



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 625 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 10th December, 2018)

ALICE WAIRIMU NGIGE..... CLAIMANT

VERSUS

ANTIPEST KENYA LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant acting on her own behalf filed suit on **1st April, 2015**, seeking damages for termination on account of redundancy and failure by the Respondent Company to pay her severance payment/or terminal benefits. She states that on or about April 2005 she was employed by the Respondent as a tea maker.

2. She avers that she commenced employment is April 2005, and that she served the Respondent with loyalty and diligence until 26th June 2014, when the Respondent wrongfully and unlawfully terminated her services without notice and refused to pay her severance payment/terminal benefits.

3. The Claimant further avers that she was not informed of the reason why she had been declared redundant yet her position was still available in complete disregard to Section 41 of the Employment Act, 2007. She goes on to state that the Respondent's actions were in violation to Sections 43 (1) and 45(1) of the Employment Act, 2007.

4. She stated that at the time of dismissal she was earning Kshs. 14,130 with an additional 2,120 as her house allowance bringing her gross salary to Kshs. 16,250 per month.

5. She avers that she was entitled to the following:-

<i>a) One Month notice</i>	16,250
<i>b) Days worked</i>	12,246
<i>c) Prorata leave of two months</i>	1,884
<i>d) Annual paid leave for 10 years</i>	98,910
<i>e) Gratuity/Service benefits for 10 years</i>	70,650
<i>f) Maximum compensation for</i>	
<u>Loss of employment</u>	<u>195,000</u>

Total **378,690**

6. She also claims for wages plus costs of the suit and interests of the suit.

7. The Respondent in its Memorandum of Defence admits that the Claimant was its employee. Save that she was employed as a general

worker (sanitary bin lady/cleaner) from April 2005 to 26th June 2014 and was paid Kshs 250 per day as per the provisions of the Regulation of Wages (General Order).

8. The Respondent further avers that making tea by the Claimant was an occasional duty shared with four other ladies in the absence of Jecinta Musyoka.

9. The Respondent avers that the Claimant's wages were adjusted as per the schedule of the Regulation of Wages (General Order) from Kshs. 260 per day as at 1st May 2010 and rose to Kshs 471 per day as at 1st May 2013. The Respondent goes on to indicate that the salary effective from 1st May 2013 was what the Claimant continued earning until 26th June 2014.

10. The Respondent further avers that when the Claimant was terminated and following consultations between the Claimant's representative and the Federation of Kenya Employers, the Claimant was offered terminal benefits amounting to Kshs. 60, 759, which she later declined owing to disagreement on how a month's salary ought to have been tabulated.

11. The Respondent avers that the final net amount owed to the Claimant of Kshs. 47,865/- was later deposited in her bank account Number 0000003XXXXXXX at Diamond Trust Bank T-Mall Branch.

12. The Respondent avers that the Claimant was terminated since she was not a satisfactory worker. It is the Respondent's averment that at the time of termination the Claimant had adopted a carefree attitude and was defiant to the laid down procedure on various accounts.

13. The Respondent contend that on or about 9th April, 2014, the Divisional/General Manager, Maria Malik-Davies found the Claimant fast asleep at one of the warehouse floors and warned her Appx. 3.

14. The Respondent further avers that on 17th April 2014 the Claimant had requested for an emergency leave to sought out a pressing personal issue. The Claimant failed to inform the Respondent of the issue to allow them make an informed decision on whether to grant the leave requested, instead the Claimant was very rude and in fact proceeded on leave without proper approval from the Respondent. The Claimant was equally warned about this behaviour by the Respondent's Divisional Manager and the Director (Appx. 4).

15. The Respondent avers that the Claimant was invited by its management for a discussion on her attitude. In the said meeting, she was also reminded of being in proper uniform at all times (wearing appropriate shoes as she was employed as a bin lady/cleaner). She unfortunately did not change (Appx. 5).

16. The Respondent further avers that on 25th June 2014 the Claimant was invited for a formal disciplinary meeting regarding her behaviour (Appx. 6). The Respondent goes on to state that it was following this meeting that the Claimant's services were terminated.

17. The Respondent avers that the Claimant was not declared redundant but was terminated for her disobedience and failure to obey lawful order.

18. The Respondent further avers that the Claimant was given an opportunity to defend herself and appropriate notice of termination issued despite the fact that the Respondent was entitled to dismiss the Claimant summarily under Section 44(4) of the Employment Act, 2007.

19. The Respondent denies that in terminating the services of the Claimant, it violated Sections 43(1) and 45(1) of the Employment Act, 2007.

20. The Respondent further avers that the Claimant is not entitled to any of the reliefs prayed for in her Memorandum of Claim. They pray for the claim to be dismissed with costs.

Evidence

21. The Claimant led evidence stating that she was employed by the Respondent from 2005 to 2014 as a tea girl and bin lady. That she worked for the Respondent for 9 years with her salary being increased from Kshs. 250/- per day to Kshs. 471/- per day. She further stated that during the period she worked for the Respondent (9 years) she was only paid for 3 years instead of the entire period upon termination and that is why the instant suit was filed.

22. The Claimant went on to state that she was paid 47,865.10, which was deposited, into her account leaving a balance of Kshs. 330, 825.

23. In cross-examination, she stated that the redundancy was not lawful. The Claimant went on to explain that the Respondent terminated her services since she was not wearing gumboots yet she was preparing tea.

24. It was the Claimant's evidence that she received a letter warning her about ensuring that she was wearing her gumboots while on duty.

25. It was the Claimant's evidence that she had differences with the Respondent's Manager Maria Davies. It was her evidence that she had never received any warning letter from the said Manager.

26. Still on cross-examination, the Claimant told the Court that she had never discussed any alleged bad behaviour with the Respondent. The only discussion the Claimant had with the Respondent was on the issue of leave to collect her identification card from the chief on a succession matter. It was further her evidence that the Respondent's Manager allowed her to be away but to return with proof.

27. The Respondent put up one witness one Ms. Mary Wairimu who stated in evidence that the Claimant was employed in 2005 as a sanitary bin cleaner.

28. That the Claimant was terminated due to misconduct. It was her evidence that the Claimant was warned on several occasions on different issues before her services were terminated.

29. The Respondent urged the Court to dismiss the suit.

Claimant's Submissions

30. The Claimant submits that she is entitled to the prayers as prayed in the Memorandum of Claim.

31. It is the Claimant's further submission that the Respondent did not avail any disciplinary proceedings before the Court in order to ascertain that the Respondent accorded the Claimant a hearing as required under Section 4(2) of Fair Administrative Actions Act No. 4 of 2015.

32. It is the Claimant's submissions that in the circumstances, the claim in its entirety be allowed with costs.

Respondent's submissions

33. It is submitted by the Respondent that the Claimant was not declared redundant but her services were terminated due to misconduct.

34. The Respondent submits that the Claimant is not entitled to gratuity as her contract of service did not provide for it. Further the Respondent submitted that the claim for severance pay similarly does not stand as the Respondent had been paying NSSF dues as per the provisions of the Section 35 (6) (d) of the Employment Act further no evidence was given by the Claimant to show that she was entitled to it.

35. The Respondent submits that the Claimant is a rude, unapologetic and non-diligent worker and no employer can tolerate repeated indiscipline from their employees.

36. The Respondent submits that all dues that were due to the Claimant were paid thus the Claimant has no claim as against the Respondent. They pray for the suit to be dismissed with costs.

37. I have examined all the evidence and submissions of the parties. From the evidence on record, the Respondent's Appendix 7, the Claimant was dismissed apparently for having bad attitude towards work and appalling behaviour despite numerous warnings.

38. The Respondents annexed letters apparently addressed to the Claimant warning her of certain behaviour, and finally suspending her from duty without pay from 18/6/2014 to 23/6/2014.

39. She was apparently invited for a disciplinary hearing on 26/6/2014 at 11 am and then dismissed on the same day. The letter referred to by the Respondents do not bear any address and there is no indication as to how the Claimant received these letters. There is also no evidence of alleged disciplinary hearing that took place on 26/6/2014. No minutes of the hearing are attached as proof that there was such a hearing.

40. What transpires is that the Claimant was dismissed without being accorded any hearing and as such the dismissal was unfair and unjustified.

41. Section 45(2) of Employment Act 2007 states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure..".

42. When the Claimant was dismissed, she was paid leave for 3 years, 1 month notice and another 2 months notice. In the circumstances, the only other award I will grant the Claimant is 10 months salary as compensation for unlawful termination = 10 x 16,250 = 162,500/=.

43. 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 10th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Namasake for Respondent – Present

Claimant in person – Present