



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NUMBER 1159 OF 2013

CAROLYNE MUNALA.....CLAIMANT

VERSUS

HOGGERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 23.7.2013 claiming the following reliefs:

- a) One month salary in lieu of notice.....21,740.00
- b) Salary for 7 days worked on 7.4.2013.....5,853.80
- c) 84 accrued leave.....70,240.80
- d) Overtime.....1,106,028.00
- e) Salary for March 2013.....21,740.00
- f) 140 public holidays.....117,068.00
- g) Severance pay for 14 years.....175,602.00

h) 12 months salary compensation for unfair Loss of employment.....300,012.00

TOTAL Kshs. 1,818,281.20

- i) Certificate of service.
- j) Future salary at the rate of Ksh.21,740
- k) Costs of the suit.

2. It is the claimant’s case that she was employed by the respondent on 1.4.1999 as a cook but later rose the ranks to become Assistant Manager earning Kshs.21,740 per month. It is further her case that she worked for 14 years without any disciplinary issue until 28.3.2013 when he was served with Notice of the decision to terminate her services from the respondent. The Notice cited deliberate alteration and misrepresentation of stock counts on multiple occasions. That, the notice suspended her without pay for 3 days pending service of termination letter. The termination was finally served on 7.4.2013 before any hearing being accorded to her despite her request for a hearing. It is her further case that the alleged misconduct was false and an attempt to taint her good employment records.

3. The respondent admitted the employment relationship between her and the claimant as pleaded by the claimant. She however denied that the claimant served with a clean disciplinary record. She contended that between October 2012 and March 2013, the claimant was involved in claims of missing stock and shrinkages, incorrect purchases and stocking expired products. She further averred that she conducted investigation through her Stock Controller and confirmed there were indeed irregularities in stock records, purchases, shrinkages, stocking of expired products, documentation, missing stock, exaggerated stock reports and records.

4. As a result of the foregoing matters, the respondent served the claimant with a show cause letter dated 28.3.2013 inviting her for a hearing but the claimant declined to be taken through disciplinary hearing. Consequently, she served the claimant with the termination letter dated 7.3.2013 and calculated her dues but the dues were not collected. She denied the claimant's claim for leave contending that she took all her annual leaves every year without failure. She further denied the claimant's claim for compensatory damages and contended that the termination was fair and lawful because it was based on misconduct under section 44(4) (c) of the Employment Act. She therefore prayed for the suit to be dismissed with costs.

5. On 17.4.2018 the parties agreed to dispose of the suit by written submissions.

Claimant's Submission

6. The claimant submitted that her termination was unlawful and unfair both procedurally and substantively. On the procedure, she submitted that the termination was not in accordance with justice and equity as required by section 45(4) (b) of the Employment Act. She submitted that she was not served with a prior notice as required by section 35(1) of the Employment Act, or given prior hearing under section 41 of the Act. Finally, she was not issued with a certificate of service after termination as required by section 51 of the Act.

7. On the substantive unfairness, the claimant denied that she negligently or poorly performed her duties as alleged by the respondent. She relied on the following precedents to fortify that view, *Agnes Yahuma Digo Vs PJ Petroleum Equipment Limited* and *Jane Samba Mukala Vs Ol Tukai Lodge Ltd* (both authorities not availed to the Court). She therefore urged that the reliefs sought should be granted because the termination was not only abrupt but unfair and unlawful.

Respondent's Submissions

8. The respondent on the other hand submitted that, the termination of the claimant's services was fair and lawful because it was grounded on a valid reason and the claimant was accorded a chance to defend herself but she declined. On the substantive fairness, the respondent urged that the reason for the termination was negligent, careless and improper performance of her work which amounted to both gross misconduct and poor performance of her work.

9. She specifically accused the claimant of concealing receipts for purchase and delivery of goods; concealing Kshs.10,000; failing to account for missing stock and shrinkages; stocking of expired products; and incorrect purchasing of products. She submitted that the said offences were committed between October 2012 and March 2013 and the claimant did not defend herself within the time given to her before the termination. She relied on *Judicial Service Commission Vs Gladys Boss Shollei and Another [2014]eKLR* to urge that the claimant's misconduct of improper performance of duty was incompatible with the terms of the employment relationship which required her to perform her duties professionally.

10. As regards the procedure followed before the termination, the respondent submitted that, the claimant was invited by the letter dated 28.3.2013 to request for a disciplinary hearing under section 41 of the Act but she declined. The respondent therefore urged that she was justified to dismiss the claimant after failing to utilize the opportunity given to clear her name. She relied on *Esha Chizi Lugogo vs Pact Kenya [2013]eKLR* to urge that an employee who squanders opportunity for hearing provided by the employer cannot turn back and accuse the employer of dismissing him without prior hearing. She therefore prayed for the suit to be dismissed and the claimant be ordered to conclude her clearance so that she can be issued with a certificate of service and be paid the Kshs.21,428 computed after the termination.

Analysis and determination

11. After careful consideration of pleadings, evidence and submissions filed, the issues for determination are:

- a) Whether the termination of the claimant's contract of service was unfair and unlawful.
- b) Whether the reliefs sought should be granted.

Unfair termination

12. Under section 45 of the Employment Act termination of employee's contract 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. Reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or employer's operational requirements. Procedure is fair if the employer accords the employee a hearing before termination and thereafter issues him with a certificate of Service and pays any terminal dues payable

Reason for termination

13. In this case, the reason for termination was misconduct and poor performance. The claimant was accused of missing stocks and shrinkages, incorrect purchases, stocking expired products and concealment of or undeclared cash. The claimant was notified of the said offence by the letter dated 28.3.2013. The respondent described the said letter as a show cause letter but the claimant denied that it was a show cause letter.

14. Whatever name one assigns to the letter, my observation is that it framed charges of misconduct against the claimant, suspended her for 3 days without pay and invited her to accept a termination after 3 days or request for a disciplinary hearing to defend herself from the charged offences. There is no dispute that the claimant received the said letter and signed indicating in writing that she did not intend to undergo any disciplinary hearing.

15. That refusal to go through the hearing meant that she had no defence to offer and the employer was justified to believe that she was guilty of the offences charged by the letter. Section 43(2) of the Employment Act defines reasons(s) for termination of contract of service thus:

“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.” (Emphasis mine)

Procedure followed

16. It is now common knowledge that the claimant herein was given an opportunity vide the employer’s letter dated 28.3.2018 to choose whether to undergo a disciplinary hearing or be served with termination letter. She however declined to undergo the disciplinary hearing as shown by the copy of the letter dated 28.3.2018 she produced as Appendix 6(a). She cannot therefore accuse the employer for dismissing her without according her prior hearing.

17. The foregoing view is fortified by *Esha Chizi Lugogo Vs Pack Kenya [2013]eKLR* where Ndolo J cited with approval *Jackson Butiya Vs*

Eastern Produce Limited, where this court held that:

“An employee who squanders the internal grievance handling mechanism 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 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.”

Reliefs

18. It must be clear by now that the termination of the claimants contract was grounded on a valid and fair reasons and that she was accorded an opportunity defend herself but declined. I therefore return that the termination was fair within the meaning of section 45 of the Employment Act. Flowing from the foregoing, I dismiss the claim for salary in lieu of notice and compensation for unfair termination.

19. The claim for severance pay is also dismissed because the termination of the claimant was not on account of redundancy. The proper terminal benefit to seek was gratuity under Regulation of Wages (Hotels and Catering Trades) Order, because she had served for more than the minimum years required to qualify for the said benefit.

20. The claim for 7 days worked in April 2013 is allowed being Kshs.5,853.10. She will also get Kshs.25,084.60 as 30 leave days as computed by the employer. The employer’s contention that the claimant went for all her annual leaves was not contested. The claimant will also get pay for 12 public holidays worked as computed by the employer being Kshs.10,033.85. The claim by the respondent that the holidays worked were 140 was not supported by any evidence.

21. Finally, the claim for overtime and salary for March 2013 is dismissed for lack of evidence. The claimant is however granted the prayer for certificate of service.

Conclusion and disposition

22. For the reasons that termination of the claimant was fair, I dismiss the claim for compensatory damages. However, enter judgment for her in the sum of **Kshs.40,970.95** plus half costs and interest from the date of filing suit. The said sum shall be paid less statutory deductions.

Dated, signed and Delivered in Open Court at Nairobi this 30th day of November, 201

ONESMUS N. MAKAU

JUDGE