



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1722 OF 2013

ELIZABETH WANJUGU NDIRANGU.....CLAIMANT

VERSUS

ROOFTECH KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 24.10.2013 seeking Damages for unlawful termination, one month salary in lieu of notice, service pay, unpaid statutory benefits, costs and interest. It is the claimant's case that she received email dated 13.9.2013 while on leave, terminating her services. It further her case that the termination was unfair because it was not grounded on any justifiable reason and her effort to seek audience was thwarted.

2. The respondent filed her defence on 12.11.2013 denying the alleged unfair termination of the claimant's contract of service and averred that the termination was due to her past performance which she had failed to improve after discussing the same with her.

3. The suit was heard on 5.4.2018 when the claimant testified as Cw1 and the respondent called her Accountant Mr. Samson Ngatia as Rw1. Thereafter both parties filed written submissions.

Claimant's Case

4. Cw1 testified that she was employed by the respondent on 1.11.2012 as a Secretary earning Kshs.30,000 per month exclusive of House Allowance. She testified that she went for her annual leave on 2.9.2013 and she report back to work on 1.10.2013. However, on 13.9.2013, she was served with a termination letter via email. She contended that the termination was unfair because she was never invited to any prior hearing or served with any show cause letter. She therefore prayed for compensation, one month salary in lieu of notice, salary for September 2013 and the unremitted NSSF and NHIF for September 2013.

5. On cross examination, Cw1 confirmed that she served for less than one year. She further admitted that the Kshs.30,000 was gross pay according to the appointment letter. She however contended that she was never served with any warning letter before the termination. She admitted that she was offered salary in lieu of notice but declined.

Defence Case

6. Rw1 testified that the claimant was employed by the respondent for a gross salary of Kshs.30,000 per month. He further testified that the claimant was verbally warned before being terminated. He further contended that her terminal dues were tabulated and two cheques forwarded to him for salary and the second one for salary in lieu of notice but she declined.

7. On cross examination, Rw1 admitted that the claimant was never served with the respondent's HR policy and procedures. He further admitted that no prior appraisal was done on the claimant's performance before terminating her for the alleged under performance she also admitted the claimant was never served with any written warning or invited to any disciplinary hearing before the termination.

Analysis and Determination

8. There is no dispute that the claimant was employed by the respondent as a Secretary on 1.11.2012 and worked until 13.9.2013 when she was terminated. The issues for determination are:

(a) Whether the termination was unfair;

(b) Whether the claimant is entitled to the reliefs sought.

Unfair termination

9. Under section 45(2) of Employment Act, termination of employee's contract of serve is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. In this case, the reason for the termination was poor performance. Under section 43 of the Act, the burden of proving the reason for termination rests with the employer. In this case, Rw1 admitted that no performance appraisal was done before termination of the claimant's service. In my view the failure to do performance appraisal militates against the alleged poor performance because there was no basis for the alleged poor performance. Consequently, I find that the respondent has failed to prove the alleged poor performance.

10. As regards procedural fairness, Rw1 admitted that the claimant was never served with any written warning or show cause letter and she was never invited to any hearing to defend herself. Under section 41 of the Act, before terminating an employee's contract of service, the employer is required in mandatory terms to first explain to the employee in a language he understands, the reason for which termination is being considered. The said explanation must be done in the presence of another employee or shop floor union official of the employee's choice and the employee and his companion must be accorded a chance to air their defence for consideration before the termination is decided.

11. The employer having failed to prove the reason for the termination and that fair procedure was followed, the termination of the claimant contract of service was unfair and it is so declared.

Reliefs

12. Under section 49(1) of the Act, I award the claimant Kshs.30,000 being one month salary in lieu of notice plus Kshs.120,000 being 4 months' salary compensation for unfair termination. In making the said award, I have considered the short duration of service and the fact that no misconduct was proved or warning letter was adduced against the claimant to prove that she contributed to the termination.

13. The claim for service pay is dismissed because the salary vouchers produced showed that the claimant was contributing member of NSSF and under section 35(6) of the Employment Act, she was disqualified from claiming service pay. Likewise the claim for unremitted statutory deductions is dismissed for lack of evidence.

Conclusion and Disposition

14. For the reasons that the claimant's contract of service was unfairly terminated, I enter judgment for her in the sum of Kshs.150,000 plus costs and interest. The said award is subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE