



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 23 OF 2018

(Before D. K. N. Marete)

DORNAH CHERONO BOR.....CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter originated by way of Memorandum of Claim dated 1st February, 2018. The issues in dispute are therein cited as;

- a) *Unfair termination of employment.*
- b) *Unlawful withholding of termination dues.*

The respondent in a Memorandum of Response dated 20th June, 2018 denies the claim and prays that it be dismissed with costs.

The claimant's case is that on 1st April, 2011, she entered into a contract of employment. She served with diligence and continued to perform her duties accordingly and owing to this good performance was promoted to the position of NTD & Nurseries Officer vide a letter of 10th March, 2015. This position came up with new responsibilities and she rose to levels 1 grade E at a new salary of Kshs.2,485,913.00 per annum with fuel allowances of Kshs.377,148.00. These terms were accepted on 13th March, 2015.

The claimant's other case is that on 2nd October, 2015, she was served with a notice to show cause on allegations of violating the respondent's Code of Business Principles by assigning a former plucking supervisor, one, Florence Jepchumba duties far away from her house during expectancy and nursing period. This is expressed as follows;

8. *The respondent's show cause letter stipulated that a written response was required by 6th of October 2015 and she did a comprehensive written and serve on the respondent on the said date. Annexed and exhibited hereto as "DCB5" is a copy of the said written response.*
9. *The claimant was surprised by the timing and the intent of the show cause letter because the subject of the charges against her resigned on her own volition on 15th of August 2014 upon getting employment opportunity with James Finlay Company Limited.*
10. *Further, the alleged complaint related to the period of July-August 2014, and the complaint was lodged over one year and four (4) months after the alleged occurrence of the matter of the complaint, contrary to the provisions of clause 22 of the Human Resource Policy.*
11. *On the 7th of October 2015 the claimant was summoned through a letter for a disciplinary hearing that was slated for 8th October 2015. Annexed and exhibited hereto as "DCB 6" is a copy of the said letter.*
12. *The disciplinary hearing set for the 8th October 2015 did not proceed and the claimant was summoned again through a letter dated 13th of October 2015 for disciplinary hearing on the 19th of October 2015. Annexed and exhibited here to as "DCB 8" is a copy of the said letter.*
13. *The committee sat on the 19th of October 2015 and the through the claimant attended, the entire process came out as mock hearing process done for the sake of appearing to adhere to the law but the minutes taken on that day clearly indicate that the*

process was a sham, a scheme with a particular end and motive in mind. Annexed and exhibited here to as "DCB 8" is a copy of the said letter.

She lays down the particulars of the respondent's malice as follows;

- a. Purporting to hand a complaint that the alleged complainant, Florence Jepchumba, had neither lodged it nor was called testify.
- b. Purporting to rely on its human resource policy in the conduct of the disciplinary process based on spurious complaint while the same complaint, if any, was lodged by an anonymous individual more than the 5 days stipulated in the relevant human resource policy. Annexed and exhibited hereto and marked DCB 9 is an extract of the relevant part of the policy.
- c. Purporting to and relying on an investigation that was shoddily and discretely done, either intentional or by omission, which investigation had a pre-determined outcome in mind.
- d. Originating a sham complaint against the claimant based on a position in her employment that she did not hold.
- e. Concocting and pursuing a complaint that was not formally lodged by the alleged complainant, and which she was not willing to attend hearing to enable the claimant to cross examine.
- f. Pursuing a purported complaint which did not have any trace of the complainant having utilized any of the over ten avenues including other members of the management, the Human Resources office, Dignity Enhancement committee, Shop steward/Union committee, workers' committee, team leaders' forum, and welfare office among others.
- g. Purporting to discipline the complainant for a purported violation of the code of principles on nursing mothers yet the alleged complainant made no official request as per the nursing break guidelines. Annexed and exhibited hereto and marked DCB 10 is a copy of the Nursing Breaks Guidelines.
- h. Basing the disciplinary process on assumptions that the claimant ought to have known the needs of the particular alleged complainant from the over 1000 employees under her management at the time when the complaint and a marked denial of the chance to cross-examine the complainant.
- i. Taking the claimant through a disciplinary process based on allegations with no witnesses and with no written complaint and a marked denial of the chance to cross-examine the complainant.
- j. The investigator was not interested in extracting information and clarification on the issues surrounding the complaint but was intend on proving guilt of the claimant by all means, notwithstanding that the complainant refused to lodge a complaint herself and refused to testify even after joining another company.
- k. The complainant was intentionally bogged down with work of preparing the Capital and Expenditure budget by the same committee chair who presided over the purported disciplinary process; hence she did not have a chance to prepare adequately.
- l. The investigator report was availed and read to her at the hearing, it was not served on her or disclosed to her in advance to enable her prepare her defence and reply.
- m. The investigator was biased in her investigation and proceeded to sit in the same committee deliberating on the claimant's case.
- n. The disciplinary committee because of it pre-determined objective deliberately failed to consider the defense case as well as incriminating and exculpatory facts or circumstances of the case including the hailstorm damage in the fields.

The claimant's other case is that the termination of her employment was unfair

for want of reasons because:-

- a) The complaint on which her termination was grounded was never formally lodged by the complainant allegedly aggrieved but was by an anonymous caller whose motive could not be ascertained and who was never cross-examined.
- b) The disciplinary hearing process was biased, with a pre-determined outcome in mind and founded on a non-existing complaint.
- c) The procedure of the disciplinary hearing process was a contravention of the article 47 of the Constitution of Kenya as well as the provisions of sections 4(1), (2), (3)(a), (b), (f) and section 4 (4) (a) and (c) of the Fair Administrative Action Act, No.4 of 2015.
- d) The respondent originated a complaint in a manner shrouded in mystery and used it as a ground for the dismissal albeit the same being time barred according to its own Human Resource Policy under clause 22.4 paragraph 1 which required complaints to be lodged within five (5) days from the date of the event forming the complaint.
- e) The purported claimant despite having more than ten avenues or channels of having her grievances, never lodged any complaint with them and no single written complaint was availed from these forums or whatever other source.

f) *The purported hearing procedure was merely a ploy and a means of attaining the respondent's malicious schemes of terminating the claimant's employment while giving it an appearance of lawful procedure.*

The claimants further case is that being aggrieved by the summary dismissal whose hearing process was flawed she appealed to the Managing Director of the respondent but this was declined on 25th November, 2015.

She further faults her dismissal as follows;

24. *The claimant further submits that the unfair procedure and the manner of termination her employment was highly prejudicial for the following reasons:-*

- a) *It came at the backdrop of good performance posted by the claimant as evidenced by her promotion few months earlier.*
- b) *The termination was based on a purported complaint with no complainant, no written complaint, disguised investigation and a shambolic disciplinary hearing process.*
- c) *It violated her legitimate expectation of employment and earning as per the terms of employment contract by bringing it to an unlawful and abrupt end.*
- d) *She had not received any previous warning letters, the respondent was manifestly terminated the contract of employment unfairly.*

She claims as follows;

- a) *A declaration that the dismissal of the claimant from her employment was unlawful and unfair.*
- b) *The payment of damages in compensation for unfair termination of employment at the rate of her gross salary for the period of 12 months.*

Kshs.202,385 x 12=Kshs.2,428,620.

Respondent's 50% Pension contribution for the one (1) as part of compensatory damages Kshs.15,168 x 12=Kshs182,016

- c) *Payment of three months' salary in lieu of notice as per the letter of promotion*

Kshs.202,385 x 3=Kshs.607,155/=

- d) *The payment of all her terminal dues and benefits, all particularized as follows:-*

- i) *Pro rata wages earned for the period between 1st of October 2015 and 2nd of November 2015 computed as follows:-*

Kshs.202,385/26 x 28= Kshs.217,953.07

- ii) *Payment of unpaid 25 leave days for the year 2015 as per section 28(1) of the Employment Act.*

Kshs.202,385/26 x 25=Kshs.194,600.96

- iii) *Public Holidays and rest days worked but not paid*

For the year 2012:

18 days x 202,385 x 2 = Kshs.194,600.38

For the year 2013:

16 days x 202,385/26 x 2= 249,089.23

For the year 2014 and 2015:

22 days x 202,385/26 x 2=342,497.69

Totals of (a), (b), (c), and (d) =4,502,157.33

- e) *An order directing the respondent to issue the claimant with a Certificate of Service.*

She prays as follows;

- a) *A declaration that the Respondent's dismissal of the Claimant from his employment was wrongful and unfair.*
- b) *Payment of damages of Kshs.2,610,636/= for the unfair termination of employment as particularized in paragraph 25(b)*
- c) *Payment of Kshs.607,155/= being three months' salary as compensation in lieu of notice as particularized in paragraph 25(d) totaling Kshs.1,284,366.33.*
- d) *An order directing the Respondent to pay the Claimant his terminal dues and benefits of as particularized in paragraph 25(d) totaling Kshs.1,284,366.33.*
- e) *Cost of the suit;*
- f) *Interests on (b), (c) and (d) above at court rates till payment in full.*
- g) *Such other relief as this honourable court may deem fit and just.*

The respondent denies the claim and further states that the suit as filed is bad in law inept, ambiguous and does not sufficiently disclose proper particulars of the claim and/or the cause of action and may be struck out with costs.

The respondent admits the statement of claim on promotion, show cause and disciplinary process but contradicts this as follows;

- *...the claimant was indeed issued with a show cause letter for defying the Respondent's Code of Business Principles and any allegations to the contrary are denied.*
- *...the respondent denies in toto allegations stated paragraph 13 and 14 and avers that the disciplinary hearing was conducted as per the provisions of the Employment to ensure that there is procedural and substantive justice at all time by the respondent.*
- *...the claimant denies that the grievant was unlawfully, wrongfully and/or unfairly dismissed and avers that the grievant was lawfully and fairly dismissed from employment after having been given a notice to show cause why she should not be dismissed, having been given a chance to defend herself and failed to show cause as to why she should not be dismissed for having defied the Respondent's Code of Business Principles. The defendant invites strict proof of the averment of paragraph 15 and 16 of the memorandum of claim.*
- *...the claimant was summarily dismissed on grounds on grounds of defying the Respondent's Code of Business Principles and strict proof is invited for any allegations to the contrary.*
- *...after the hearing the panel concluded that the explanations given were unsatisfactory and the offence amounted to gross misconduct and the Respondent therefore on the grounds and in accordance to section 44(4) of the Employment Act summarily dismissed the claimant.*

The termination from employment therefore remains lawful and unquestionable.

The matter came to court variously until the 23rd July, 2018 where the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in her written submissions dated 14th September, 2018 reiterates her claim and submits a case of unlawful termination of employment.

It is her case that her termination of employment was biased and malicious and further that the respondent did not adduce sufficient reasons for her termination in contravention of section 43(1) of the Employment Act, 2007 as follows;

43 (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

The claimant further submits a case of lack of substantive and procedural fairness as provided by section 41(1) and (2) of the Employment

41 (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

She also seeks to rely on the authority of **Michael Dowling vs. Workplace Safety & Insurance Board [2004] CAN LII 436 92**, which was cited in **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** where the court stated;

“It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.”

The respondent’s in her written submissions also reiterates her case of lawful termination of employment. It is her submission that the respondent in awarding duties to Florence Jepchumba clearly flouted the respondents Code of Business Principles and Nursing Break Guidelines. This was not denied by the claimant. She puts it thus;

The claimant being the manager of the relevant unit was thus required to be the one who was in the fore front of enforcing there guidelines. Instead the claimant went ahead to allocate the concerned employee work in very distant fields not taking into consideration her obtaining condition. She admits in page 10 of the disciplinary meeting minutes that she allocated the far fields only that in her defence she says this was for about 6 days this was when the employee was expectant. In page 11 of the said minutes she confirms that the employee was still allocated far fields only that in her defence she said that she did not know that the subject employee had already delivered a child. Indeed your lordship this cannot be taken to be a valid reason since she had confirmed that she knew the employee was expectant and had gone for maternity leave. It w as also subsequently confirmed in the said meeting that the claimant has written a statement earlier on the 29th September 2015 which confirmed that she knew that the employee had delivered. Her defence remained that she had not physically seen the baby!

Again,... in the rest of the minutes it is evident that the respondent was justifiably concerned as to how and why the claimant inhumanly treated a junior employee to the extent that the employee had seek employment elsewhere. The evidence of the inconsiderate allocations form part of the minutes and indeed the claimant does not dispute them. This was in clear contravention to the Code of Business Principles and Policies (see document 10 in respondent’s list of documents) which required that all employees must respect the dignity and human rights of colleagues and those they come in contact with as part of their jobs.

This is a long story. However, the claimant’s case takes sways in the circumstances. It is her case that her dismissal was not concomitant with the alleged offence of misconduct by herself, inasmuch as she admitted this. However awful the conduct of the claimant was in the allocation of duties to the expectant and nursing mother employee, something does not add up in the execution of her sentence or punishment of summary dismissal.

Further, the claimant brings out a clear case of a disciplinary process that was not especially transparent. Her appeal against dismissal is also denied by the highest authority of the respondent. This is all suspect. It stinks of a hidden agenda in the entire exercise of dismissal. It also rings the bell of the claimant’s citation and reliance on the authority of **Michael Dowling** aforesaid. The context of the misconduct in this case did not warrant such a determinate punishment. I therefore find a case of unlawful termination of employment of the claimant by the respondent and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and award a relief as follows;

- i. A declaration be and is hereby issued that the dismissal from employment of the claimant by the respondent was wrongful, unfair and unlawful.
- ii. One (1) months salary in lieu of noticeKshs.204,909.40.
- iii. Twelve (12) months salary as compensation for unlawful termination of employment 204,909.40 x12...Kshs. 2,458,913.00

Total of claim.....Kshs. 2,663,822.00

iv. The respondent be and is hereby ordered to meet and pay the claim per (i) and (ii) above within thirty (30) days of this judgement of court.

v. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kiprono instructed by Mutai, J. K. & Company Advocates for the claimant.
2. Mr. Muchella instructed by Murimi, Ndumia, Mbago & Muchalla Advocates for the respondent.