



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1647 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 17th December, 2018)

RUTH WAKIO MBAGA.....CLAIMANT

-VERSUS-

KACHE LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 11th October, 2013, through the firm of Macharia, Odongo and Kosgei Advocates seeking damages for wrongful and unfair termination of employment.
2. She avers that she was employed by the Respondent in December, 2005 as a Sales Assistant at a salary of Kshs. 20,000.00 per month until 1st October 2010 when the Respondent purported to formalise the Claimant's employment by giving her an appointment letter reducing her salary to Kshs. 15,000 per month.
3. That the new appointment denied her all the benefits that would have accumulated and/or arisen from the continuity in employment and service which continuity the Respondent did not recognise in the new appointment letter.
4. That she executed her duties diligently and faithfully until 11th October, 2011 when she was orally suspended and subsequently terminated unfairly. She avers that the Respondent falsely accused her of stealing and caused the police to summon and question her and press charges for stealing Kshs. 348,889.00. That while on suspension the Respondent advised her to consider herself terminated without being given any notice, hearing nor paying her terminal dues.
5. She prays for salary for the month of September, October, 2011, notice pay, house allowance from 2005 to October, 2011, service pay, leave not taken and compensation for unfair and wrong termination.
6. The Respondent on the other hand in an amended Reply to Claim admitted the Claimant was working with them on a casual basis from 2005 to 2008 when the relationship was terminated. In 2010 the Respondent aver that the Claimant was formally appointed as a Sales Assistant at the Respondent's Nakumatt Junction branch and subsequently an employment contract was signed between them which they contend was the only instance when they formally retained the Claimant on a permanent basis.
7. They also contend that the Claimant during her employment could not account for missing stock valued at Kshs. 112,600 and that she fraudulently schemed with other employees to defraud the Respondent by involving themselves in sale by credit card without receipts amounting to Kshs. 538,700.
8. The Respondent deny suspending the Claimant from work but aver that the Claimant failed to report to work on her own accord after charges were pressed against her. They urge the Court to dismiss the Claim with costs.

Evidence

9. The Claimant led evidence as set out in her memorandum of claim and added that on 11th October, 2011, she fell ill and while in hospital, the Respondent's director, Angela called her on phone and instructed her to go to Kilimani Police Station where she learnt that there had been a theft at the respondent's offices the previous night and she was asked to assist in tracing some 2 employees.
10. That the Director informed her that she was being suspended pending investigations into the theft and that she was later charged with

theft before the Magistrates Court, which charges, were withdrawn on 12th November, 2012.

11. She stated that in November 2011, she followed up with the Respondent's director for her September and October 2011 salary but she was informed that her contract had been terminated. She was not given notice, a hearing nor was she paid any dues.

12. The Respondent's witness on the other hand led evidence that the Claimant was her employee on a part time basis from 2005 and in 2010 there was an incident of credit card fraud occurred prompting her to report to the police. That the Claimant was called by the police and charges pressed and thereafter she failed to report to work.

Submissions

13. On behalf of the Claimant, it is submitted that section 9 of the Employment Act requires all employers to issue contracts to employees who work for more than 3 months, which the Respondent failed to comply with between 2005 and 2010.

14. Further that Section 10(7) of the Employment Act states that if in any proceedings an employer fails to provide a written contract or the particulars in subsection 1 thereof, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. That the Respondent did not disprove any of the allegations made by the Claimant and therefore the claim that the Claimant was a casual from 2005 to 2010 should be disregarded.

15. As to whether the Claimant was unfairly terminated, it is submitted that none of the processes envisaged under Section 41 of the Employment Act was adhered to as the Claimant was terminated in November, 2011, through a telephone call without notice of impending termination or any hearing being accorded to the Claimant. They rely on the case of **Industrial Court Case No. 1050 of 2011 Nairobi Loice Otieno Vs Kenya Commercial Bank Limited** where it was held that the doctrine of natural justice or procedural fairness is now an essential part of the employment relationship.

16. That the Claimant is entitled to all the reliefs sought for the aforementioned reasons.

Respondent's submissions

17. The Respondent filed submissions where they aver that the previous employment of the Claimant was on casual basis, which was terminated after an incident in 2008 with a client. That the Claimant begged to be given a second chance and was reemployed on new terms at a salary of 15,000/= per month.

18. The Respondent also avers that they terminated the Claimant's services due to circumstances that were fair and lawful.

19. I have examined evidence and submissions of the parties herein. I note that the Claimant was dismissed due to the fact that there had been some theft at Respondent's shop and she was arrested and even charged.

20. Under Section 44 of Employment Act summary dismissal can be effect if:-

“44 (vii) 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”.

21. The Claimant was suspected of involvement in theft at the Respondent's shop and was even arrested and charged. In the circumstances, the Respondent had a valid reason to warrant dismissal.

22. Notwithstanding the presence of a valid reason, the Claimant was still entitled to a fair disciplinary process for which she was denied as envisaged under Section 41 of Employment Act.

23. It is therefore my finding that the Claimant's dismissal was unfair under Section 45(2) of Employment Act 2007. In terms of remedies I find for Claimant and award her as follows:-

1. 1 months' salary in lieu of notice = 15,000/=.

2. 6 months' salary as compensation for unfair termination = 6 x 15,000= 90,000/=

3. Salary for October 2012 = 15,000/=

4. House allowance for 3 years preceding the dismissal as the previous years are time barred = 15% x 15,000 x 3 = 6,750/=

Total = 126,750/=

5. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 17th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kalii holding brief Macharia for Claimant – Present

Cheudhri & Associates for Respondent – Advocate