



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 972 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

ALEXINA KERUBO MISARO.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

JUDGMENT

The Claim herein is filed by Alexina Kerubo Misaro alleging wrongful and unlawful termination of her employment and failure by the Respondent to pay her terminal benefits based on her salary. She seeks the following reliefs:

- (i) The sum of all moneys allowances and benefits due to her from the time of interdiction to date.
- (ii) Terminal benefits due
- (iii) General, aggravated, exemplary and/or special damages, whichever combination the Court may deem fit and expedient
- (iv) Costs of this suit
- (v) Interest in (i), (ii) and (iii) above
- (vi) Any other reliefs the Honourable Court may deem fit.

The Respondent filed a Reply to the Memorandum of Claim which was amended by leave of the Court in which it admits that the Claimant was its employee. It is further admitted that the Claimant was terminated from the Respondent's employment. The respondent however contends that the termination was on grounds of gross negligence of duty and loss of confidence in her continued service.

It is further contended in the Reply that as a result of the Claimant's gross negligence the Respondent lost Kshs.761,710, which is the basis of the Respondent's counter claim.

At the hearing of the claim the Claimant represented by the firm of Swaka Advocates testified on her behalf while the Respondent acting through the firm of Kwengu & Company Advocates called one witness, Teresa Sakuda. The parties thereafter filed and exchanged written submissions.

On 3rd October 2016, the Claimant in her testimony stated that she was employed by the Respondent in the year 1991. She went through the process of probation and was later confirmed on 23rd November 1993. It was her testimony that she was promoted to position of Postal Officer II with a salary increment and later on in acting capacity as Postal Superintendent.

On 10th August 2006 she received a letter of interdiction followed by a letter of termination on 17th October 2007 without any prior oral hearing. The termination at the time was pegged on a matter before the Makadara Law Court (Criminal Case Number 4234 of 2006) that was at the time undecided, in which the Claimant was charged with the loss of 761,710 during her tenure as Post Master at Mobil Plaza, Nairobi.

It was the Claimant's evidence that the Criminal matter was later dismissed on 15th July 2011 and she was acquitted. It is further the Claimant's evidence that she did write a letter of Appeal to the Respondent following her termination, which letter was never responded to by the Respondent.

On cross examination the Claimant stated that as the Post Master she was in charge of operations and all staff as well as safety of the facility. Further that the show cause letter issued to her was on negligence of duty for the loss. She went on to indicate that the monies were kept in a safe which was accessible by other staff members as the main door was unlockable, a matter she had brought to the Respondent's knowledge earlier but no action was taken.

The Respondent's case was heard on 30th July 2018, with RW1, TERESIA SAKUDA giving evidence on behalf of the Respondent. It was RW1's evidence that she is the Employee Relations Manager of the Respondent, whose duties include employee discipline and staff welfare. RW1 confirmed that the Claimant was indeed employed by the Respondent and was dismissed on 16th October 2007 for gross negligence of duty.

RW1 further stated that on 1st August 2006 the Respondent Company received a report on the loss of Kshs.761,710. Subsequently investigations were conducted and a report prepared on the matter. It was RW1's evidence that the report indicated that the loss was due to the fact that the door leading to the safe where the monies were kept was left unlocked. She further testified that the Claimant was subsequently charged for the loss.

RW1 reiterated that the Claimant was dismissed on account of gross negligence and loss of confidence.

The parties thereafter filed and exchanged written submissions.

Claimant's Submissions

The Claimant submitted that her termination was not lawful due to the following reasons:

1. She was dismissed from service without any warning written or oral and without due regard to the procedure for summary dismissal.
2. That allegations of loss of funds that precipitated a charge of two counts of stealing by a person employed in the public sector at the Chief Magistrates Court at Makadara Criminal Case Number 4234 of 2006 was dismissed and the claimant was acquitted of the said charges.
3. There was never an internal hearing by the Respondent thereby denying the Claimant an opportunity to be heard. She was condemned unheard which is unfair contrary to the provisions of Article 50(1) of the Constitution of Kenya, 2010 that gives every person the right to fair hearing. In addition Article 47 (1) states that **"... every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair..."**
4. There was no previous disciplinary action taken against the Claimant and she therefore did not qualify for summary dismissal.

It is further submitted that under Section 45 (1) of the Employment Act, 2007 it is provided that no employer shall terminate the employment of an employee unfairly. The Claimant relied on the decision in **Sarah Wanyanga Muchiri Vs Rev. Bishop Henry Kathii (2013) eKLR**, in which the Court relied on **British Leyland UK Limited V. Swift 1RLR 91**, where Lord Denning stated as follows:

"The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would dismiss him, then the dismissal was unfair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss, then the dismissal must be upheld as fair even though some other employers may not have dismissed him."

It is further submitted that what the Court needs to determine is whether the reason/s for termination were valid. For this the Claimant relied on the provision of Section 43(1) and (2) of the Employment Act.

The Claimant further relied on the case of **Sylvanus Otieno Odiaga V Attorney General (2014) eKLR**.

The Claimant prayed that the instant suit be allowed as prayed.

Respondent's Submissions

The Respondent submitted that the Claimant's termination was on grounds of gross negligence of duty and loss of confidence in her continued service, that the respondent has demonstrated that the reason for termination was valid and fair procedure was followed.

It is submitted that the Respondent complied with the provisions of Section 41(2) of the Employment Act, 2007 as the reasons for termination were brought to the Claimant's knowledge before termination. For this the Respondent cited various authorities among them – **Jackson Butiya –v- Eastern Produce Kenya Limited (Industrial Cause No. 335 of 2011** where the Court held as follows;

"An employee who squanders the internal grievance handling mechanisms provided by the employer cannot come to Court and say "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal grievance handling process between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law."

The respondent also relied on the case of **Matthew Luch Cherusa –V- Poverelle Sisters of Belgamo (2013) eKLR** where the Court held that:-

“I find that the Claimant failed to avail herself of the internal grievance handling procedure provided by the Respondent and cannot therefore complain that she was not heard. For this reason the claim for unfair termination and one month’s salary in lieu of notice fail and are hereby dismissed.”

The Respondent further submitted that the termination was lawful and that the Claimant is not entitled to the reliefs sought in her memorandum of Claim.

On the issue of terminal dues, it is the Respondent’s submission that the Claimant is not entitled to the same as she has neither specified nor has she quantified the same in her Claim.

The respondent submitted that it is entitled to the award in its Counter Claim.

The Respondent urged the Court to dismiss the Claim with costs and allow the Counterclaim for Kshs.761,710/- with costs to the Respondent.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties, the following are the issues for determination:

1. Whether the termination of the Claimant’s employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought
3. Whether the Respondent is entitled to the counterclaim
4. Who bears the costs of the suit

The Law

The claimant’s employment was terminated by letter dated 16th October 2007 before the coming into operation of the Employment Act 2007 whose date of commencement is 2nd June 2008. The claimant’s case is therefore to be determined under the regime of the Employment Act, No. 2 of 1976 (now repealed). Section 16 thereof provided as follows –

Payment of wages in lieu of notice.

16. Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection.

There was no requirement for justification of grounds of termination under the law applicable at the time of the termination of the claimant’s employment.

In the present case, the claimant was first interdicted by letter dated 10th August 2006, following the loss of funds at the Post Office, Mobil Plaza. By letter dated 8th May 2007, the claimant was charged with gross negligence of duty and required to give a written explanation within 48 hours. Her response dated 22nd May 2007 from Kiage and Company Advocates, her lawyers, was that the claimant having been charged with Criminal Case Number 4234 of 2006, the matter was *subjudice* and the claimant should not be required to deal with the disciplinary process. The claimant having failed to respond to the charges, the respondent summarily dismissed her by letter dated 16th October 2007.

Based on the fact that the law then in operation did not require the respondent to give an employee a hearing and the respondent nevertheless having asked the claimant to defend herself and the claimant having declined to do so, she cannot complain about the summary dismissal having been unfair, even under Section 41 and 43 of the Employment Act, 2007. As was stated by Ndolo J. in JACKSON BUTIYA –V- EASTERN PRODUCE KENYA LIMITED –

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”

The same position was taken in **Mathew Lucy Cherusa -vs- Poverelle Sisters of Belgamo [2013] eKLR**, where Ndolo J. held as follows; -

“I find that the Claimant failed to avail herself of the internal grievance handling procedure provided by the Respondent and cannot

therefore complain that she was not heard. For this reason the claims for unfair termination and one month's salary in lieu of notice fail and are hereby dismissed."

In **David Njeka -vs- Lavage Dry Cleaners Limited [2013] eKLR**, where Ndolo J. held as follows; -

"In normal practice an internal disciplinary process is triggered by correspondence between the employer and the employee. By declining to present his written explanation as required by the Respondent, the Claimant effectively locked himself out of the internal disciplinary/grievance handling process. He cannot therefore be heard to say that he was not given an opportunity to defend himself. For this reason, the Claimant's claim for unfair termination fails and is hereby dismissed..."

Similarly, in **Jennifer Osodo -vs- Teachers Service Commission [2013] eKLR**, where Ndolo J. held as follows; -

"I need to add that an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend the disciplinary proceedings at their convenience. I have examined the facts and circumstances of this case and I am satisfied that the Respondent afforded adequate opportunity to the Claimant to defend herself but she threw away the opportunity..."

The foregoing being the case, the claimant's claim must fail and is accordingly dismissed.

The respondent counterclaimed the sum of Kshs.761,710 being the amount of money lost by the respondent as a result of the claimant's gross negligence. The evidence on record is that this money was stolen from a safe in the respondent's office which was left unlocked. This amount had never been demanded from the claimant. RW1 who testified on behalf of the respondent only mentioned the money with respect to the reason for dismissal of the respondent on grounds of gross negligence but did not mention the counterclaim.

The issues raised by the claimant about possibility of other persons holding the keys to the safe was never responded to by the respondent. The respondent further did not respond to claimant's averments that the issue of security of the office had been raised and the respondent did nothing about it. The claimant was acquitted of the charges of stealing the money. As was observed in the judgment –

"It has not been shown that the 1st accused was the sole custodian of the said keys. When 1st accused took over, the keys to the said safe was not changed and one cannot rule out other possibilities of other staff having access to the said keys or the duplicates. The security guards reported at 6.00 p.m. and the staff ah delft at 5.00 p.m. The post office was therefore left unguarded for the time between 5.00 p.m. and 6.00 p.m. and one cannot rule out the shown that someone else accessed the premises during that one hour. The circumstances surrounding this case do not solely point to the accused person to the exclusion of all others. When the securing guard discovered the doors were not locked and informed his in charge, they did not contact the post master to goa back to the office and lock and it is also possible that someone else could have accessed the office after that and stolen. It is also not been possible that the accused person deliberately left the doors open. They were not the only one in a position to steal the money as submitted by the defence. It was also admitted by PW4 that other post matters before the 1st accused had handled the post master's key."

I find that the respondent has not proved that the claimant is liable to the respondent in the sum of Kshs.761,710 claimed in the counterclaim. Consequently, I find the counterclaim not proved with the result that the same is also dismissed.

In the end I dismiss both the claim and counterclaim with each party meeting their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE