



## REPUBLIC OF KENYA

### IN THE EMPLOYMENT & LABOUR RELATIONS

### COURT OF KENYA AT NYERI

CAUSE NO. 318 OF 2017

**BARBARA KAGENI.....CLAIMANT**

**VERSUS**

**MR. GREEN TRADING (A) LIMITED.....RESPONDENT**

### JUDGMENT

1. The Claimant sued the Respondent her former employer seeking to recover terminal dues for unlawful dismissal. She averred that she was dismissed though could prison – her termination was illegal, malicious, unfair and unlawful for want of reason for summary dismissal by dint of sections 43 and 45 the employment act. She averred that in her termination letter, the Respondent warranted that it would pay an additional two month's salary but only paid one month. She thus sought payment of the balance of one month's notice. She averred that she had just reported back from maternity leave and was not aware of the impending termination referenced 'administrative termination' issued on 28<sup>th</sup> April 2017. She averred that the Respondent never forwarded the requisite deductions to the Kenya Revenue Authority NSSF and NHIF for the months of April, May and June 2017. She averred she earned a salary of Kshs. 45,000/- a month. She averred that she was not paid for leave days for the year 2017. She thus sought the sums due to her, costs for the suit and in addition, payment for ½ day for Sundays worked for 72 weeks, a Certificate of service, interest on the sums claimed as well as costs of the suit.

2. The Respondent defended the suit and filed a statement of response on 27 September 2017. In the response it averred that it had employed the claimant on 20 December 2016 as an administrative assistant in employment commenced on 1<sup>st</sup> January 2017 with a gross salary of Kshs. 45,000/-. It was averred that the terms of employment of the Claimant were subject to terms and conditions stipulated in the contract as well as the Respondent's existing rules and regulations as introduced from time to time. It was averred that on or about March 2017, the Respondent carried out a routine performance review of the Claimant whereat the Claimant scored very poorly in several areas and was clearly informed that as she stood in violation of the terms and conditions of employment, she could be liable to summary dismissal. Respondent averred the Claimant clearly understood the weight of her poor performance and that she was afforded an opportunity to improve, an opportunity she willingly undertook with the knowledge that she stood to be summarily dismissed if there was no positive change in performance within the next immediate one month. It was averred that she submitted a written response dated 20<sup>th</sup> March 2017 to the Respondent after the aforesaid performance review, thanking the Respondent for spotting her weaknesses, apologizing for poor performance and promising to improve. The Respondent averred that the Claimant subsequently did not improve her performance and was summarily dismissed on 28<sup>th</sup> April 2017 in line with the terms and conditions of her contract of employment. The Respondent averred that the Claimant was treated fairly in accordance with the letter and spirit of the Employment Act 2007 and that the Respondent was justified in taking the action that it took. It denied that the action against the Claimant was illegal, malicious, unfair, irregular and unlawful. The Respondent averred that the Claimant was not entitled to any of the reliefs sought except for Kshs. 45,000/- being salary for one month and a certificate of service. The Respondent therefore prayed for the claim to be dismissed forthwith with costs.

3. The Claimant testified on 14<sup>th</sup> February 2018 where she stated that she was employed from December 2015 and that her last working day was 20<sup>th</sup> April 2017. She stated that she was not informed of any intended dismissal and when she sought the reason for the dismissal, she was informed by her boss that he did not want to give the reason. She testified that that upon dismissal she did not receive payment of the terminal dues indicated in the dismissal letter. She stated that the reference in the letter of termination was 'administrative action' and that the letter did not give any reason for the termination. He stated no hearing and that the discussion held was at the end working hours when she was called and told that she was dismissed. She stated her duties entailed the handling of the MPesa line, renewal of licenses, banking, reconciliation and updating the ERP system. She stated the MPesa line was handled every day of the week and that she would top up Kshs. 30,000 for the 19 trading points for daily transactions, buying airtime for supervisors, fueling the truck and for purchases. She testified that she would work on weekends as the trading points would close on Saturday and the trading points were required to have the money ready for any trading on Monday. She therefore sought to have the pay for the ½ day worked for the 72 weeks she worked for the Respondent. She also sought leave for 2017 which was unpaid. She stated that she had seen the response by the Respondent and that the only time she had been called in was in March and the problem then was that she had forgotten to pay rent for one trading point. She stated she had never been warned or even been reprimanded and that it was that error that she was called for. She pointed out that in the contract of employment under paragraph 18 there is an indication of the disciplinary code and that she was not taken through the code. She stated the trading points were the collection points where the scavengers or collectors would bring plastics which were then weighed and that the payment of the money is at

the collection point. She therefore sought an award for unlawful termination and stated that she had eight months left in the contract for that year. That marked the end of oral testimony. The Respondent did not appear at the hearing despite the date having been taken in court in the presence of the Respondent's counsel.

4. The Claimant therefore filed submissions on 19<sup>th</sup> February 2018 and judgment was deferred to today. In her submissions, she submitted that the dismissal was without notice and that even on the letter of dismissal no reason was given. The Claimant pointed out that under regulation 18 of the contract of employment, the disciplinary code dictates a series of notices suited for each transgression by the Claimant. She submitted the system of warnings in the said code were not followed. She sought payment of the sums sought and submitted that there was no denial in the defence filed to contradict her assertion that she worked for ½ day on the weekends. She therefore sought payment of the sums claimed the suit.

5. The dismissal of the Claimant was headed 'administrative termination'. In the letter of dismissal, the Respondent indicated that it would pay the Claimant one month notice, salary for April 2017 as well as an additional 2 month's salary for the termination. The Respondent in its defence admitted it had not paid one month out of the two months promised in the letter of dismissal. The Respondent is therefore liable to the Claimant for the same. In the Claimant's contract of employment, there is a clause on disciplinary code. It provides as follows:-

*When the employee violates a rule of the employer, the following procedure will be followed:*

*a. Minor Misconduct: Counsel the employee and issue a verbal warning, which will be considered as a formal warning. Determine the cause of the problem and take necessary steps to help resolve the conflict. A letter will be placed in the employees file.*

*b. Serious Misconduct: Conduct a formal meeting with employee in which nature of violation and any recurrence could lead to summary dismissal would be stated. A formal warning letter will be written citing the incident and provide references to past violation. Copy of signed letter will be placed in Employee's file. If there is continued failure to improve or performance remains unsatisfactory, or if the misconduct is serious enough to warrant a second or third written warning, but insufficiently serious enough to justify summary dismissal, final written warning will be given to the employee. It will warn that summary dismissal may result if there is no satisfactory improvement.*

*An employee can be summarily dismissed at any time, without regard to the preceding steps if the offences of an extremely serious nature or if the employee's presence would disrupt the employer and other employees.*

The code makes no reference to any appraisals or the conduct of the Respondent pursuant to such appraisal. It therefore follows that any breach or misconduct by the employee that could lead to summary dismissal would have to follow the provisions of clause 18, or clause 20 on termination, or clauses 21 on termination and notice period, or clause 24 on summary dismissal.

6. The Claimant was dismissed by a letter dated 28<sup>th</sup> of April 2017. The letter was in the following terms:

*We regret to inform you that we are hereby terminating your contract with Mr Green Trading Africa (K) Ltd.*

*In lieu of your termination we are hereby paying one month notice period along with your salary for this April 2017.*

*As well, as you have agreed to cooperate with us and assure a smooth transition during the handover process, we hereby agree to pay you an additional two month salary, should be paid to you on a monthly basis for the next two months.*

*We shall also be paying you for your outstanding leave for 2016 which was in accrual.*

7. It is clear from the letter above that the termination dubbed 'administrative termination' was one for which no reason for termination was given. It is not denied that an employer has a right to terminate the employment of an employee for cause. Whereas in the response to the claim it is indicated that there was appraisal which led to the dismissal there is no appraisal form that was produced by the Respondent to prove their allegations that she fell short of certain indicators in her appraisal. It is therefore clear that the dismissal of the Claimant was without basis and unjustified. No reasons are shown to have been in existence at the time of termination. In my view the fact that the employer went one step ahead and offered to pay two month's salary in addition to the duties she was entitled to suggests she was entitled to a fairer dismissal. Whereas the Claimant claims her dues and taxes were not paid there is no evidence adduced to show that her statutory deductions are not remitted or that her taxes were not paid. I would therefore dismiss that aspect of the claim. She was dismissed unfairly and is entitled to compensation which I cap at six months. She is also entitled to the unpaid salary for one month Kshs. 45,000/- was as well as pro rata leave for four months between January and April 2017. She will also be entitled to costs of the suit as well as to interest on the sums awarded from date of judgment till payment in full. She shall also get a certificate of service. In sum, I enter judgment for the Claimant against the Respondent for:

- i. One month salary unpaid Kshs. 45,000/-
- ii. Compensation for 6 months Kshs. 270,000/-
- iii. Kshs. 10,500/- being pro rata leave for 4 months at rate of 1.75 days for each month
- iv. Certificate of service
- v. Costs of the suit

vi. Interest on the sums in i) at court rate from date of filing suit till payment in full

vii. Interest on the sums in ii) and ii) above at court rates from date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 5<sup>th</sup> day of April 2018**

**Nzioki wa Makau**

**JUDGE**