



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1399 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

MWENDE MBITI.....CLAIMANT

VERSUS

CITRUS INN LIMITED.....RESPONDENT

JUDGMENT

The Claimant, MWENDE MBITI, instituted this claim by a Memorandum of Claim dated 23rd August 2013 and filed on 30th August 2013 seeking damages for wrongful and unlawful dismissal and payment of terminal dues against the Respondent, Citrus Inn Limited. She avers that the Respondent employed her in December 2007 as a Waiter by a contract of employment, with a monthly salary of Kshs.4,000/= and later promoted her to the level of a Supervisor in January 2009 with a salary of Kshs.8,000/=. That during her employment, she performed her duties diligently, reliably and responsibly until June 2013 when the Respondent by its directors, supervisor and/or agents unlawfully terminated her employment and failed and/or refused to explain to her orally or in writing the reasons for termination allow another employee of her choice to be at the meeting where the explanation for termination was tendered, and to allow or accept her presentations in defence.

She contends that the Respondent has refused and/or neglected to pay the following dues it owes her amounting to Kshs.411,400/= as herein below:-

- a) Salary in lieu of 3 months' notice of Kshs.24,000/=
- b) Unpaid cumulative salary of Kshs.45,000/=
- c) Service pay at half month's pay for the 6 years period worked
($\frac{1}{2} \times 8,000 \times 6$) of Kshs.24,000/=
- d) Unremitted NSSF contributions for 6 years
($400 \times 6 \times 12$) of Kshs.28,800/=
- e) Unpaid Leave days for the 6 years of Kshs.50,400/=
- f) Payment in lieu of Holiday for 6 years of Kshs.35,200/=
- g) Unpaid House Allowance for 6 years of Kshs. 93,600/=.
- h) 12 months' salary as compensation for wrongful termination of Kshs.96,000/=

She prays for judgment against the Respondent for:

- a) A declaration that the termination of the Claimant's employment was wrongful, illegal and unfair.

- b) The sum of Kshs.411,400/=
- c) Interests and costs and incidental to this suit.
- d) Certificate of Service.
- e) Any such other relief or further relief as this Honourable Court may deem fit and just to grant.

Respondent's Case

The Respondent filed its Memorandum of Reply dated 13th January 2014 on 15/01/2014 stating that the Claimant was dishonest in her conduct, slothful, reckless and negligent in her duties for colluding with the attendants of 'Young Club Stockist' to falsify a receipt and indicating that only 5 crates of beer had been purchased by the Respondent's Manager, one Anthony Wanjohi Mutua, keeping the said receipt without disclosing its contents to the Manager and not accounting for the sale proceeds of the sixth crate of beer and that this amounted to gross misconduct leading to her dismissal.

It avers that the Claimant was afforded a hearing where the grounds of the termination were explained to her and after listening to her representation, the Respondent considered that she was unable to offer a satisfactory answer and that the employee she chose to be present during the hearing, one Jedidah, absconded from duty. It denies that it owes the Claimant Kshs.411,400/= and avers that all emoluments due to her were duly paid and all statutory deductions submitted to the relevant institutions. Further, that it was entitled to summarily dismiss the Claimant and she is not entitled to any compensation.

Evidence

The Claimant testified that the Manager called her a thief at the Bar area in the presence of a cashier called Njeri, then asked her to leave without telling her what she had stolen and that she was never paid any of her claims. In cross-examination, she stated that she worked 3 to 4 days a week in a 24 hour-shift that ran from 9 am to 9 am the following day then she would go off duty for the next 24 hours. She narrated the events of the night of 7th June 2013 that she was on duty when in the company of the Manager, went to buy additional stock using the Manager's car. That she is not the one who obtained the receipt after they purchased the crates of beer and that she cannot remember the number of crates they bought. She stated that she never used to receive or record any stock but only dealt with customers of the Respondent and she also adduced evidence in court that she was paid in cash. In re-examination, she stated that during the period she was employed by the Respondent, she worked on public holidays and had never taken annual leave.

RW1 in his Statement dated 14th September 2017 and filed on 18th September 2017 stated that on the material Saturday night, the claimant informed him that beer supplies had run low and upon the cashier informing them that there was insufficient cash in the till, he decided to use his own Kshs.5,000/= to purchase of the beer. That while he was attending to the loading of the beer into a vehicle outside, he left the Claimant attending to the writing of the receipt and when he went to claim for a refund the following day, he was surprised to see a receipt showing 5 instead of 6 crates that had been purchased. In court, RW1 testified that the Claimant left the Respondent's workplace on the night of 10th /11th June 2013. In cross-examination, he stated that the Claimant as a Supervisor would not be expected to be out during weekends and Public Holidays as those are the days when the Respondent had many customers.

Claimant's Submissions

The Claimant submits that having proved the period of engagement she had worked with the Respondent of approximately 6 continuous years, this Court should invoke Section 37 of the Employment Act and take judicial notice of the same. That the court should also be guided by Section 10(7) of the Employment Act which provides that, "in any legal proceedings if an employer fails to produce a written contract or written particulars of contract of employment, the burden of proving or disproving an alleged term of employment shall be on the employer". Further, that since the Respondent was unable to disapprove her assertions that her monthly salary at the time of dismissal was Kshs.8,000/=, the Court guided by section 10(7) of the Act should find the same.

She submits that her employment was unfairly and un-procedurally terminated in violation of Sections 41 and 45(2) of the Employment Act and calls upon the court to be persuaded by the reasoning and finding of Ndolo J. in Milkah Khakayi Kulathi vs Sandstorm (Africa) Limited, Cause Number 758 of 2012, where it was observed at paragraph 24 that:

"At any rate there was no evidence of the Claimant having been taken through a disciplinary process akin to what is prescribed in Section 41 of the Employment Act and I therefore find that in terminating the Claimant's employment the Respondent failed to follow due process".

That she therefore claims her terminal dues which include: 3 months' salary in lieu of notice by virtue of Section 49 of the Employment Act which in evidence was confirmed not to have been paid to her by the Respondent; Unpaid Cumulative Salary which was demonstrated in her list of documents and which the Respondent did not dispute in evidence; Service Pay at half month's pay for the 6 years she worked for the Respondent as provided for under Section 35(5) of the Employment Act since she was not paid service; unremitted NSSF and NHIF contributions, Leave Days and Holidays worked for the 6 year period; and House Allowance for the 6 years as provided in Section 31(1) and (2) of the Employment Act. That in paragraph 26 of the Milkah Khakayi Kulathi case above, the court awarded the claimant House allowance as mandated by the Act. Further, that if this Court declares her termination unlawful and unfair then she will be entitled to Damages being 12 months' salary compensation as per section 49 and 50 of the Employment Act. She also prays for service pay for the over one year worked, worked out as half months pay for every year worked, of Kshs.6,100 and which she had omitted in her pleadings.

Respondent's Submissions

The Respondent submits that this is not a case of unfair termination but that of an employee who negligently performed her duties in the course of her employment leading to her dismissal. It cites the case of **Judicial Service Commission -vs- Gladys Boss Shollei & Another Civil Appeal No. 50 of 2014** where the judges of the Court of Appeal borrowing from **Michael Dowling -vs- Work Place Safety and Insurance Board [2004] CAN LII 43692 at page 74**, observed as follows:-

“...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 of the circumstances of the misconduct.”

It also submits that it did not act arbitrarily in terminating the employment of the Claimant and that it followed due process and the termination is therefore lawful. That **Section 41** read together with **Section 43** of the Employment Act give guidance as to the procedure of termination to be followed by the employer and employee and that the court should be guided by the finding in **Kenya Ports Authority -vs- Fadhil Juma Kisuwa (2017) eKLR** where the Court of Appeal stated that:-

“As a general rule, no employer has the right to terminate a contract of service of an employee without notice. However under section 44, for specific reasons, the employer can summarily dismiss an employee without notice or with a shorter notice than that to which the employee is entitled. An employee, by his conduct may leave no doubt that he is in fundamental breach of his obligations under the contract of service. Among the many conducts enumerated under section 44 (4) (a) to (g) that would warrant summary dismissal is where the employee commits, or is, on reasonable and sufficient grounds suspected of having committed, a criminal offence against or to the detriment of the employer or the employer’s property.

...The duty to hear an employee is limited to the employer explaining to the employee clearly the nature of the accusations for which it is contemplated that his employment be terminated and an opportunity for the employee to make representations, if any, which the employer will consider in deciding, one way or another. Only where the employee wishes to be accompanied at the hearing, by another employee or a shop floor union representative, will it be necessary to hear him in their presence.

..We have said earlier that where dismissal is on the grounds of misconduct, poor performance or physical incapacity the employer, by the provisions of section 41 is bound, not only to explain the reason for which the employee’s dismissal is contemplated but also to hear and consider any representations he may have. At the disciplinary hearing the employee is entitled to have in attendance, if he/she wishes another employee or a shop floor union representative of his choice. This requirement only imposes a duty on the court to hear the employee in the presence of his/her colleagues where the employee wishes them to be present. The court cannot impose them on the employee. It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case.”

Further, that as per **Section 47(5) of the Employment Act**, it has discharged its burden of proof by showing the reasons leading to the termination of the claimant’s service, that it also accorded the Claimant a fair hearing in the presence of all other employees regarding the night in question. That she failed to provide any plausible explanations on the same which led to the termination of her services and that it was therefore not in violation of Section 41 of the Employment Act.

The Respondent submits that the 3 months’ salary in lieu of notice is misconceived as the Claimant was summarily dismissed under **Section 44** of the Act and it is therefore not payable. That unpaid cumulative salary is not payable because all employees were paid in cash which they would sign for once they were paid and that the Claimant confirmed the same in her testimony and therefore there is no balance owed to her. That there is no basis to enforce payment of service pay in the absence of fixed terms by both parties as provided under **Section 35(5)** of the Act and that the same is only payable to employees who are not covered under the various social security mechanisms stated under **Section 35(6)** of the Act. That she is not entitled to NSSF as it duly made regular payments to NSSF and that any statutory dues should be paid to the said institution and not to the Claimant. That the Claimant took leave during her employment with the Respondent and that since she has also not adduced evidence to show she worked on which public holidays, she is not entitled to both claims. That she is not entitled to house allowance as she did not demand for the same during her time in employment but only after termination and also, the wages paid to her was all inclusive and there was no agreement to pay for house allowance separately as was upheld in the case of **Pius Toboso Matendechere -vs- Jaswant Singh & Brothers (2015) eKLR**.

Further, that since it has submitted that the Claimant’s termination was fair and lawful, she is not entitled to damages or compensation for wrongful termination in the amount of Kshs.96,000 as alleged in her claim and the claim should be dismissed with costs.

Determination

The first issue for determination is whether the Claimant was wrongfully and unfairly dismissed from employment. The second issue is whether the Claimant is entitled to the prayers sought.

Section 44(4) of the Employment Act provides for termination of an employee’s services on grounds of misconduct while **Section 43** of the Act provides for proof of the reason for termination, **Section 45(2)** states that the termination is unfair if due process is not adhered to as per **Section 41**. In this case the respondent avers that the Claimant was summarily dismissed for gross misconduct under circumstances explained by the Respondent in its pleadings. The Respondent however failed to prove that it followed procedure before terminating the Claimant’s services as required in section 41 of the Employment Act since it was not proved in court that the Claimant was afforded a proper hearing or allowed to make presentations before a disciplinary panel of the Respondent. For that reason the summary dismissal was unfair as was held in the case of **Donald Odeke -vs- Fidelity Security Ltd Cause No. 1998 of 2011** where the Honourable Court observed at page 3 that:

“An employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.....it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair.”

Further, in *Nicholus Muasya Kyula V FarmChem Limited Industrial Cause Number 1992 of 2011; (2012) LLR 235 (ICK)* the court held that:

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

In this case RW1 stated that *“I asked Mwendu what had happened and she did not respond. I told her to leave.”* Further that *“Mwendu had to go because the work was going down and she had to go.”* He further stated *“I do not know if it is Jedidah or Mwendu who was at fault.”* RW1 did not refer to any disciplinary hearing having taken place. He further admitted that he did not establish who between Jedidah and the claimant was at fault. He thus did not satisfy the requirements of proof under Section 43 of the Act making the termination unfair.

Remedies

Having been dismissed unfairly the claimant is entitled to salary in lieu of notice as was granted in *Daniel Kiplagat Kipkeibut v Smep Deposit Taking Micro Finance Limited [2016] eKLR*.

RW1 admitted that the claimant worked on public holidays as these were the busiest days for the business, so the claimant is entitled to pay for the public holidays. The evidence of RW1 counter the submissions by the respondent that the claimant did not state which public holidays she worked.

The claimant’s evidence that she was owed arrears of salary as documented at age 5 to 14 of her bundle of documents was uncontroverted. When asked about her arrears RW1 responded *“I do not know about Mwendu’s salary arrears. There was no accountant.”* I therefore find that the claimant is entitled to the arrears of salary as tabulated and claimed.

Having not been a member of NSSF, the claimant is entitled to service pay as provided under Section 35(5) as read with 35(6) of the Employment Act.

The claimant is entitled to leave as there was no proof that she took any leave during her employment with the respondent.

The claimant is entitled to house allowance as the salary she was paid was consistently below the statutory minimum basic wage. As at 2012 when the claimant was earning Kshs.8,000 the minimum wage for a waiter was Kshs.9,266.30 without house allowance. Having been a Supervisor the claimant was entitled more

I award her house allowance based on 15% of statutory minimum wage equivalent to Kshs.1,389.95 up to April 2012 at Kshs.83,397.00 and Kshs.1,584.50 for May and June 2013 when the minimum basic wage for a waiter was Kshs.10,563.60 being underpayment Kshs.3,168.90 per month.

The prayer for Kshs.28,800 in respect of NSSF and Kshs.14,400 in respect of NHIF fail as these monies are only payable to the statutory bodies. In lieu of NSSF the claimant has prayed for service pay while NHIF was supposed to be deducted from her salary but was not.

Conclusion

In sum, I find that the summary dismissal of the claimant was unfair and enter judgment in her favour against the respondent as follows –

- a) One month’s salary in lieu of notice..... Kshs.8,000
- b) Service pay..... Kshs.24,000
- c) Cumulative salary arrears..... Kshs.45,000
- d) Leave days at 21 days per year for 6 years (126 days)..... Kshs.38,769.20
- e) Pay in lieu of public holidays (11 x 6) = 66 days
based on double daily rate..... Kshs.40,615.40
- f) House allowance..... Kshs.86,565.90
- g) Compensation
- h) Having been unfairly dismissed and taking into account the manner in which the claimant was dismissed and all circumstances of

her case, I award her 6 months' salary as compensation in the sum of Kshs.48,000.

Total **Kshs.290,950.50**

i) The respondent shall pay claimant's costs of the suit.

j) The decretal sum shall attract interest from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE