



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 37 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

JOYCE WAMBUI KARUU.....CLAIMANT

-Versus-

KENYA NUT COMPANY LIMITED.....RESPONDENT

JUDGMENT

By memorandum of claim dated 12th January 2012 and filed in court on 13th January 2012, the claimant avers that her employment contract was unlawfully and unjustly terminated by the respondent on 8th June 2011 and seeks the following remedies.

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|---|-----------------|
| a) Compensation for loss of future earnings | Kshs.367,176.00 |
| b) Service pay for 18 years | Kshs.367,176.00 |

Total Kshs.734,352.00

- c) Costs of the claim plus interest therein.

The respondent filed a response to the claim in which it denies the averments in the memorandum of claim.

The case was heard on 6th November 2013 and the claimant testified on her behalf while the respondent called its Human Resource officer Rebecca Maina who testified on its behalf.

The claimant was represented by Ms Mildred K. Gakoi instructed by Gakoi Maina and Company Advocates while the respondent was represented by Ms Milimo instructed by Mbugwa, Atudo and Macharia Advocates. Both parties thereafter filed written submissions.

Claimant's Case

The claimant testified that she was employed by the respondent on 2nd January 1993 and dismissed summarily on 8th February 2011. At the time of dismissal, she was a Supervisor in the respondent's general store. The grounds for her dismissal was that did nothing while theft took place at the store which she was supervising.

The claimant testified that on 25th January 2011, while on annual leave she was called and directed to report back to work immediately. When she reported she found that the store had new staff. She was asked by her Manager to hand over to the new staff, then the accounts department was called in to carry out an audit. The audit found that some items in the store were not tallying, the physical and Bin Card were not tallying.

The claimant testified that her duties entailed supervising clerks in the general store, ensuring reports were done in time, receipt and dispatch of items by store clerks and generally to keep the store clean. She testified that stores clerks did the entries and she assisted only when any of the clerks was away or when the workload was high.

The claimant testified that during the period in question, she did not make any entries. That the entries were made by a clerk by the name Mercy. She testified that she was not charged with any criminal offence and was not given a chance to defend herself. She testified that she

was only told to wait for her letter of dismissal, which she was given on the same day at around, 5 p.m.

She prayed for compensation of loss of future earnings, service of 8 years, costs and interest. She testified that at the time of dismissal, she was earning a monthly salary of Kshs. 30,748/=.

During cross-examination, the claimant testified that she was the only Supervisor in the general store. She testified that she does not recall making a handwritten statement on 7th February 2011 but recalled explaining the differences that were raised by the audit team. She testified that after dismissal, she reported to the Labour Office where an agreement was reached that her dismissal be reduced to normal termination and that the respondent pays her terminal dues. She admitted that she was paid salary in lieu of notice and pending leave days. She was paid a total of Kshs. 56,007. She testified that she was not allowed to ask for anything else.

In the written submissions filed on behalf of the claimant, it is submitted that the respondent did not prove that the summary dismissal of the claimant was within the prescribed parameters of the law. She prayed for judgment as prayed in the claim.

Respondent's Case

The respondent called one witness, REBECCA MAINA, its Human Resource Officer who testified that she started working with Kenya Nut Company Ltd, the respondent, on 9th November 2011.

She testified that the claimant was called from leave and taken through a disciplinary inquiry. She testified that before that there was a lady from the stores by the name Mercy who was caught going out of the compound with some goods in the evening. The said Mercy did not have documents authorising her to take the goods out. She testified that all the three ladies who worked in the store, including the claimant, were summarily dismissed after the audit found that the records did not tally with physical goods in the store.

Rebecca testified that when the claimant reported to Labour Office, her only complaint was that she was not satisfied with what she was paid. She testified that the claimant's terminal dues were paid through the Labour Office after the claimant agreed with the amount of Kshs. 56,007/=. She testified that part of the money was paid to the SACCO and the other part to Standard Chartered Bank to offset loans advanced by the SACCO and Bank to the claimant.

On cross-examination, Rebecca admitted she was aware the claimant worked for 18 years for the respondent. She testified that the payment at the Labour Office included 45 days in lieu of notice, leave days and salary. She testified that there was an agreement that the respondent would utilise the claimant's terminal dues to offset her loans in both the SACCO and the Bank.

Rebecca testified that the claimant was not happy with what she was paid as she wanted to be paid service. She testified that the claimant was a member of NSSF.

Rebecca testified that she did not have proof that the claimant wrote a statement or that she was given a chance to defend herself. She testified that the claimant was not at work on the day Mercy was exiting with goods without authority and was also not present when Mercy was caught with the goods. She testified that it is not the Supervisor's duty to frisk workers leaving the store.

In the submissions filed for the respondent, it is submitted that the claimant was summarily dismissed for gross misconduct after investigations carried out by the respondent disclosed that she failed to carry out her duties and when she did, she carried out her duties carelessly or negligently. It is submitted that the claimant admitted loss of items in the store. It is submitted that the summary dismissal was in accordance with the Employment Act.

The respondent relied on the following authorities;

The case of **Elizabeth Wakanya Kibe –vs– Telkom Kenya Ltd (2014) eKLR** where the Court of Appeal stated that Onyango J in **Engineer Francis N. Gachuri –vs– Energy Regulatory Commission – Industrial Cause No. 203 of 2011** while considering the remedies available in a case of unfair dismissal correctly expressed himself as follows:

“There is no provision for payment of damages to date of retirement. This is because employment like any other contract provides for exit from contract. The fact that the claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for termination.”

The Court of Appeal in the above case also cited the Rika J, in **D. K. Njagi Marete –vs– Teachers Service Commission – Industrial Cause No. 379 of 2009**, where the court held;

“What remedies are available to the claimant? This court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way... A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years would not be a reasonable remedy.”

The Respondent also relied on the decision in the **High Court Civil Case No. 1139 of 2002** between **Menginya Salim Murgani –vs– Kenya Revenue Authority**. Hon. Justice Ojwang stated that;

“It would be injudicious to found an award of damages upon sanguine assessments of prospects... the court applied the principle,

then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on and not sit back waiting to enjoy anticipatory remuneration.”

Determination

I have carefully considered the pleadings and evidence on record. I have further considered the submissions of parties and authorities cited by the respondent. In my opinion, the issues for determination are whether the summary dismissal of the claimant was fair and if she is entitled to the remedies sought in the claim.

Fair Dismissal

The Employment Act provides the circumstances under which an employer may summarily dismiss an employee for gross misconduct at Section 44 (4). Among those grounds is where an employee wilfully neglects or carelessly performs work, which it is his duty to perform properly. This is what the claimant was accused of. The letter of dismissal states that she performed her work carelessly leading to loss of goods worth hundreds of thousands of shillings.

Although Section 44 provides for summary dismissal under the circumstances set out therein, Section 41 provides that before the employee is summarily dismissed on those grounds, the employer must take him through the disciplinary process set out therein as follows:

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

In this case, it is the claimant’s averment, which is admitted by the respondent’s witness, that the goods that were lost were taken out by another employee by the name Mercy, while the claimant was on annual leave. The respondent’s witness testified that the claimant was taken through a disciplinary inquiry but admitted that there is no evidence of any such process having taken place. The claimant on her part stated she was not taken through any disciplinary process.

The letter of dismissal does not refer to any disciplinary process having taken place.

Section 47 (5) provides that

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

In the present case, I find the respondent has not discharged the burden of proving that the ground for summary dismissal was valid as the claimant was not subjected to any disciplinary hearing or given an opportunity to defend herself as provided in Section 41 of the Act.

Further the claimant was on leave when the alleged acts for which she was summarily dismissed were perpetrated by Mercy, the Stores Clerk. I therefore find and declare the summary dismissal of the claimant unfair.

Remedies

The claimant prayed for compensation for loss of future earnings in the sum of Kshs. 367,176 and service pay for 18 years in the sum of Kshs. 367,176/=. It is not clear what the basis of the calculation of the two heads of claim was as this is not explained by the claimant in her testimony nor has it been mentioned in the submissions.

Be that as it may, the claimant was a member of both NSSF and a pension scheme as is evident from her payslip. She is therefore not entitled to service pay in terms of Section 35 (5) as read with 35 (6) which provide as follows:

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the Retirement Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.

Again, the claimant is not entitled to compensation for loss of future earnings as was stated in the following cases;

- 1. Elizabeth Wakanya Kibe –vs– Telkom Kenya Ltd (2014) eKLR**
- 2. Engineer Francis N. Gachuri –vs– Energy Regulatory Commission – Industrial Cause No. 203 of 2011**
- 3. D. K. Njagi Marete –vs– Teachers Service Commission – Industrial Cause No. 379 of 2009**
- 4. High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani –vs– Kenya Revenue Authority.**

The maximum compensation provided under Section 49 (1) (c) is 12 months' salary. The respondent argued that the claimant did not pray for compensation for unfair termination. This in my view is a matter of semantics as the claimant prayed for compensation for loss of earnings, which arose from her summary dismissal.

Having found the summary dismissal unfair and taking into account the claimant's long service of 18 years, I award her maximum compensation in the sum of Kshs. 368,976/=. The respondent will also pay claimant's costs of the suit. The decretal sum will attract interest at court rates unless paid within 30 days from date of judgment. The Respondent will deduct from the amount awarded the sum of Kshs. 56,007/= which the claimant admitted having been paid.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE