



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 849 OF 2015

DIANA NABATURU MUTEKHELE.....CLAIMANT

VS

DAVANNS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 9th November 2015 and filed in court on 10th November 2015, is for compensation for unlawful and unfair termination of employment. The Respondent filed a Memorandum of Defence on 3rd May 2016.

2. When the matter came up for hearing on 18th January 2018, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Anne Mbugua. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 12th February 2014, in the position of Regional Water Technologist. She earned a monthly salary of Kshs. 31,100. She states that on 3rd August 2015, her employment was terminated verbally by the Respondent's Chief Technologist, David Kariuki.

4. It is the Claimant's case that the termination of her employment was unlawful and unfair. She therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 31,100
- b) Salary for July.....31,100
- c) 6 days leave balance.....7,292
- d) Prorata leave for 2015.....13,364
- e) Compensation for unfair termination.....379,200
- f) Certificate of service
- g) Costs plus interest

The Respondent's Case

5. In its Memorandum of Defence dated 29th March 2016 and filed in court on 3rd May 2016, the Respondent admits that the Claimant was its employee as from 12th May 2014, having served probation from February 2014.

6. The Respondent denies terminating the Claimant's employment and states that in July 2015, the Claimant, without permission, took the Respondent's motor vehicle registration number KBJ 772G, drove it around the Plant at KIPEVU II and smashed it on one of the Plant barriers.

7. Upon accepting responsibility, the Claimant was suspended from duty, in accordance with the Respondent's policy. When the suspension period ended, the Claimant met with her supervisor and it was agreed that the Claimant would pay for the cost of repair of the motor vehicle.

8. The Respondent reiterates that it did not terminate the Claimant's employment. Rather, the Claimant requested for leave to enable her raise money to pay for the damage caused to the Respondent's motor vehicle. The Respondent avers that the Claimant had received twelve (12) prior verbal warnings.

9. The Respondent adds that the Claimant's conduct was a violation of the express directions of her supervisor.

10. By way of counterclaim, the Respondent claims from the Claimant Kshs. 158,480 being the amount spent on repair of motor vehicle registration number KBJ 772G.

Findings and Determination

11. There are three (3) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

The Termination

12. In her testimony before the Court as well as in her submissions, the Claimant admits that at the time of the accident which occasioned damage to Respondent's motor vehicle registration KBJ 772G, she was not authorised to drive the said motor vehicle.

13. It seems clear to me that by driving her employer's motor vehicle without authority, the Claimant was in breach of the terms and conditions of her employment. The Respondent therefore had a valid reason to terminate her employment as required under Section 43 of the Employment Act, 2007.

14. Nevertheless, in effecting the termination, the Respondent overlooked the mandatory procedural fairness requirements enacted under Section 41 of the Act. In her written submissions filed on 7th February 2018, the Claimant referred to the decision by **Rika J** in ***Fred Ondari Makori v The Management Committee of Ministry of Works Sports Club [2013] eKLR*** where my brother Judge re-affirmed that failure to comply with the disciplinary procedure set out under Section 41 renders a termination procedurally unfair.

15. This position is firmly grounded in law and in the circumstances of this case, I find the termination of the Claimant's employment unfair for want of procedural fairness and hold that she is entitled to compensation.

Remedies

16. Pursuant to the foregoing, I award the Claimant (3) months' salary in compensation. In arriving at this award I have taken into account, the Claimant's length of service as well as the conduct of the parties. I further award the Claimant one (1) month's salary in lieu of notice.

17. In the absence of any records to the contrary, the claims for salary for July 2015 and prorata leave for 2015 succeed and are allowed.

18. No basis was laid for the claim for 6 days leave balance which therefore fails and is dismissed.

19. Consequently, I enter judgment in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation.....Kshs. 93,300
 - b) 1 month's salary in lieu of notice.....31,100
 - c) Salary for July 2015.....31,100
 - d) Prorata leave pay for 2015 (31,100x1.75x7).....12,699
- Total.....168,199**

The Respondent's Counterclaim

20. In her testimony before the Court, the Claimant admitted the counterclaim by the Respondent in the sum of Kshs. 128,000. I therefore enter judgment in favour of the Respondent against the Claimant in the said sum of Kshs. 128,000.

Final Orders

21. The net effect is that the Claimant is entitled to the sum of Kshs. 40,199.

22. The Claimant is also entitled to a Certificate of Service.

23. Each party will bear their own costs.

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL 2018

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JUDGE

Appearance:

Miss Osore for the Claimant

Mrs. Gatheca for the Respondent