



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO.1515 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 27<sup>th</sup> April, 2018)**

**MARY AOKO ODUOR.....CLAIMANT**

**VERSUS**

**SPARKFRESH INVESTMENTS LIMITED.....RESPONDENT**

**JUDGEMENT**

- 1.The Claimant filed suit through the firm of Ochwo and Company Advocates seeking terminal dues for unfair, wrongful and unlawful dismissal, reinstatement and pay in lieu of notice. The Claimant avers that she was employed at the Respondent's Plant on 27<sup>th</sup> May 2013 for an undefined period until 19<sup>th</sup> February 2014 when the Respondent gave her a written contract of employment.
- 2.On the 17<sup>th</sup> June 2014, the Claimant fell ill at the Respondent's Plant in Karen following which she was admitted at Nairobi West Hospital Limited up to 20<sup>th</sup> June 2014 when she was discharged. On 21<sup>st</sup> June 2014 the Respondent's officer by the name Chrisantus Mogeni wrote a text message to the Claimant informing her that her sick leave had been extended to Wednesday of the following week, that is 25<sup>th</sup> June 2014.
- 3.He further requested her to prepare a detailed report of an incident that happened within the Respondent's premises on 12<sup>th</sup> June 2014 in which a roof-tank on the Respondent's water purification plant had burst which she did on the 22<sup>nd</sup> of June 2014 and forwarded it to Mr. Chrisantus.
- 4.The Claimant states that on the eve of when she was to resume work, that is 25<sup>th</sup> June 2014, Mr. Chrisantus Mogeni, informed her by an SMS that her services had been terminated and her terminal dues were being worked out.On 4<sup>th</sup> July 2014, the Claimant's officer, M/s Beatrice Arasa informed the Claimant that she had deposited her terminal dues of Kshs. 42,143 in her Cooperative Bank Account.
- 5.The Respondent filed their Memorandum of Defence where they aver that the Claimant was an employee of the Respondent from 27<sup>th</sup> May 2013 as a product worker on casual basis but that she never signed the employment contract and that all that time the Claimant had operated as a casual employee.
- 6.The Respondent further avers that the relationship between the Claimant and the Respondent had been characterized by the Claimant absenteeism and late reporting to work without permission as she would wake up one day and call in sick.
- 7.They aver that on 12/06/2014 at around 9.30 am, the Claimant called one of the Respondent Company's Directors, one Beatrice Arasa and informed her that there was a tank burst at the Respondent's premises leading to water spilling on the Claimant among other workers which incident the Claimant decided to capitalize on and/or use as a pretext not to report work as she extorts company resources.
- 8.The Respondent further avers that the Claimant arbitrarily and without neither an explanation nor lawful justification decided to abscond work for four consecutive days, to wit, on the 13/06/2014, 14/06/2014, 16/06/2014. She reported at 11.00 am on 17/06/2014 looking okay but not ready to work and upon reporting to work, she informed one of her colleague, Elizabeth Akinyi that she felt like she was getting malaria due to her travelling to Kisumu over the weekend.
- 9.Later at 3.00 pm she started behaving strangely and rude refusing to work claiming that she was injured as a result of the tank burst on 12/06/2014. She was taken to Nairobi West hospital where she was examined, tested and treated for Malaria, Goiter, Hepatitis B and C, Thyroid etc at her request.

10. The Respondent states that due to the Claimant's deceiving and conniving actions and appetite to defraud and mislead the Respondent into paying for her medication, the Claimant caused the Respondent to incur Kshs. 50,000 in hospital bills for her treatment. The Respondent further states that he sent the Claimant her advance pay of Kshs. 15,000 as applied for via Mpesa Transaction and came to know of the Claimant's deceit after she was discharged from the hospital and upon looking at the discharge summary.

11. The Claimant submits that she signed the contract of employment and returned it on 11<sup>th</sup> March 2014. She avers that she delayed in returning the contract as she sought more time from the management of the Respondent to understand its terms before signing.

12. She further states that following the injury that occurred on 12<sup>th</sup> June 2014, the Claimant was kept away from work until she resumed the following week where she received 15,000 from one of the Respondent's Directors as payment in lieu of leave not taken to help her seek treatment.

13. The Claimant further admits that upon resuming work, she fell ill at the Respondent's Plant in Karen and was taken to Nairobi west Hospital and admitted up to 20<sup>th</sup> June 2014 when she was discharged. She was supposed to resume work on 21<sup>st</sup> June 2014 when the Respondent's Director, Mr. Chrisantus Mogeni wrote a text to her informing her that her sick leave had been extended to 25<sup>th</sup> June 2014 but when that day reached Mr. Chrisantus informed her through a text message that her services had been terminated and her terminal dues were being worked out. She avers that the Respondent did not explain to her the reasons for which they terminated her employment and that they did not give her an opportunity to be heard.

14. The Respondent in their submissions aver that the Claimant was never wrongly, unfairly or unlawfully terminated.

15. In her Memorandum of Claim, the Claimant sought for judgement against the Respondent for orders of the payment of salary for unexpired period of the contract 18 months and 19 days of Kshs. 471,590.

16. The Respondent on their part submit that the Claimant is not entitled to salary for an unexpired period of a contract that she did not sign. The Respondent relied in a decision made by the Supreme Court of Uganda's case of **Bank of Uganda vs Betty Tinkamanyire, civil Appeal No. 12 of 2017**, where the Court held that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

17. They submit that the Claimant's actions of unexplained absenteeism from work and defrauding the Respondent amounted to gross misconduct which warranted a summary dismissal hence disentitled her from a month's pay in lieu notice.

18. I have examined all the evidence on record plus the submissions filed herein. The issues for determination are as follows:-

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

**2. Whether the Respondent exercised due process before dismissal of the Claimant.**

**3. What orders to grant in the circumstances.**

19. On the 1<sup>st</sup> issue, the Respondent admits employing the Claimant but state that she was a casual employee and had been offered a contract of employment on 19/2/2014 and was to return the signed copy on 21.2.2014 which she did not sign. On her part, the Claimant states that she was employed with effect from 27<sup>th</sup> May 2013.

20. RW2 however confirmed that Claimant was employed on 27.5.2013. Assuming then that was the day of employment, at time of termination on 25/6/2014, she had served the Respondent for slightly over one year. Though she never signed any contract as averred by the Respondent, I will consider her a permanent and pensionable employee by virtue of Section 37(1) of Employment Act which states as follows:-

**“Notwithstanding any provisions of this Act, where a casual employee:-**

**(a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or**

**(b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service”.**

21. Was there any valid reasons to warrant her dismissal? The Respondent avers that the Claimant was a perpetual absentee and had absconded duty. On this, the Claimant avers that she was unwell and had been admitted at Nairobi Womens Hospital. In this case, the Claimant produced before Court her medical records to prove the illness and admission in hospital from 17<sup>th</sup> to 20<sup>th</sup> June 2014.

22. The Respondent on their part insist on the fact that Claimant was always coming late to work and absconding duty. The Respondent however never produced their employment records like their muster roll to prove the absenteeism.

23. Section 43 of Employment Act 2007 states:-

***“(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.***

24. The law is clear that reasons for termination must be valid reasons. It is not enough just to state the reasons but an employer must give minimum justification and prove the same. In the absence of proof of the reasons given for dismissal, I find that the Claimant was dismissed without valid reasons.

25. On the 2<sup>nd</sup> issue, the Respondent concedes that they dismissed the Claimant through a text message. Section 41 of Employment Act 2007 is clear on the process envisaged before termination or dismissal of an employee. Section 41 of Employment Act 2007 provides 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”.***

26. There is no indication that the above process was ever followed. The Claimant was therefore dismissed without due process.

27. Section 45 (2) of Employment Act 2007 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.***

28. The Claimant was however dismissed without valid reasons and without following due process. I therefore find the dismissal of the Claimant unfair and unjustified.

29. I find for the Claimant in terms of the prayers sought as follows:-

***1. 1 months salary in lieu of notice = 25,000/=.***

***2. Damages for unfair termination equivalent to 8 months salary = 8 x 25,000/=200,000/=.***

***3. Payment in lieu of leave for 1 year – 25,000/=.***

***4. Unpaid salary for days worked in June 2014 = 15,625/=.***

***TOTAL = 265,625/=.***

***5. The Respondent will also pay costs of this suit.***

Dated and delivered in open Court this 27<sup>th</sup> day of April, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mutugu for Claimant – Present

No appearance for Respondent