



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2448 OF 2012

MARY MWINJI.....CLAIMANT

v

AFRICA POLICY INSTITUTE.....RESPONDENT

JUDGMENT

1. Mary Mwinji (Claimant) was offered employment by Africa Policy Institute (Respondent) through a contract signed on 28 January 2011 as an Office Administrator. The contract was to expire on 4 January 2012.
2. On 7 November 2011, one of the Respondent's directors wrote to the Claimant to inform her that it had been decided to summarily dismiss her.
3. The Claimant was aggrieved, and on 6 December 2012 she instituted legal proceedings against the Respondent alleging that the dismissal was wrongful and unfair. She sought a total of Kshs 511,500/-.
4. On 5 October 2015 the Claimant filed an *Amended Memorandum of Claim* after securing leave of the Court on 21 September 2015.
5. The Respondent only filed a Response on 25 September 2017, although it had been given 14 days after service of the *Amended Memorandum of Claim*.
6. The Cause was heard on 18 April 2018 and 4 July 2018 when the Claimant testified and on 12 July 2018 when the Respondent's Chief Executive Officer/Founding President testified.
7. The Claimant filed her submissions on 15 August 2018 while the Respondent filed its submissions on 31 August 2018.
8. The Court has considered the pleadings, evidence and submissions and adopted the Issues for determination as set out in the Claimant's submissions.

Unfair termination of employment

Procedural fairness

9. The Claimant challenged her dismissal on the grounds that she was not given notice of termination or reasons for the termination.
10. During testimony, the Claimant admitted that she was accused of being responsible for the loss of Kshs 10,000/- by the Accountant and that she attended three meetings at which the question of the loss were discussed but still contended that she was not afforded an opportunity to be heard.
11. The Respondent's witness on the other hand maintained that investigations were held and a hearing involving the Claimant conducted on 21 October 2011 and 4 November 2011 respectively.
12. The witness testified that a neutral person was invited to chair the hearing, and that the Claimant was afforded an opportunity to make representations before the decision to dismiss was taken.
13. The Respondent also filed minutes of a meeting dated 7 November 2011 and the minutes indicate that Claimant was questioned and made representations.

14. The process envisaged by section 41 of the Employment Act, 2007 does not require an employer to conduct a hearing with the strictures of a court-room proceeding.

15. With the admission by the Claimant that she attended some meetings where the question of the loss of Kshs 10,000/- was the subject, and the Respondent's evidence that there was an outsider chairing the hearing remaining unrebutted, the Court is satisfied that the bare minimums of procedural requirements as contemplated by section 41 of the Employment Act, 2007 were met.

Substantive fairness

16. Pursuant to sections 43 and 45 of the Employment Act, 2007, it is incumbent upon an employer to prove the reasons for terminating the services of an employee, and that the reasons were valid and fair.

17. It was therefore the obligation of the Respondent to prove that the Claimant was responsible for the loss of the Kshs 10,000/-.

18. It is not in dispute that the Respondent's Director and witness in this case gave the Accountant Kshs 200,000/- as part of wages and that in the course of counting and preparing the employees' wages, the Accountant was assisted by 2 other employees including the Claimant, and that the Kshs 10,000/- got lost in the course of that process.

19. It was also not disputed that the Claimant did not share offices with the Accountant (she shared the office with 3 Researchers).

20. The Accountant was not called to testify. It is not clear where she kept the money after receiving it from the Director up to the time it was being counted and paid out. It is probable that the staff who shared the office with the Accountant had the opportunity to take the money.

21. In the view of the Court, the Respondent did not prove that it was the Claimant who was responsible for the loss of the Kshs 10,000/- as opposed to the other staff who shared the office with the Accountant and who had the opportunity to take the money.

22. The Court finds that the Respondent did not discharge the burden placed on it, and hence the dismissal was substantively unfair.

23. With the finding of unfairness, the Court is of the view that the equivalent of 2 month gross wages as compensation would be appropriate considering the Claimant's length of service.

24. The Court also finds that the Claimant is entitled to 1 month pay in lieu of notice by dint of section 35 of the Employment Act, 2007.

October 2011 salary

25. The Claimant testified that she was not paid the salary for October 2011. The Respondent's witness maintained that the salary was paid.

26. Without the records as contemplated by section 20 of the Employment Act, 2007, the Court finds that the Respondent did not pay the Claimant the salary for October 2011.

27. The Claimant did not work after 7 November 2011 and would not be entitled to the wages after that date.

Leave

28. The Respondent's witness admitted that the Claimant did not take leave during the 11 months of employment.

29. In terms of section 28(1)(b) of the Employment Act, 2007 the Claimant was entitled to commutation of the leave on *pro rata* basis (about 18 days with full pay).

Certificate of Service

30. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant forthwith.

Conclusion and Orders

31. The Court finds and holds that the summary dismissal of the Claimant though procedurally fair was substantively unfair and awards her

(a) Pay in lieu of notice Kshs 30,000/-

(b) Accrued Leave Kshs 30,000/-

(c) Compensation Kshs 60,000/-

TOTAL Kshs 120,000/-

32. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 9th day of November 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Itonga instructed by K. Itonga & Co. Advocates

For Respondent Mr. Kiarie Mungai instructed by Nchogu, Omwanza & Nyasimi Advocates

Court Assistant Lindsey