



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2209 OF 2014

DINAH NERIMA.....CLAIMANT

- VERSUS -

IMAGINE IMC LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th July, 2018)

JUDGMENT

The claimant filed the statement of claim on 11.12.2014 through J.A. Guserwa & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) The declaration that the claimant suffered unfair and unlawful termination by the respondent.
- b) Damages for wrongful and unlawful termination.
- c) Payment of all the lawful terminal dues set up at paragraph 10 of the statement of claim being:
 - i. Pay in lieu of notice Kshs. 246, 989.00.
 - ii. Gratuity for 2 years at half salary per year Kshs.246, 989.00.
 - iii. 12 months compensation Kshs.2, 963, 896.00
 - iv. Total Kshs.3, 457, 846.00.
- d) Costs of the suit with interest thereon.

The memorandum of reply to the statement of claim was filed on 11.03.2015 through Kang'ethe & Mola Advocates. The respondent prayed for dismissal of the suit with costs.

The respondent's business includes marketing campaigns, advertising and merchandising. The claimant was employed by the respondent as a Studio Manager from 04.06.2012 to 04.07.2014. The claimant's job entailed supervision of the respondent's creative department's projects and managing staff in that department towards achieving the respondent's market share and profitability.

The claimant's employment was terminated by the letter dated 04.07.2014. The letter referred to the meeting of 31.05.2013 at which the claimant and her supervisor discussed the matters leading to the warning letter of 05.06.2013. The reasons for termination per the termination letter can be summarised as follows:

- a) The claimant had poor interpersonal skills leading to a negative effect on her leadership of the staff under her department as per the warning letter of 31.05.2013 which the claimant received and acknowledged by signing.
- b) After the warning letter it had been noted that the claimant had failed to make efforts to improve her interpersonal skills and exhibited a negative attitude towards work and projects under her role. She failed to offer solutions to problems but instead focused on the problem thereby offering no guidance or leadership on the way forward.

c) It had been noted that the claimant was often absent from duty without prior authorisation and without notifying her supervisory manager about the absenteeism. She was often late in arriving at the office without authorisation.

d) The claimant's behaviour was therefore unacceptable especially that she was a head of department as she was not a good example to her team and the rest of the employees.

e) Thus a thorough review of the claimant's personal attitude to work showed that the claimant lacked the qualities required of a head of department in the respondent's establishment.

f) The warning letter had conveyed that further incidents of the same nature would be subject to strict disciplinary action leading to summary dismissal without notice and without claims against the respondent. The respondent therefore terminated the claimant's contract of employment with immediate effect. He final dues would be paid being 4 days worked and 5 days of due leave payable after hand over and clearance. The claimant signed the acknowledging receipt of the termination letter. She signed below the statement thus, **"I acknowledge by my signature below the terms of my contract and certify that a disciplinary hearing was conducted with me present. I hereby agree to the decision as stated above."**

The claimant's case is that her dismissal on 04.07.2014 was in haste, arbitrary, summary, and unfair.

The **1st issue** for determination is whether the termination was unfair. The evidence is that the claimant received the warning letter of 05.06.2013. The letter confirms that the claimant and her supervisor held a meeting on 31.05.2013 and they discussed the claimant's intolerable lack of interpersonal skills and the expected immediate change. The letter further stated that if the claimant continued with the behaviour it would lead to summary dismissal by the respondent without any notice and without claims against the respondent. The notice of disciplinary meeting of 08.08.2013 shows that an oral warning was imposed against the claimant for being late at a staff meeting on 05.08.2013. The claimant signed the notice acknowledging that she had been counselled about her inappropriate conduct and informed of consequences if improvements are not made. Further, by the email dated 05.08.2013 the claimant wrote, **"I acknowledge that I arrived slightly late this morning for the staff meeting and did not excuse myself to either my HOD and the CEO who had called for the meeting. My apologies as assure not to repeat the same."** By the email dated 11.06.2013 addressed to the claimant, it was noted that the claimant had frequently been absent from work on account of seeing a doctor – 5 days in 2012, and 8 days in 2013; and the claimant was requested to advise if she had any medical condition and if yes, if she wished to take some days off to get better. The email reminded the claimant that only a maximum of 7 days of paid sick leave were allowable and thereafter, sick leave of 7 days on half pay. It is clear from the termination letter that the claimant was accorded a disciplinary hearing as she acknowledged as much. The Court finds that while according the claimant a disciplinary hearing per section 41 of the Employment Act, 2007, the notice in the section was not served. The respondent's witness and managing director (RW) confirmed that the respondent had a policy on termination process which entailed advice on the misconduct and 3 warning letters to be served – and that in the present case only 2 warning letters had been served.

The Court has considered the evidence. The Court returns that it has been established that the respondent failed to comply with its own policy on 3 warnings and a notice under section 41 was not served, even a shorter termination notice than was agreed upon in the alleged event of gross misconduct. It was in **Shankar Saklani –Versus- DHL Global Forwarding (K) Limited [2012]eKLR** that the Court held that a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract and as per section 44(1) of the Act.

The Court has taken all the evidence into account and finds that the respondent has established that as at the time of termination, the reason for termination was valid. The admissions of lateness and warnings are apparent on the claimant's record of service. The main procedural failure established is the respondent's admitted failure to serve a third warning per its policy. In that sense, the Court finds that the termination suffered a procedural defect especially in view of the respondent's submission thus, **"Although the claimant was terminated by the letter dated 4th July 2014, while the last warning was issued 8th August 2013 the management was giving her an opportunity to reform and improve on her misconduct which included frequent absenteeism, rudeness to colleagues. Unfortunately her misconduct and lack of capacity did not improve."** It is clear that from 08.08.2013 to termination on 04.07.2014 there was no 3rd warning letter as was expected under the policy. For that procedural infraction, the Court considers that a one month pay in compensation under section 49(1) (c) of the Act will meet ends of justice making **Kshs.246, 989.00** – the respondent not having provided evidence of any other last monthly gross pay. Otherwise, the Court finds that the claimant substantially contributed to her termination in view of the warnings and her admissions on record. She also signed agreeing to the disciplinary hearing and the dismissal. The Court therefore finds that she is not entitled to any further compensation under section 49 of the Act and as prayed for or a notice pay in lieu of termination notice in line with section 44(1) of the Act which entitled the respondent to terminate with no or shorter notice than the contractual or statutory notice. It was submitted that the respondent introduced new allegations against the claimant in the termination letter and which had not been subject of previous warnings. The Court returns that no manifest injustice can be deciphered because the claimant signed agreeing to the disciplinary hearing and the ensuing dismissal.

As submitted for the respondent, the claimant was a member of the NSSF and the Court returns that she is not entitled to gratuity as prayed for in view of section 35 (6) (d) of the Act.

The Court has considered the claimant's action of signing in agreement with the termination and all circumstances of the case and returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the parties with orders as follows:

a) The respondent to pay the claimant a sum of **Kshs.246, 989.00** by 01.10.2018 failing interest to be payable thereon at Court rates from today till full payment.

b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 20th July, 2018**.

BYRAM ONGAYA

JUDGE