



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 614 OF 2012**

***(Before Hon. Lady Justice Maureen Onyango)***

**RUTH MUNGAI.....CLAIMANT**

**VERSUS**

**KACHE LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant, Ruth Mungai, instituted this claim by a Memorandum of Claim dated 12<sup>th</sup> April 2012 and filed on 13<sup>th</sup> April 2012 seeking damages for wrongful dismissal and payment of dues against the Respondent, Kache Limited.

She avers that the Respondent employed her as a Sales Assistant by a letter of appointment dated 16<sup>th</sup> March 2010 with a net monthly salary of Kshs. 12,000/= including overtime. That on 23<sup>rd</sup> March 2012, a Director of the respondent, one Angie Meseguer attended a stock taking exercise in the Respondent's Karen Branch where the claimant worked and discovered some inconsistencies and/or omissions with the stock brought about by wrong classification and coding of garments and she asked questions about cash payments made during the day amounting to Kshs.30,000/= to which the Claimant pointed out that the day's collections were in the drawer where it was customarily placed. That without confirming if the money in question was in the drawer, the said Director started shouting and throwing her spectacles in the presence of employees and she blurted out that the Claimant's services had been terminated and that she should collect her dismissal letter the following day. That she was never summoned by the Respondent and explained to in a language she understood why her services were dispensed with contrary to the Principles of Natural Justice and Section 41 of the Employment Act. She lists the particulars of breach of contract and of her employment as follows:-

- a) Failure to give the Claimant notice as per the terms of contract.
- b) Failing to afford the Claimant a hearing to record their version and/or events and call witnesses to corroborate or otherwise deny the Claimant's version of events.
- c) Failure to conform to Section 17 of the Employment Act with regard to the enumeration of circumstances that lead up to summary dismissal that are justifiable or lawful under law.
- d) Failure to deliver to the Labour Officer the circumstances leading to and the reasons for the Claimant's dismissal.
- e) Failure to remit the monthly deductions to NSSF and NHIF as required by law.

She avers that she has never been given any warning prior to the termination and that the Respondent owes her a sum of Kshs.72,527/= as follows:-

- i)..... One month's salary in lieu of notice..... Kshs. 13,000/=
- ii).... NSSF (Kshs. 4,800/=) and NHIF (Kshs. 7,680/=) from  
March 2010 to March 2012..... Kshs. 12,480/=
- iii)... 13 days leave due..... Kshs. 8,047/=

iv)... Severance pay for two years..... Kshs. 26,000/=

v).... Salary for March 2012..... Kshs. 13,000/=

**Total** **Kshs. 72,527/=**

The Claimant prays for judgment against the Respondent for:

- (a) This Honourable Court to declare that the dismissal of the Claimant was wrongful.
- (b) The Claimant to be paid their terminal benefits as listed above.
- (c) The Respondent to be ordered to compensate the Claimant for wrongful dismissal equivalent to 12 months' gross salary.
- (d) This Honourable Court to be pleased to order the Respondent to pay the costs of the claim.
- (e) Interests on the above at court rates.
- (f) This Honourable Court to issue such further orders as it may deem fit to meet the ends of justice.

### **Respondent's Case**

The Respondent filed its Reply to Claim dated 22/06/2012 on the same date admitting the employment terms with the Claimant. It avers that it has been remitting monthly contributions to both NHIF and NSSF on behalf of the Claimant during her period of employment. That the money paid on the material date was payment for a credit sale the Claimant partook without consulting and in contravention of a lawful order not to engage in credit sales without prior authorization of the Director. That the Claimant did not issue a receipt at the time of the sale. It denies all the Claimant's contentions over her alleged dismissal from employment and avers that it has been willing to pay her the claimant her lawful entitlements which she has been offered but has declined to collect.

In a statement accompanying the Reply to Claim, the Respondent's witness, one Peter Karanja, states that when he and another employee called Kevin started checking the stock in the Karen Branch as instructed by the Respondent's Director, they noted the Claimant had not deducted the items she had sold but they had not checked the Sales File. When the Director joined them in the afternoon, they discovered some items had been indicated as sold twice. That they informed the Director they had seen the Claimant receive some cash from someone while they were taking stock. That the claimant changed her attitude when the director asked her questions and started saying that she wanted to quit the job and started packing. She even dropped some 15 necklaces in a paper bag when the Director requested to inspect her stuff before she left, then rushed to the police. Further, that they followed her to the police station and handed over her handbag which she had left behind to her in the presence of the OCS.

### **Evidence**

The Claimant testified that she worked 6 days a week with one alternate off day and that on the material day, the Respondent's Director thought the sales of Kshs.30,000/= had not been paid for. She also informed the court that she was allowed to sell goods on credit. In cross-examination, she testified that she refused to take her dues because the amount was incorrect and that NSSF and NHIF were never remitted by the Respondent on her behalf but that she had not checked the current statements for verification.

RW1 testified that on the material day, the Claimant insisted that she wanted her dues before leaving and when she asked to inspect the Claimant's handbag, the claimant threw it on the floor and went to the police. It was her testimony that the Claimant had taken all her leave days. She insisted that she did not dismiss the Claimant and that it is the Claimant who refused to listen to her and left. RW2 testified that he was relying on his Statement. On cross-examination, he confirmed that they found some items missing from the stock which could have been sold and not recorded.

### **Claimant's Submissions**

The Claimant submits that as per her letter of appointment, she was entitled to one month's notice or a third warning letter before her services would be terminated by the Respondent and that she served the Respondent with dedication until 02/04/2012 when she was dismissed by a letter of confirmation of dismissal for gross misconduct. That her dismissal from employment was not lawful summary dismissal as it did not conform with Section 44 (4) of the Employment Act. Further, that she was never accorded a hearing before her dismissal as required by Sections 41(2) and 43(1) of the Employment Act. She relies on the case of Nicholus Muasya Kyula V FarmChem Limited Industrial Cause Number 1992 of 2011; (2012) LLR 235 (ICK) where 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."

That this position is further enumerated in Kenfreight (E.A.) Limited vs Benson K. Nguti [2016] eKLR where the court stated that:-

"The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It

established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.”

She submits that she was not furnished with any detailed evidence linking her to the alleged un-updated stock records, or inventory that did not belong to the company, or the goods sold on credit as alleged in the dismissal letter and that no reports or complaints had been made about any disobedience or her failure to follow her job description prior to her dismissal. That the Respondent failed to prove in court its allegations of gross misconduct against her and acted on assumption that the personal items they found in her possession were for sale. Further, that the termination of her employment was wrongful and unfair as provided in Section 45 of the Employment Act.

It is submitted by the Claimant that she is therefore entitled to compensation as per Section 49(1) of the Employment Act. She relies on the decision of the Court of Appeal in International Planned Parenthood Federation and Pamela Ebit Arrey Effiom Civil Appeal No. 132 of [2011] eKLR. That she had worked for the Respondent for 2 years and is therefore entitled to service pay as per Section 35(5) (c) of the Act and is also entitled to unpaid salary arrears, 13 unpaid leave days and unremitted NHIF and NSSF deductions and that the burden of proof was on the Respondent to demonstrate that it remitted the said statutory contributions.

As to who should bear the costs of this suit, the Claimant urges this court to award costs to her citing the case of Jasbir Sing Rai & 3 others - vs- Tarchan Sing Rai & 4 others [2014] eKLR wherein the Supreme Court rightly held as follows:-

“So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at page 94]”

#### Respondent’s Submissions

The Respondent submits that it terminated the Claimant’s employment in accordance with **Section 45(2)** and **Section 44 of the Employment Act** and that the statutory burden of proving unfair and wrongful termination of employment is on the Claimant as stipulated in **Section 47(5) of the employment Act** which provides that:

*“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”*

It submits that while it had earlier treated the Claimant as having voluntarily quit employment and expected her to go for her dues the following day, she instead sent the respondent a letter dated 24<sup>th</sup> March 2012 attempting to explain her conduct and issuing threats against it. That its Director then called her to invite her for a disciplinary meeting scheduled for the 30<sup>th</sup> March 2012 which she attended with a person unknown to the Director and after discussing the Claimant’s conduct, could not resolve the issues arising. That the claimant went ahead to issue more threats and making unreasonable demands through a letter dated 31<sup>st</sup> March 2012. That pursuant to the aforementioned events, the respondent finally issued a Notice of termination dated 2<sup>nd</sup> April 2012 to the Claimant enumerating the reasons for her dismissal and enclosing her last payslip for her terminal dues which she used as an exhibit in this suit. That the Claimant has further confirmed that there was a disciplinary meeting in her letters dated 31<sup>st</sup> March 2012 and 5<sup>th</sup> April 2012. The respondent urges this Court to therefore find that there was both issuance of notice and a discipline meeting in this matter.

It is submitted by the Respondent that this Court should treat the particulars of breach described in (c) and (d) by the Claimant as allegations as she has failed to adduce evidence on the same and any of the particulars she pleaded. That for the claim of NSSF and NHIF, it has produced in court a statement of account proving that the claimant’s contributions were remitted to both funds. That this is a Court of law which determines matters on the basis of evidence placed before it and it cannot rely on mere allegations, which position is unambiguously stated in **Section 107 of the Evidence Act (Cap 80)** which provides that, **“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.”**

The Respondent submits that the Claimant is not entitled to 12 months’ salary as compensation or service pay because she is a member of NSSF; or leave days because she had exhausted the same. That this court should only find that she is entitled to her terminal dues of the days worked in March 2012 and for one month’s salary in lieu of notice. Further, that without any proof of wrongful termination of employment it prays that this suit be dismissed and costs awarded to the Respondent.

#### Determination

The first issue for determination is whether the termination of employment of the Claimant was wrongful. The second issue is whether the Claimant is entitled to the prayers sought. The third issue is who should bear the costs of this suit.

While the Respondent purports to have followed due procedure by conducting a disciplinary meeting at a Café with the Claimant where she was given the opportunity to defend herself and thereafter given reasons, the Respondent did not comply with fair procedure as required under Section 41 of the Employment Act. The Court of Appeal at Nairobi in the case of Samsung Electronics East Africa Ltd v K M [2017] eKLR held that:

“Although we in no way wish to prescribe the format in which the minutes for disciplinary hearing should take, these minutes did not clearly spell out the respondent was facing a disciplinary hearing; nonetheless, issues of integrity regarding work protocols were put before the respondent which she denied. There was no indication given to the respondent she was appearing before a disciplinary

committee and even after the allegations were put to her, she was not asked to respond to them in writing. At the end of it all, the disciplinary committee considered the evidence and decided on the disciplinary action to be taken against the respondent. In our view, this is not a disciplinary hearing but appears as a regular meeting wherein the management informed and questioned the respondent on her perceived shortcomings in her department.”

In the present case there was no invitation, no charges and no information to the claimant that she had a right to be accompanied. Furthermore the manner in which the claimant was treated in the shop was dehumanising. RW2 confirmed that nothing was stolen from the shop.

From the foregoing, I find that the termination of the claimant’s employment was unfair.

### **Remedies**

The claimant was given notice and was paid all her terminal dues. She is not entitled to one month’s notice or pay for days worked as these were paid. She is not entitled to severance pay as she was not declared redundant and was in fact paid service pay.

The claimant is not entitled to NSSF or NHIF as these were remitted to the statutory bodies.

Taking into account all the circumstances of this case, including the claimant’s conduct, I do not think this is an appropriate case for award of compensation as the claimant heavily contributed to the circumstances that led to the termination of her employment.

In the circumstances, the case must fail and is accordingly dismissed with no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**