



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 217 OF 2016

CHRISTINE TSUMA SANGA.....CLAIMANT

VS

ANGLICAN DEVELOPMENT SERVICES.....1ST RESPONDENT

ACK ST. LUKE’S MISSION HOSPITAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 21st March 2016 and filed in court on 22nd March 2016, the Claimant has sued the 1st and 2nd Respondents for unlawful termination of employment. The Respondents filed a joint Reply on 5th May 2016.
2. The matter came up for hearing on 22nd January 2018 when the Claimant and the Respondents’ witness, Hesbon Saro Mae testified. The parties subsequently filed written submissions.

The Claimant’s Case

3. The Claimant states that she was employed by the 1st Respondent on 8th March 1993 in the position of Accounts Clerk (Health Nurse). She was deployed to work at the 2nd Respondent. On 1st January 2015, the Claimant was issued with a new contract of employment and on 23rd October 2015, she was summarily dismissed.
4. The Claimant’s case is that her dismissal was unlawful and unfair. She therefore claims the following:

- a) Unpaid salary for July, August, October 2015.....Kshs. 124,000
- b) One month’s pay in lieu of notice.....31,010
- c) Unpaid leave for 2015.....31,010
- d) Loan repayment deduction.....31,010
- e) Terminal benefits.....4,093,320
- f) Compensation for unlawful termination.....37,120
- g) Unpaid overtime
- h) Gratuity
- i) Costs

The Respondents’ Case

5. In their Reply dated 27th April 2016 and filed in court on 5th May 2016, the Respondents state that the Claimant was a problematic

employee prone to insubordination and disrespect to his superiors, lacked commitment and neglected and/or refused to adhere to the terms of her employment and the Respondent's code of conduct.

6. The Respondents aver that the Claimant was lawfully dismissed under the provisions of Section 44 (4)(c) and (e) of the Employment Act, 2007. The Respondents deny that they owe the Claimant any amount in terminal dues.

7. The Respondents further state that the Claimant was aware of the charges against her and that she was given an opportunity to defend herself before the decision to dismiss her was made.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

9. The Claimant was dismissed by letter dated 23rd October 2015 stating as follows:

"RE: TERMINATION OF SERVICE

We regret to inform you that your service with us has been terminated with effect from 23rd October 2015.

This is due to dishonest and improper job performance experienced by your good self which resulted to cash figures in suspense and your conduct during your suspension period, an action contrary to your contract with us (sic).

Please arrange to return every hospital property that may be in your possession vide a discharge form obtainable from Human Resources department and collect your terminal dues from the pay office.

Yours faithful,(sic)

For: ST LUKES MISSION HOSPITAL

(Signed)

HESBON S MAE

Human Resources Officer"

10. Prior to the dismissal, the Claimant had, by letter dated 19th August 2015, been suspended for a period of two weeks on allegations of unsatisfactory and grossly inefficient job performance.

11. From both the letter of suspension and the dismissal letter, it is evident that the accusations against the Claimant had to do with poor performance. Jurisprudence emerging from this Court is to the effect that once poor performance is noted, it should be pointed out and the employee given reasonable time to improve (see *Jane Wairimu Machira v Mugo Waweru & Associates [2012] eKLR*).

12. In this case, the Respondents having noted the Claimant's performance lapses, sent her on suspension instead of supporting her to improve. Thereafter, they dismissed her from employment.

13. What is more, the minutes of a disciplinary meeting held on 22nd October 2015 do not show any record of specific charges put to the Claimant and her response thereon as required under Section 41 of the Employment Act, 2007. In fact, the Claimant and her colleague, one Mercy Sheti were subjected to the same disciplinary meeting. This begs the question; which specific charges did each one of them face? The Respondent made no attempt to answer this question.

14. Overall, the Court finds that the Respondents not only failed to establish a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act but also violated the procedural fairness requirements set out in Section 41 of the Act.

Remedies

15. In light of the foregoing findings, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award I have taken into account the Claimant's length of service and the Respondents' conduct prior to the dismissal.

16. From the documents availed to the Court, the Claimant was paid one (1) month's salary in lieu of notice as well as accrued leave pay.

These claims are therefore without basis and are dismissed.

17. The claims for unpaid salary, loan repayment deduction, terminal benefits, overtime and gratuity were not proved and are dismissed.

18. Finally I enter judgment in favour of the Claimant and against the 1st and 2nd Respondents jointly and severally, in the sum of KShs. 372,120, being 12 months' salary in compensation for unfair dismissal.

19. This amount will attract interest at court rates from the date of judgment until payment in full.

20. The Claimant will have the costs of the case.

21. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MAY 2018

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JUDGE

Appearance:

Mr. Ambwere for the Claimant

Mr. Masila for the Respondent