



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1990 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 19th March, 2018)

ALICE WANJIKU MBUGUACLAIMANT

VERSUS

PATH CARE KENYA LIMITED ...RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of Nyabena Nyakundi and Company Advocates seeking damages for unfair termination and payment of her terminal dues.
2. That the facts giving rise to the Claim are that on or about 3.10.2011 the Respondent offered the Claimant employment as a phlebotomist at its clinic with a starting salary of Shs. 29,500, exclusive of house allowance. That she worked for the Respondent with due diligence and faithfulness until 19.5.2012 when the Respondent terminated her employment without giving any reasons, without giving her notice or letter to show cause and refused to pay her terminal benefits. She prays for her Claim to be allowed as drawn.
3. The Respondent filed a statement of defence through the firm of Soita & Saende admitting the employment relationship but denied that the emoluments were exclusive of house allowance.
4. They state that by an email dated 21.3.2012, from the Respondent's marketing manager the claimant was called upon to perform certain duties and responsibilities with specific instructions on how the tasks were to be performed. That by 28.3.2012, the tasks had not been performed and upon inquiries from her supervisors the Claimant engaged them in an unsavoury manner and flatly refused to conduct the said duties and instead engaged her superior in an annoying argument.
5. It is contended that notwithstanding her dereliction of duties the Claimant formed a systematic habit of absenting herself from duty without justifiable cause. That despite various warnings from the management about her conduct the Claimant failed to desist from her behavior and or improve on her work ethic thereby necessitating her summary dismissal under Section 44 of the Employment Act.
6. The Respondent additionally aver that they settled all her terminal benefits and the Claim should be dismissed.

Evidence

7. The Claimant led evidence according to her pleadings and cross examined accordingly. The Respondent on the other hand called two witnesses, one Samuel Ogalloh who stated that he was employed by the Respondent as the head of Phlebotomy. He also led evidence to the effect that the Claimant's salary was inclusive of house allowance. He led evidence on the alleged neglect of duty and insubordination whereas RW2 was a co-worker who led evidence on the Claimant's alleged tardiness.

Submissions

8. The Claimant submits that the letter for termination did not indicate the reason for termination but only points to a redundant situation without reason and that the Court should find as such. It is also submitted that procedure envisaged under section 41 was not followed and thus the termination was unlawful. It is submitted that the Claim should be allowed and damages awarded.

9. The Respondent's counsel submits that the dismissal was a summary dismissal as provided under section 35(4)(b). That this section predicates the freedom to contract and the intention of the parties before, during, and after termination and as such the Claimant's termination

is fair. They cite the case of Elphas Odhiambo Okenno vs African Gas & Oil Company Limited (2017)eKLR where the Court found that where an employee willfully neglects to perform any work which is his duty to perform he is guilty of gross misconduct.

10. In the instant case, by an email dated 21.3.2012, from the Respondent's Marketing Manager the Claimant was called upon to perform certain duties and responsibilities with specific instructions on how the tasks were to be performed. That by 28.3.2012, the tasks had not been performed and upon inquiries from her supervisors the Claimant engaged them in an unsavoury manner and flatly refused to conduct the said duties.

11. It is submitted that the dismissal of the Claimant met the threshold envisaged under section 44 of the Employment Act. In the instant case the Respondent, aver that the Claimant failed to perform her duties under her contract of employment and they were as such justified to invoke summary dismissal. They cite the case of Bamburi Cement Limited vs William Kilonzi (2016)eKLR in support of this position.

12. The Respondent's Counsel urges that having established that there was a reason for termination and due process followed in the termination, the claim should be terminated and none of the benefits claimed are payable. They pray for the Claim to be dismissed with costs.

13. This letter does not state reasons for this termination. Other than the fact that the "claimant cannot fit in". The Respondent have averred that she was dismissed for insubordination and they attached a series of emails to prove some exchanges between the Claimant and other employees. These emails are however not proof of a misconduct.

14. I have examined all the evidence and submissions of the parties. I do set down the issues for determination as follows:-

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

2. Whether due process was followed before Claimant was dismissed.

3. What remedies are available in the circumstances?

15. On the 1st issue, I note that on 19.5.2012, the Claimant was served with a termination letter which stated as follows:-

"Re: Termination of Employment

We write to inform you that your employment with this Company has bene terminated forthwith.

After continuous training and monitoring, we find that you cannot fit into the set up at Pathcare.

You will be given your final dues after a period of 2 weeks.

Please kindly leave your Company ID card with your Superior prior to leaving the premises.

Yours faithfully,

For: Pathcare Kenya Limited"

16. This letter does not state reasons for this termination. Other than the fact that the "Claimant cannot fit in". The Respondent have averred that she was dismissed for insubordination and they attached a series of emails to prove some exchanges between the Claimant and other employees. These emails are however not proof of a misconduct.

17. Under Section 43(1) and (2) of Employment Act:-

"(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".

18. Thus, reasons for any termination must be proved. Such reasons must be reasons existing and which reasons must be communicated to the employee in writing. The termination letter is however silent on the reasons for the termination. The letter only talks of her not being able to fit into the organization. This to me falls bellow the requirement of giving valid reasons for a termination.

19. On issue number 2, Section 41 of Employment Act states as follows:-

"(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”.

20. Thus, the insistence by the law that due process must be accorded an employee before termination is mandatory. The Respondent submitted that the Claimant was summarily dismissed. This is not true because the Claimant was terminated as per the termination letter above.

21. Section 45(2) of Employment Act states as follows:-

2. “A termination of employment by an employer is unfair if the employer fails to prove:-

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.

22. The Respondent in this case have not established the reasons for the termination and neither was due process followed before the termination. Therefore, I find the Claimant’s termination unfair and unjustified.

23. I award the Claimant as follows:-

1. Month salary in lieu of notice = 29,500/=.

2. House allowance equivalent to 15% of 29,500 x 7 months = 30,975/=.

3. 6 months salary as damages for unfair termination = 6 x 29,500= 177,000/=.

Total awarded = 237,475/=

4. I also direct that Claimant be issued with a Certificate of Service. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

Read in open Court this 19th day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kuloba holding brief for Nyabena for Claimant – Present

No appearance for Respondent