



REPUBLIC OF KENYA

IN THE INDUSTRIAL OF KENYA COURT AT NAIROBI

CAUSE NO. 2050 OF 2012

(Before D. K. N. Marete)

ANNE WINO MISUMI GUMBI.....CLAIMANT

VERSUS

YOUTH ENTERPRISE DEVELOPMENT FUND BOARD.....RESPONDENT

JUDGEMENT

This matter was originated by way of an Amended Statement of Claim amended on 20th September, 2012. It does not disclose any issue in dispute on its face.

The respondent in a Memorandum of Response dated 7th November, 2012 denies the claim and prays that it be dismissed with costs.

The claimant's case is that at all material times to this claim, she was employed by the respondent first, as a Marketing and Linkage Scheme officer of Kisumu office. She reported to the Credit Manager and her employment was effective from 14th October, 2009.

The claimant's further case is that she entered into an employment contract detailing the terms of her employment thereof.

The claimant's other case is that on 27th March, 2012, she was summarily dismissed in contravention of the contract of employment. As part of this contract, she was entitled to annual leave, pension, leave allowance, accrued salary arrears as such employee.

The claimant lays claim to eleven days untaken leave and three months salary in lieu of notice of termination as follows;

a. Leave days @ Kshs.4,780/= per day for 11 days =Kshs.52,584/=

b. Three Month's salary in lieu of Notice @ 145,404.00=Kshs.436,212/=

She had put in two and a half years of service.

She prays as follows;

a) Reinstatement to employment without any loss of benefits or break in years of service.

b) In the alternative to prayer (a) above the sum of Kshs.488,796/=

c) General and Exemplary Damages for unlawful termination

d) Costs of the suit.

e) Interest in (a) (b) and (c) above.

f) Any other relief that this Honourable court may deem fit to grant.

The respondent's case is one of denial of the claim.

It is her case that the effective date of the employment of the claimant is 1st November, 2009 and not as pleaded.

The respondent's further case is that this employment was governed by the terms set out in the letter of appointment, the respondent's Human Resources Policies and Procedure Manual and the relevant labour laws of Kenya. She was expected to practice good corporate governance in the organization to ensure optimum utilization of the *Fund* resources to establish her goals.

The respondent's other case is that on or about December, 2011 the claimant was transferred to Kisumu to take charge of Siaya, Kisumu, Homa Bay, Migori, Kisii and Nyamira counties but only reported and thereafter deserted duty. Upon investigations, it was established that in the months of January and February she was in office for less than ten (10) days. She was involved in other serious cases of misuse of the respondent's resources and abuse of office,

insubordination, misrepresentation and general gross misconduct.

The respondent's case further comes out as follows;

10. Vide a letter dated 27th March, 2012, the respondent acting pursuant to the provisions of clause 2.26.4(a) (c) of the respondent's Human Resources Policies and Procedure Manual, summarily dismissed the claimant.

11. The claimant was also surcharged to refund three (3) months' salary earned since January without working plus an imprest amount of Kshs.50,000/= that was given to her to run the office and she failed to utilize for the intended purpose.

12. In addition, the Respondent conducted an internal audit on the Claimant regarding various falsifications of funds at the Nairobi Show and Busia County Trade Fair, and a summary of the report was forwarded to the Claimants advocates.

13. In the report, the Claimant was found to have misappropriated or misused the Respondent's resources and she was surcharged to refund an amount totaling to Kshs.698,400.

14. The respondent's Human Resource Policies and Procedures Manual at clause 2.26.6 entitled the claimant to lodge an appeal against the dismissal in writing within six weeks. She ignored the said appeal process.

17. The respondent avers that since her dismissal and despite several reminders, the claimant has failed to clear or hand over the respondent's assets (and specifically a lap top computer) allocated to her and the amounts she has been surcharged.

The respondent in the penultimate avers that the claim is unworthy of attention for its frivolity and is an outright abuse of the process of court.

The matter variously came to court until 21st November, 2018 when it was heard *inter partes*. The hearing was a recital and reiteration of the parties respective cases as pleaded and expressed.

The issues for determination therefore are;

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

The 1st issue for determination is whether termination of the employment of claimant wrongful, unfair and unlawful. The claimant in her written submissions dated 24th October, 2018 reiterates her case of unlawful termination of her employment by the respondent.

It is her case and submission that she was not afforded a hearing before summary dismissal by the respondent. This she argues is an outright contravention of section 41 of the Employment Act, 2007. This was also an upfront of the respondent's Human Resource Manual which guarantees all staff facing disciplinary process a fair hearing and also provides the steps to be undertaken by the respondent. These are;

- i. Verbal warning*
- ii. Written warnings (first, severe and final warnings as per the code of conduct)*
- iii. Show cause letter*
- iv. Termination*

On this and in further support of her case she relies on the authority of **Godfrey**

M. Mae vs. Equity Bank Limited, Cause No. 71 of 2013 where the court observed as follows;

“The procedures set out in the Respondent's Human Resource Policy Manual must be seen as in addition to and not in place of the basic minimum requirements provided for in section 41 of the Employment Act.

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

It cannot be disputed that the Claimant was not given any show cause letter setting out the allegations or complaints against him as required by the Respondent's Human Resource Manual. Section 41 of the Employment Act does not explicitly require that written notification be given and in this regard the Respondent's Human Resource Manual has raised the threshold by making it mandatory that allegations against an employee be put in writing in a show cause letter."

The claimant further seeks to rely on the authority of **Magdalene M. Ngea vs. National Cereals and Produce Board, Cause No.1335 of 2015** where the court held thus;

the employer must justify valid reasons to dismiss an employee which reasons must be established at the time. Establishment of such reasons would ordinarily follow due process during which hearing process as envisaged under section 41, the presence or otherwise of these reasons would be adjudicated upon.

Further reliance was made on the authority of **Iyego Farmers Co-operative Sacco vs. Kenya Union of Commercial Food & Allied Workers Civil Appeal No.12 of 2015** the court of appeal observed as follows;

Section 45 of the Employment Act prohibits unfair termination of employment.

Further a termination of employment shall be deemed unfair if the employer fails to prove among others that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility.

A termination is further deemed unfair where it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee."

The claimant's penultimate submission is that the respondent has failed to prove that the reasons for dismissal were fair and also failed to institute appropriate disciplinary hearing or process in the dismissal of the claimant. This was against the law, equity and justice and is totally unsustainable.

The respondent in his written submission dated 26th November, 2018 also comes out horns blowing in reiteration and support of her case. In so doing, she relies on the authority of section 44 (a), (c) and (g) in support of her action of dismissing the claimant. This is in circumstances where an employee indulges in misconduct as follows;

44. (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

b. ...

c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

d. ...

e. ...

f. ...

g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

The respondent in buttressing her case also sought to rely on the authority of **Simon P M Karimi v Kenya Commercial Bank Limited & another [2015] eKLR** where the court of appeal observed as follows;

"We have on our own revisited the contents of the record and considered it in the light of the learned judge's reasoning set out

above. Our findings are that as per the circular of 31st December, 1992 the appellant ought to have reported the 1st respondent's to Voi on 11th January, 1993 which date coincided with the appellant's last day of his leave; (ii) thereafter the appellant did not proceed on to Voi branch allegedly because he had lodged an appeal with the General Manager of the first respondent;...(v) words extracted from the appellant's communication ... speak for themselves that the appellant had resolved to decline to take up his transfer. By declining, we mean he had disobeyed instructions to proceed on transfer..."

The Court of Appeal further upheld the superior court's finding as below;

"... The plaintiff clearly was ordered to go for transfer to the Voi branch. He was released from his employment with the 2nd defendant on 12th February.

The plaintiff did not get any written variation of the order to transfer and therefore can clearly be said to have disobeyed his mater's lawful and reasonable order. I therefore cannot find that the defendants in any manner breached the contract of employment. The plaintiff failed to obey the order and consequently as per section 17 of the Employment Act, the defendants were entitled to summarily dismiss the plaintiff"

It is in conclusion the respondent's submit that the claimant's case is hollow and in any event she is not entitled to the relief sought.

The claimant further supports her case in her witness statement dated 4th October, 2013 and a detailed List of documents of even date. Likewise the respondent has filed witness statement in respect of Ken Wamai, her acting Regional Coordinator – North Rift, Paul Kasyoki, her driver and Friday Nyaberi, Security Officer II. This is besides an annexure of various documents complementing her case of the disability and failure of the claimant in the discharge of her employment contract. These are as follows;

1. Report on security assessment in Regional offices.
2. Report of investigation into desertion of duties by Ann Gumbi Regional Coordinator Nyanza Region.
3. Nyanza Region Grievances
4. Clocking register for 9th January to 15th March, 2012 for Kisumu office.
5. Report for Anne Gumbi on surcharge regarding various falsification of funds at the fund.
6. Letter of Summary Dismissal dated 27th March, 2012
7. Letter on summary dismissal dated 24th April, 2012
8. Demand letter on alleged unlawful dismissal dated 2nd July, 2012
9. Show cause letter on why you should not be surcharged to the claimant dated 22nd August, 2012.
10. Another demand letter on alleged unlawful dismissal dated 3rd September, 2012 When all is said and done, this matter tilts in favour of the claimant. This is because in her entire endeavour to enlist a case of lawful termination of employment, the respondent has totally failed to adduce or display any evidence of having walked the claimant through a disciplinary hearing as is required of the law.

Sections 41, 42, 43, 44 and 45 of the Employment Act, 2007 come out clearly in a definition of what comprises lawful and unlawful termination of employment. A critical ingredient of lawful termination of employment is the application of appropriate disciplinary proceedings as required of section 41 above cited. This is the necessity of a fair hearing in a disciplinary process that is unnecessary ingredient in any event of summary dismissal or termination of employment.

The provisions of Employment Act, 2007 on this subject are not mere decorative instruments on the statute book. This is trite law that must be pursued to the letter by any prudent employer. It is only under these circumstances that one is able to identify the aggressor in a situation of termination of employment: which of the two parties has refused to heed the call of the law and justice. This is it and no more.

The respondent's case is a display of gaping holes in the observation of the law and process as set out. She failed to accede to the all important call of justice. She refused to award the claimant an opportunity to be heard in her case dismissal. She even failed to observe her own Human Resource Manual which provides for very simple means of meting out justice to recalcitrant or so imagined employees. However helpless an employee's case or conduct may appear, the law mandates fairness in the process of termination or dismissal. Her case (respondent's) must therefore fail. I therefore find a case of unlawful termination of the employment of the claimant by the respondent and hold as such. And this answers the 1st issue for determination.

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 relief as follows;

i. One (1) months salary in lieu of noticeKshs.141,527.00

ii. Leave allowance for 11 days untaken leaveKshs.52,584.00

iii. Six (6) months salary as compensation for unlawful termination of employment Kshs.141,527.00 x 6
=.....Kshs.849,162.00

Total of claim.....Kshs.1,043,273.00

iv. The costs of the claim shall be borne by the respondent.

Dated and signed this day of 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 20th day of December, 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Mashira holding brief for Mungai Kalange instructed Mungai Kalange & Company Advocates for the claimant.
2. Mr. Mutai holding brief for Wanga instructed by Waweru Gatonye & Company Advocates for the respondent.