



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 1525 OF 2014

ROSE AKOTH OGWANG.....CLAIMANT

VERSUS

CIC GENERAL INSURANCE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant through her suit to recover for her dismissal from employment. In the claim filed on 2nd September 2014, the Claimant averred that she was employed as an accounts clerk and that she worked diligently and was promoted over the years to the position of Assistant Manager Claims as at the time of dismissal. The Claimant averred that the Respondent dismissed her from employment unfairly, wrongfully and/or unlawfully for alleged involvement in bribery and kickback with the Respondent's suppliers which allegations were untrue and unfounded. The Claimant averred that the dismissal was unprocedural and in contravention of labour laws as laid down procedures were never followed nor any discussion or dialogue ever took place prior to the dismissal. The Claimant averred that between 2000 and 2013 house allowance was not paid as required under law and that at the time of dismissal the Claimant was not paid 62 days of accrued leave together with terminal dues and unpaid house allowance. The Claimant thus sought 2 month's salary in lieu of notice, overtime pay, unpaid house allowance, accrued annual leave, severance pay and damages for wrongful dismissal all amounting to Kshs. 5,697,725.55 as well as interest on the sum claimed from the date they become due till payment in full, costs of the suit and any other relief the honourable court may deem fit to award under the circumstances. The Respondent filed a response on 17th July 2015 and in it averred that the Claimant's employment was governed by the Employment Act as well as the Respondent's human resources manual and code of conduct. The Respondent averred that following reports that the Claimant had corruptly solicited and received bribes and kickbacks from the Respondent's service providers, the Respondent undertook investigations into the matter and the investigations revealed that indeed the Claimant had received numerous direct payments from various service providers through M-Pesa which payments the Claimant had not disclosed to the Respondent. The Respondent averred that it invited the Claimant through letter dated 3rd November 2013 to attend a disciplinary hearing on 7th November 2013 so as to hear her side of the story. The Respondent averred that the Claimant was unable to satisfactorily explain the purpose and *bona fides* of the payments and to the contrary the reason advanced that the payments were contributions for funeral expenses for her deceased mother-in-law were found to be inconsistent with the dates of some of the payments. The Respondent averred in any event, the Claimant was by virtue of her employment duty bound to disclose the said payments to the Respondent in view of the undoubtable conflict of interest. The Respondent averred that in view of the findings it had no choice but to summarily dismiss the Claimant from its employment under the provisions of Section 44(3) and 44(4)(g) of the Employment Act, 2007. The Respondent averred that the payment the Claimant received contained an element of rent in terms of

Section 31(2)(a) of the Employment Act and that the Claimant was duly paid all her terminal dues and signed in acceptance of the payment of Kshs. 91,280/-. The Respondent denied causing the Claimant any mental anguish and averred that it was not the Respondent's fault that the Claimant is unable to procure employment in a similar position as the one she held at the Respondent as she has only herself to blame for the position she now finds herself in. The Respondent averred that the Claimant's dismissal was in accordance with the law and sought the dismissal of the claim with costs.

2. The Claimant testified on 1st November 2017. She stated that she is currently in employment as an assistant claims manager and was previously employed by the Respondent from 1989 till November 2013 when her services were terminated. She stated that her pay rose from Kshs. 2,130/- till Kshs. 159,000/- at the time of termination. She testified that an item being housing was scrapped from her pay in the year 2000. She recalled that in October 2013 she had proceeded on leave and was recalled by the manager and given a letter asking her to appear before the disciplinary committee where she was accused of receiving kickbacks. She stated that the only evidence was an Mpesa transaction on her phone which had 69,000/-. She testified that she had been bereaved, the sums were contributions and that the printout was without her consent. She stated that after the hearing she was just dismissed and on 12th November 2013 she was given her letter of termination. She testified that she had pending leave days and was not paid in lieu of the leave and she thus sought payment of the sums as well as her other claims for the unlawful dismissal.

3. In cross-examination, she testified that she received Mpesa payments and that she gave an explanation. She stated that she did not disclose the receipt of the payments and that she had seen the code of conduct for the first time when she was summoned. She stated that she had not come across it prior and could not comment about the values espoused. She testified that she stood by the values of integrity and that is why she had served for 24 years and agreed that she should avoid conflicts of interest. She stated that the payments she received were because people were empathizing with her. She testified that at the time there was bereavement there was also a church building. She stated that if the payments were kickbacks they would have been larger and that the person died around August/September. She testified that they were building a church and people stood with her on both of these matters. She could not comment on the repeat payments as she could not dictate as to how one would contribute and she did not see it as strange. She testified that she was accorded a hearing and that is when she was accosted with the transaction and was not given an opportunity to defend herself.

4. In re-examination she testified that it was not stated that she should tell the employer on private affairs such as funerals or church fundraising and that receiving support did not interfere with her integrity or cause conflict of interest. She stated that the person who died was her mother-in-law and she died around July-August which was long back and that there were mini-harambees for the church building and then final harambee. She stated the sums were received within 2013 and that Unity Auto Garage was the employer of her husband and a service provider.

5. The Respondent called its witness Mr. Peter Mwenda Gitugi on 29th November 2017. He testified that he was a HR practitioner at the Respondent as HR Business Partner and that he was familiar with the case. He stated the Claimant was appointed on 13th April 1989 and that a complaint was received from service providers – garages, motor assessors and others who serve at motor claims that they were being asked for money so that they remain in the panel to serve CIC. He testified that the Respondent decided to engage the Claimant in a discussion on the matter and the issue was reported to HR. He stated that the Claimant denied that she had solicited for funds and the Respondent undertook investigations though the Claimant was not suspended. He stated that the report confirmed the receipt of money and the audit department went to service providers who confirmed sending money to the Claimant through Mpesa. He testified that the Claimant was called to a hearing on 7th November 2013 and one of the values that the Respondent espoused is integrity in service, urging staff not to have conflict of interest. He stated that if one receives gifts in exchange of service it is conflict of interest and that the Respondent had HR Policy Manuals and Code of Conduct both of which are sited on intranet and staff are advised to see the changes upon review. He stated that he was present at the disciplinary hearing and that he took the minutes. He testified that the Claimant was notified of the purpose and she confirmed knowledge of the reason for the meeting. She confirmed the number on the report was her number and the panel wanted to know the

purpose of the transactions and he testified that the Claimant stated that she had a personal need and that having worked with the service providers she considered them friends so she asked for help. He stated that the Claimant was asked what the personal need was and she replied that she had lost her mother-in-law in April 2013 and the burial had been conducted in the last week of April. He testified that the panel was not convinced that was the purpose as she had continued to receive funds even as late as June and that she mentioned a church construction as well but could not relate the fundraising with the pattern in which the funds were being received. He testified that the committee was not convinced she had explained and the management decided to terminate her employment for breaching the Employment Act as well as the values of the Respondent and the penal code. He stated that the Claimant was cleared and received payment of her final dues on 27th November 2013. He testified that the Claimant would still be employed by the Respondent had the incident not occurred and perhaps would even be the Claims Manager. He stated the Respondent complied with procedure.

6. In cross-examination he testified that he started working with the Respondent on 7th July 2012 and that he could access the Claimant's file and had gone through it. He stated that the Claimant worked for a long period and had received funds from service providers. He testified that he had not seen the complaint in writing and that the Claimant and her seniors were to communicate with service providers. He stated that the audit department was the author of the report but the name of the person who made it is not there. He conceded it did not show the process of getting the report. He testified that he had not said the Claimant was soliciting and that he was saying that the Claimant was asking for money for them to be retained as service providers and that was the basis for the investigation. He stated that the code of conduct was required to be signed by the employee and that the Claimant's signature was not on the copy. He stated that the employees are directed to the intranet and given a hard copy during induction. He testified that the Claimant was paid house allowance and that there was provision for house allowance. He stated that the amount given for April 2013 was consolidated and the sum was not separated. He testified that the conduct was considered as gross misconduct and that in the meeting there was no attendance sheet but the minutes showed who attended.

7. In re-examination he testified that the Claimant admitted to having received the payments for her personal needs and that was not in dispute. He stated that the audit department was the author of the report which he fully owned as CIC. He testified that the meeting was not ad hoc but scheduled and the minutes were confirmed in subsequent meeting. He stated that the nature of disciplinary meeting was that it is only when there is an appeal that there is another meeting. He stated that the gross pay included consolidated salary. That marked the end of oral testimony.

8. Parties were to file submissions and the Claimant filed submissions on 5th December 2017. As at the time of penning the judgment in January 2018, there was no submission by the Respondent on the file. The Claimant submitted that the issues for determination were whether

- i. There was procedural fairness
- ii. There was valid reason for the termination
- iii. House allowances and terminal dues paid
- iv. The Claimant is entitled to relief

The Claimant submitted that the Respondent did not accord the Claimant the right to be heard under the principle *audi alteram partem* a cardinal rule of natural law but also enshrined in the Constitution of Kenya. The Claimant relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited [2013] eKLR** for the proposition that the Claimant was not accorded the essentials of a fair hearing. It was submitted that the Claimant was not involved in any disciplinary hearing and that the minutes of the alleged disciplinary meeting were manufactured after the suit was filed. It was submitted that the minutes were not approved by all the parties who were present in the meeting nor were they approved by the Claimant as a true reflection of what transpired in the meeting. The Claimant submitted that there was no notice to show cause nor a letter of invitation to a disciplinary hearing. The Claimant

submitted that even the alleged investigations report was not produced in court by the maker of the said investigation report and that not even the complaint that triggered the disciplinary process was availed to the Claimant or produced in court. The Claimant cited the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where the court held that though internal disciplinary proceedings are non-judicial in nature, in order for an employee to respond to the allegations made against them the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The Claimant also placed reliance on the case of **David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] eKLR** where the court held that the principle of fair hearing of an employee's case was stated to be giving the employee sufficient time to prepare for the disciplinary hearing, the right to fully understand the charges and the right to documentation. The Claimant submitted that the process was not fair and that the Claimant never knew what charges she was facing and what evidence the Respondent had against her to enable her to respond to the same comprehensively as desired. The Claimant submitted that the Respondent bore the responsibility of proving procedural fairness and that it had not discharged this burden by availing a notice to show cause, an invitation to a hearing and the evidence they relied on including the disputed Mpesa transactions and investigation report. The Claimant submitted that the only conclusion the court could come to was that if there was any process it was grossly unjust. The Claimant submitted that the termination was substantively unlawful and unfair. Reliance was placed on the case of **Pelecia Olum v Export Processing Zones Authority [2014] eKLR** where the court held that the failure to call the person who allegedly received the money the Claimant in that case was accused of losing was fatal to establishing a valid reason for summarily dismissing the Claimant. The Claimant submitted that the code of conduct was never supplied to the Claimant and she may never have had knowledge of the contents or regulations as provided in the alleged code of conduct. The Claimant submitted that the Respondent's witness, an experienced human resource practitioner should have advised the Respondent on the appropriate process in handling complaints. The Claimant thus urged the court to grant her the remedies she sought. On house allowance the Claimant relied on the case of **Alex Muriuki Bundi v Kakuzi Limited [2012] eKLR** which cited with approval the holding of Waki J. (as he then was) in **Wanjohi v Mitchell Cotts Kenya Ltd [2002] 2 KLR 462** where the learned judge stated that house allowance cannot be regarded as part of pay. On the issue of leave pay the Claimant relied on the case of **Grace Kavenrege Kendeli v Laborex Kenya Limited [2013] eKLR** where it was held that no records were produced by the Respondent to prove the Claimant had taken all her leave days. On end year bonus, the Claimant relied on the case of **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR** for the holding that the practice of issuance of an annual bonus had become a customary practice by the Respondent and must be enforced. The Claimant thus sought the award of the sums claimed as well as costs.

9. The dismissal of the Claimant was on the basis of an allegation that she was involved in some shady dealings with service providers. The Respondent relied on Mpesa transactions which the Claimant allegedly received. The Claimant asserts the dismissal was without basis and manifestly unlawful and unfair. The Respondent asserts that the dismissal was merited and procedural. Under Section 43 the employer has a distinct burden. The provisions of the section are as follows:-

43.(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.

10. In addition under Section 47(5), the law makes provision as follows:-

47.(5) 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 shall rest on the employer

11. The Claimant testified before me on 1st November 2017 and was on two instances unable to explain when precisely her mother-in-law was deceased and why she had continued to receive funds long after her mother-in-law had been buried. She came across as dishonest in regard to the purpose of the payments asserting that 2013 was a long time ago. She was also unable to explain why she received multiple payments. She confirmed in her testimony that the Mpesa report was obtained without her authority. She did not challenge the actual receipts and indicated the sum she had received due to empathy from her friends was Kshs. 69,000/-. Disciplinary hearings under Section 41 of the Employment Act cannot be equated to a trial before a Magistrate where evidence is adduced, cross examination undertaken and thereafter a pronouncement of guilt given. The letter inviting her for a hearing was issued on 3rd November 2013 for the meeting on 7th November 2013. The Respondent's witness testified that he was the one who prepared the minutes exhibited as the proceedings of the meeting on 7th November 2013. He came across as candid and even volunteered that had the Claimant not undertaken the venture of receiving funds from service providers she could perhaps be the claims manager of the Respondent. He referred to the minutes which contained a question/answer format. In the second page of the minutes, the Claimant gave the exact answers at the time of the hearing as she gave in cross-examination by counsel for the Respondent. I do not doubt that the proceedings reflect to a large extent what transpired as the Respondent could not have forecast what the Claimant would say in response to the questions put to her regarding the repeated payments and the purpose of the payments she received through her phone. In the final analysis I find that the Claimant failed to prove her termination was unjustified or unprocedural. Turning to the issue of house allowance, the payslips exhibited show the Claimant was paying off a house loan but there was no house allowance component indicated on the payslip. The Claimant produced payslips for February 2010, January 2011, January and February 2012 as well as April 2013. The limitation period bars any claim from 2009 as there is a 3 year limitation period for accrued rights. The Respondent was required to either pay house allowance at 15% of the basic salary or provide housing in terms of Section 31 of the Employment Act. The salary was not indicated to be consolidated in terms of Section 31(2)(a) as pleaded by the Respondent since the contracts exhibited did not state so. In the premises the Claimant is successful on her claim for house allowance for the months of February 2010 – Kshs. 16,912.50, January 2011 – Kshs. 16,912.50, January and February 2012 Kshs. 44,733.60 as well as Kshs. 23,708.85 being house allowance for April 2013. The Claimant did not plead for bonus and therefore the case of **Okemwa v KEFRI** (*supra*) holds no succor for her. In the final analysis I enter judgment for the Claimant against the Respondent for Kshs. 102,267.45 as well as costs on the lower scale granted that most of her claim was unproved. There will be no interest on the sum awarded.

It is so ordered.

Dated at Nairobi this 10th day of January 2018

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 22nd day of January 2018

Radido Stephen

JUDGE