



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 796 OF 2012

CHRISTINE OPIYO LAMON.....CLAIMANT

-VERSUS -

SEVENTH DAY ADVENTIST CHURCH EAST AFRICA LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant's suit is contained in the amended memorandum of claim filed on 6.8.2015 and it seeks the following reliefs:-

a) Declaration that the termination of the claimant's employment was unlawful and unfair, null and void.

b) 3 month's salary in lieu of noticekshs 171,243 c) Severance pay for 7 years
.....kshs 399,567 d) Accrued leave Kshs. 57081 e) Refund of 50% cost for career
advancement.....kshs. 199,150 f) 12 months' salary for unfair termination..... Kshs 684,972 g) Costs and interest

2. The respondent admitted in her defence that she employed the claimant at the east Africa Union as a Secretary but denied that the termination of her services was unfair and unlawful. She averred that the claimant's tenure of office was soiled with breach of employment regulations, poor performance and irregular conduct which culminated in the eventual termination of her services. She further denied claimant's entitlement to the reliefs sought and prayed for the suit to be dismissed with.

3. The suit was heard on 25.10.2018 when the claimant testified as Cw1 and the respondent called Pastor Festus Njagi as Rw1. However none of the parties filed written submission as directed by the court.

Claimant's case

4. The claimants testified that she was employed by the respondent as a as an Administrative Secretary on 1.11.2003 earning Kshs. 57081 plus house Allowance of Kshs. 20000. In November 2009 she was suspended for one month for alleged inappropriate service to her Supervisor by not picking phone calls when away on sick leave. The matter was however resolved and she was served with a warning letter.

5. She further stated that in October 2010, she again had problems with her supervisor Pastor Benjamin Tanui who was demanding for intimate kissing from her but she declined and reported the harassment to Rw1 who was the Ministerial Director. The latter brushed the matter aside contending that Pastor Tanui was also a Human being.

6. She contended that on 8.7.2011 she attended morning devotion after which she was accused of being improperly dressed and summoned by Pastor Paul Muasya who inspected her and found nothing wrong with her dressing. However on 12.7.2011 she received a show cause letter accusing her of inappropriate dressing and she responded on 14.7.2011.

7. Cw1 further testified that on 19.7.2011 she received a letter inviting her to appear before the executive committee of the respondent on 27.7.2011 for hearing and she complied. The hearing took 10 minutes and the committee of 50 members were all hostile to her except one who defended her. After the hearing she was given a termination the same and told to hand over office keys by Elder Martin Akoto.

8. Cw1 contended that the termination was unfair because the reasons cited for the dismissal were the same ones cited for the earlier suspension and resolved by the warning letter yet the disciplinary handbook bars the employer from revisiting past issues. She denied the alleged poor performance and contended that she was appraised by her supervisor at 80%.

9. Cw1 prayed for reimbursement of the cost of her further studies contending that the respondent had the practice of refunding 50% of the

cost of studies to her employees upon completion. She stated that she paid Kshs. 398,300 for her BA Social Work at the University of Nairobi and therefore prayed for refund of half of the same. She also prayed for the other reliefs pleaded in her Claim.

10. On cross examination, Cw1 admitted that the reason for termination were communicated to her and she was also invited to a hearing by the respondent's executive committee. She further admitted that she appeared before the said committee on 4.12.2009 after which she was served with a warning letter dated 22.12.2009 but she never appealed against it. She admitted having been transferred to various departments of the respondent but denied that it due to complaints against her.

11. However on being shown letter dated 10.11.2009 and warning letter dated 22.12.2009, she confirmed that she was transferred due to complaints against her, relational problems and bad attitude towards work. Also on being shown copy of the login attendance Register, she admitted that there are days she arrived to work late or absented herself altogether. Further on being shown letter dated 25.7.2011, she admitted that the letter showed the days she absented herself from work without giving any reason. She however contended that from 22.4.2011 to 11.5.2011 she was on study leave and not absent as indicated.

12. She admitted that clause 4.6.2. of the employee Handbook required that application for sick leave was to be accompanied by a medical Certificate. She further admitted that clause 3.0 cautioned the respondent's employees that they were working for a church and they were to hold high standards of Christian values, that clause 3.2 of the handbook provided for compulsory attendance to daily morning worship, while clause 3.31 provided for a dress code dictated by Christian code. She further admitted that clause 2.13 of the handbook provided that if the employee is found guilty, his/her history was to be considered.

13. On being shown minutes of the executive committee dated 30.6.2009, cw1 admitted that the committee allowed her to pursue her studies at her own cost. She however denied that such resolution disqualified from getting the 50% refund. She further admitted that she never applied for any bursary to the respondent through the standard forms designed for that purpose.

Defence case

14. Rw1 confirmed that the claimant was formerly employed by the respondent as a secretary but stated that the claimant lived in a house whose rent was paid by the respondent. He testified that from the beginning there were complaints of dress code, relational problems and poor performance against her for which she was suspended in 2009 but late reinstated and served with a warning letter. That from 2010 to 2011, she was his secretary and he had problems with her because she never improved on her dress code, absence from work and interpersonal relationship with other employees even after the warning letter.

15. Rw1 further testified that as a result of the said complaints, the claimant was served with a show cause letter stating the offences she was accused of including failure to do assignments as expected, failure to attend morning worship and not dressing modestly. He stated that morning worship was compulsory for respondent's employees and the dress code for them must reflect their respect. He maintained that the claimant was qualified for the job but she deliberately refused to perform.

16. Rw1 further testified that the claimant responded to the show cause letter by her letter dated 14.7.2011 admitting that her supervisor had complained against her dress code and further admitting that some of her dresses were a bit tight and promised to buy others which reflect Christian modesty. That thereafter the claimant was invited to hearing before the executive committee of the respondent after the response to the show cause letter was found to be unsatisfactory.

17. Rw1 confirmed that he attended the said hearing and the claimant was asked questions and she answered and thereafter she was released. However after consideration of her defence and her history by the committee she was dismissed and paid Kshs.129,930.65 made up of salary, termination allowance under Policy Y35 of the ECD Working Policy2007/Y, and welfare allowance. He denied the claimant's entitlement to reimbursement of cost of study and contended that she never applied for Bursary under the Bursary Policy Guidelines.

18. Rw1 maintained that the claimant absented herself from work as evidenced by the lack of her signature on the attendance register which is the only prove of employee's attendance to work. He admitted that the claimant complained of sexual harassment by a pastor but after investigations the case ended for lack of evidence.

19. On cross examination, Rw1 stated that he used to interact with the claimant in the department, social welfare and as office pastor even before being assigned to him in 2010. He further stated that his colleague pastors who were supervising the claimant always complainant about her in the departmental meetings. He admitted that he evaluated the claimant's performance in 2010 and she scored 66-83% which was good. He further admitted a warning letter expires after one year.

20. He denied that the respondent has a policy for refunding 50% of the cost of studies undertaken by her employees but stated that there was bursary available to employees some times. He however contended that the church allows employees to study at their own cost provided the same does not interfere with work. He concluded by observing that the course pursued by claimant was not related to her work.

Analysis and Determination

21. There is no dispute that the claimant was employed by respondent from 1.11.2003 to 27.7.2011. The issues for determination are:-

- a) Whether the termination was unfair.
- b) Whether the reliefs sought should be granted.

Unfair termination

22. Under Section 45(2) of the Employment Act, termination of employee's employment contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Valid and fair reasons is one that relates to the employees conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand refers to the process of according the employee a hearing before termination of his contract of service and post termination process including right to appeal, payment of terminal dues and issuance of certificate of service.

Reasons for termination

23. The respondent averred that the claimant was dismissed by the letter dated 29.7.2011 which was produced herein as an exhibit. The reasons cited in the letter included failure to dress appropriately to the place of work, failure to attend worship service regularly and on time, unexplained absence from the place of work, and rendering unacceptable service to her supervisors. The claimant had been warned against the same offence in December 2009 but failed to improve and the respondent considered the said offence to be a serious departure from her Employee Code of conduct.

24. The claimant admitted the said offences vide her letter dated 14.7.2011, by which she responded to the show cause letter dated 12.7.2011. On the failure to perform her assignments or render acceptable service to her supervisors, she blamed it on a bad chair and related ill-health. She admitted that she missed morning worship but again she blamed it on ill-health and the medicine she was taking which made her drowsy in morning. Finally she admitted that she had been wearing tight clothes and that her supervisors had mentioned that to her but she blamed it on financial problems. She however apologized and promised to improve her work performance, worship attendance and investing in modesty and appropriate dressing.

25. Under clause 3.12.2 of the respondent's Employee Handbook, habitual commission of minor offences, gross neglect of duty by willfully neglecting, refusing or carelessly performing duty, insubordination and/or disrespectful behavior to authority and repeated absence from work without permission are classified as major offences. Minor offences are provided under clause 3.14.1 of the respondent's Employee Handbook and include late arrival to work or early departure without permission, absence from duty without proper permission from immediate supervisor, feigning sickness, failure to carry out all duties listed in the job description, inappropriate decorum and failure to attend official union functions such as morning worship.

26. After careful consideration of the evidence tendered, and especially the claimant's letter dated 14.7.2011, I am satisfied that the respondent has proved that the claimant grossly violated the Employee Code of Conduct and had failed to heed to her written warning and as such she was entitled to summarily dismiss her under section 44 of the Employment Act. That she habitually committed minor offences and also major offences as outlined above. Consequently, I returned that the respondent has discharged her burden of proving and justifying the reason for terminating the claimant's services as required by section 43 (1), 45(2) and 47(5) of the Employment Act.

Procedure followed

27. The claimant testified that she was served with a show cause letter and after her response she was invited to a hearing by the respondent's Executive committee. She has however contended that the committee was hostile against her and heard her for less than 10 minutes. Rw1 attended the hearing and he stated that the claimant was given a fair hearing whereby she was asked questions and she answered and thereafter her defence was considered before the dismissal was decided.

28. Section 41 of the Employment Act provides that, before terminating an employee on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands and in the presence of another employee of his choice or shop floor union official, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided. After considering the evidence adduced *vis a vis* the said provision, I return that the respondent has proved on a balance of probability that she followed a fair procedure before terminating the claimant's services. She was served with show cause letter and admitted that charges against her. She was further given oral hearing by the executive committee of the respondent.

29. In view of the finding herein above that the respondent has proved both substantive and procedural fairness in the termination of the claimant's services, I return that the answer to the first question for determination herein is in the negative.

Reliefs

30. Flowing from the foregoing finding, I decline to make declaration that the termination of the claimant's contract of service was unfair as prayed. For the same reason, I dismiss the prayer for salary in lieu of notice and compensation for unfair termination.

31. The claim for severance pay is also dismissed because the termination was not on account of redundancy. Likewise the claim for leave is dismissed for lack of particulars and evidence.

32. Finally the claim for refund of 50% of the cost of university studies while in employment is also dismissed for lack of evidence. After considering the evidence presented I am not satisfied that the claimant has proved the same on a balance of probability.

Conclusion and disposition

33. I have found that the termination of the claimant's contract of service was both substantively and procedurally fair. Consequently, I dismiss the suit with no order as to costs.

Signed, dated and delivered at Nairobi this 14th day of December, 2018.

ONESMUS N. MAKAU

JUDGE