



REPUBLIC OF KENYA



KENYA LAW
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**Nasambu v Kenya Rugby Union (Cause 2278 of 2012)
[2018] KEELRC 1897 (KLR) (3 May 2018) (Judgment)**

Adelaide Nasambu v Kenya Rugby Union [2018] eKLR

Neutral citation: [2018] KEELRC 1897 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 2278 OF 2012
NZIOKI WA MAKAU, J**

MAY 3, 2018

BETWEEN

ADELAIDE NASAMBU CLAIMANT

AND

KENYA RUGBY UNION RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on 13th November 2012. In this suit, the Claimant sought relief for the unlawful, unprocedural and unfair termination. The Claimant had been employed as a casual labourer from June 2005 till 18th August 2008 when she received a fixed term contract. Upon expiry of the fixed term contract, the Claimant was not given an appointment letter nor was her contract renewed. She proceeded to render service to the Respondent until 8th October 2012 when she received a letter of termination. She averred that she was not paid any allowance and that the reason for her termination was on the memo dated 9th July 2012 claiming she was absent from work yet she had applied for 2 days leave to attend sports in Mombasa. She gave an explanation indicating that she was permitted to be on leave on the days she was accused of absenteeism and this was followed by a letter from the Respondent indicating that the information she had given was insufficient. She was dismissed three months later on 8th October 2012. She sought a certificate of service, Kshs. 30,000/- as one month's salary in lieu of notice, Kshs. 30,000/- for withholding of salary, Kshs. 960,000/- for house allowance, Kshs. 90,000/- being leave for 3 years, compensation for early retirement Kshs. 11,520,000/- being the salary she would have earned till retirement at 60 years, compensation under Section 49 of the *Employment Act* Kshs. 360,000/- and a declaration that her termination was unlawful, unfair, unprocedural and unconstitutional as well as costs of the suit.
2. The Respondent replied through the statement of Fred Yida the Chief Financial Officer of the Respondent. He averred that the Claimant had been contracted as a project facilitator on a fixed



term contract of employment dated 18th August 2008 which terminated on 30th June 2009 but she continued working for the Respondent on the same terms and conditions until 8th October 2012 when she was dismissed. It was a term of the contract that the said contract could only be varied by agreement in writing of the person engaged and the Respondent's board. The Respondent averred that on the 6th, 7th and 9th July the Claimant without authorisation absented herself from work leading to inconveniences during the Prescott, Damu Pevu and Damu Changa schools rugby tournament finals held at RFUEA Grounds on 9th July 2012. The Respondent averred that the Claimant's leave was not approved and that the Claimant confirmed in her reply that she had sought leave but the leave was not approved and that no officer of the Respondent had signed the leave request. The Respondent averred her termination of employment was pursuant to clause 11(a) and (c) of the contract of employment which permitted dismissal for absenteeism. The Claimant claimed her leave dues vide a letter dated 15th October 2012 and she received her dues and signed in acknowledgement. The Respondent averred that the Claimant's NHIF and NSSF deductions were made and she should follow up her terminal dues with the relevant government bodies. The Respondent asserted that the Claimant was not unfairly or unprocedurally dismissed.

3. The Claimant was heard by Nduma J. on 18th January 2017 and she testified that she was employed as a project facilitator and was earning Kshs. 15,000/-. She stated that she worked after the expiry of contract and continued to earn the same amount as before. She stated that she was issued with a show cause on 10th July 2012 and she replied that she had filled absence of duty form and done an SMS to the General Manager. She was issued a warning for misconduct and continued working. She later received a letter of dismissal dated 8th October 2012 and that the letter did not state the reason for the dismissal. She testified that nothing had happened between the letter of warning and the termination and that no disciplinary hearing was held neither was she charged but worked as usual.
4. In cross-examination she testified that she was employed in 2005 and that the Respondent had proof of that as a casual till 2008. She stated that she was paid through the bank and continued working after the contract lapsed. She admitted she was absent for 3 days on 6th, 7th and 8th that was Friday to Sunday and she reported to work on Monday as Sunday was a working day. She stated that she had requested 3 leave days from general manager and confirmed that she did not know if the leave form was signed. She testified that they never came back to her usually. She was aware the finals were to be on Sunday and not Saturday. Damu Changa, Damu Pevu and Prescott were important events. She sought leave and it was not automatic to be at work. She stated the Kenya Rugby Patrons Society had a rugby tournament to promote women and she went there. She stated her work was to register players during the finals. She stated that she did that and gave it to her colleague. She admitted that she was not present.
5. In re-examination she testified that she was given a show cause over the issues and she responded and was punished by a warning and the matter ended. She handed over before she left.
6. The Respondent did not present any witness on the date for defence hearing on 8th May 2017 and the case for the defence was closed after various attempts to conclude the defence case failed. The case was fixed for service week and allocated to me. The Respondent did not appear despite service of the date by the Court. I directed parties to file submissions and only the Claimant filed submissions. In her submissions filed on 16th April 2018, she submitted that she was dismissed without a valid reason. Under Section 43 of the [Employment Act](#), the Respondent was obligated to prove they had a valid reason to terminate the Claimant. She submitted that the Respondent required her to show cause and after she showed cause was reprimanded by way of a final warning letter for misconduct. She relied on the case of *Celestine Shisia Waswa v Faith Homes Kenya Limited* [2017] eKLR where Ndolo J. held that a warning is by itself a disciplinary action, which once executed, dispenses with the case at hand. It follows therefore that by issuing a termination letter on the heels of a warning letter on the same



subject matter, the Respondent subjected the Claimant to double jeopardy. The Claimant submitted that the case before the court is on all fours as the case cited. It was submitted that the Respondent was required to charge the Claimant with a new charge of an employment offence before dismissing her subject to procedural fairness. It was submitted that the Claimant was not heard before her dismissal. The Claimant thus submitted she was entitled to full compensation.

7. The Respondent dismissed the Claimant for absenteeism. This is a valid reason for termination. However, the Claimant had been punished in July 2012 with a final warning. This case, like that of *Celestine Shisia Waswa v Faith Homes of Kenya* (supra) is one where the Respondent elected to punish the employee for the indiscipline by issuing a warning letter only to later turn around and dismiss for the same cause. Like my sister *Ndolo J.* I hold that a warning is by itself a disciplinary action and once that is executed it dispenses with the case at hand. It follows therefore that by issuing a termination letter right on the heels of a warning letter on the same subject matter, the Respondent subjected the Claimant to double jeopardy. The Respondent had no basis to revisit the concluded disciplinary matter and the dismissal of the Claimant was therefore unlawful and unfair. The Claimant would be entitled to recover for the dismissal. The Claimant sought payment of other dues which she did not prove such as the unpaid house allowance as well as the claim for the payment of salary till her retirement at 60 years. She was however, entitled to notice prior to dismissal. In the final analysis, the Claimant is awarded the following:-

- i. Kshs. 180,000/- being 12 months compensation
- ii. Kshs. 15,000/- being one month salary in lieu of notice.
- iii. Costs of the suit
- iv. Certificate of service

It is so ordered.

DATED AT NYERI THIS 2ND DAY OF MAY 2018

NZIOKI WA MAKAU

JUDGE

DELIVERED AT NAIROBI THIS 3RD DAY OF MAY 2018

RADIDO S.

JUDGE

