 49,654/= only that month being her salary in full and 3 months' notice.
22. Under cross-examination, she stated that she signed her final clearance forms under duress and in re-examination, she stated that she was not given recommendations of the hearing.
23. RW1, Mwacheda S. J. Robert testified that he wished to rely on his statement as his evidence. He stated that the disciplinary committee interviewed the Claimant and made recommendations to management and that the dues she was paid include basic salary of Kshs. 18,129/=:, overtime amount, house allowance and notice pay.
24. Under cross-examination, he stated that 5 out of 9 members did not recommend dismissal and that the committee members did not sign the recommendations but confirmed in re-examination that the Minutes were circulated as a bundle and signed together. That also, the

Claimant was present when the recommendations were made.

### **Claimant's Submissions**

25. The Claimant submits that RW1 in his testimony failed to adopt the Respondent's list of documents as evidence and further produced recommendations from the committee members at *pages 26 and 27 of the Respondent's bundle of documents* where only 4 out of 5 members recommended for her dismissal.

26. That to date no explanation has been tendered by the Respondent as to why she was dismissed from her employment. She submits that this Court be pleased to find that the termination of her employment by the Respondent was unfair, irregular, unprocedural and unlawful and proceed to award her damages as prayed in the Memorandum of Claim.

### **Respondent's Submissions**

27. The Respondent submits that any overtime claimed should be proved and that the Claimant should refrain from claiming blanket amounts as what is due to her as was supported by the Court in **Fred J Owuor alias Fred O J Owuor v Tec Institute of Management Limited [2017] eKLR** when it found that the Claimant had not proved that he was entitled to payment for extra hours and dismissed the claim.

28. It submits that it ensured the Claimant's termination of employment was in accordance with **Section 41 (2) of the Employment Act** as it considered her representations before dismissing her on the grounds of misconduct under Section 44(3) or (4) of the Act.

29. That it also ensured a union representative who was a shop steward was present at the disciplinary meeting and that the Claimant cannot therefore claim to have been a victim of unfair termination.

30. That termination of employment by an employer is deemed unfair under **Section 45 of the Employment Act** if the employer fails to prove: that the reason for the termination is valid and fair and related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure.

31. That the Claimant was aware of the terms contained in her letter of employment and therefore understands that her actions amounted to misconduct and that the termination was valid.

32. It submits that she is not entitled to any reliefs as prayed as she has failed to prove that she was wrongfully terminated and that **Section 107 of the Evidence Act** states that: "*Whosoever 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.*"

33. On costs of the suit, the Respondent cites the case of **Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR** where the Court of Appeal held that costs are in the discretion of the Court though the generally accepted principle is that costs follow the event.

34. I have examined all the evidence and submissions of the Parties. The issues for this Court's determination are as follows:-

***1. Whether there were valid reasons to warrant termination of the Claimant.***

***2. Whether due process was followed before Claimant was terminated.***

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

35. On the 1<sup>st</sup> issue, the Claimant was dismissed vide a letter dated 28<sup>th</sup> August 2015 which informed her that the Respondent had decided to terminate her services with effect from 30<sup>th</sup> November 2015.

36. The termination letter does not give reasons for the termination but just indicates that she was being given 3 months' notice for the termination and was expected to proceed on annual leave not utilised and also clear with the company before she collects her terminal dues.

37. 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".***

38. It is therefore important that the Claimant be given valid reasons before her termination as envisaged in the law. In this case the termination letter is silent on the reasons for the termination which offends the provisions of Section 43 of the employment Act.

39. Before the Claimant's termination, Respondent avers that they took the Claimant through a disciplinary process. The Respondent exhibited their Appendix 12 which is a memo served upon the Claimant to explain herself on issue of unblocking the drainage at the

Respondent's premises which they averred was not true.

40. The Claimant explained herself vide a letter dated 21/8/2018. There were also other allegations concerning funds collected from the cashier towards medical assistance for one Danson Ndolo. She also explained herself.

41. Thereafter she was invited to a disciplinary hearing held on 24<sup>th</sup> August 2015. From the minutes before Court, out of 9 members of the Committee, 3 recommended she be dismissed while 5 opted for warning, pardon and transfer. The Respondent however decided to terminate her services.

42. Based on the minutes, the Claimant was given a chance to be heard before being terminated. As to whether it was established that there were valid reasons to warrant termination, the same is not established as the majority of committee members did not recommend her dismissal. The termination letter was also silent on the reasons, which finally informed her termination.

43. In the circumstances of this case, I find that the Respondent did not have valid reasons to terminate the Claimant and therefore in terms of Section 45(2) of Employment Act 2007, the termination of the Claimant was unfair and unjustified.

44. As for the remedies, the Claimant sought various remedies including damages for the unfair termination and her September to November salary and 16 days leave pay.

45. Indeed the Claimant was given 3 months' notice before termination and so she was still entitled to her salary during those 3 months. She was also told to take her leave during the same period which in my view is tantamount to taking away her notice period. She was therefore entitled to her leave not taken and the salary during the notice period;

**1) 3 months salary** = 64,587/=

**2) 16 days leave = 16/30 x 21,529** = 11,482/=

**3) 6 months salary for the unfair termination = 6x21,529 = 129,174/=**

**TOTAL = 205,243/=**

**Less what was paid** = 64,587/=

**Balance payable** = 140,656/=

**Less statutory deductions**

**4) The Claimant should also be issued with a certificate of service.**

**5) The Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

**Dated and delivered in open Court this 4<sup>th</sup> day of December, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Kahora for Respondent – Present

Claimant - Absent