



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 179 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 23rd February, 2017)

LYNETTE PEREIRA.....CLAIMANT

VERSUS

KENYA MOTOR SPORTS FEDERATION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 7th February, 2013, through the firm of S.N.Gikera & Associates wherein they seek reinstatement of employment of the Claimant and damages for having allegedly been wrongfully dismissed.
2. They aver that the Claimant received a letter of appointment from the Respondent Company on 1st May, 2005, where the terms and conditions were that the gross salary for the month of May was 25,000/= and Kshs. 45,000/= for the month of June. She worked seven hours and thirty minutes shifts and was also paid 21 days leave.
3. She further avers that on 31st January, 2011, she received a letter from the Respondent informing her of a salary increment back dated to 1st October, 2010, which in effect raised her salary to Kshs. 90,108. The said letter was attested by the Claimant and the Respondent's General Manager.
4. It is the Claimant's contention that on 28th January, 2013, she received a letter terminating her employment with immediate effect. She was paid one month's salary in lieu of notice and service pay for seven years worked. She prays for:
 - a. *That the Respondent be restrained from terminating the Claimant's employment.*
 - b. *That the Respondent reinstates the Claimant to her prior employment position and accords her all rights she is entitled to as an employee of the Company.*
 - c. *That the Respondent pays damages to the Claimant for wrongful dismissal from employment.*
 - d. *That the Claimant claims as against the Respondent the costs of this suit together with interest thereon at such rates and for such period as this honorable Court may deem fit to grant.*

5. The Respondent filed a Statement of Defence on 11th March 2013 wherein they confirm that there was a contract of employment between them and the Claimant and that subsequently the terms of engagement were altered.
6. They however state that they terminated the Claimant lawfully and strictly in accordance with her contract, the terms of her engagement and the relevant provisions of the Employment Act. That the Claimant was already terminated and in the circumstances she is estopped from obtaining prohibitory relief and or damages as claimed. They pray for the Claim to be dismissed with costs.
7. The Claimant in evidence reiterated the contents of the Claim and added that the termination was unfair as she was not given notice and neither was she given a fair hearing. She prayed for the Claim to be allowed as drawn.
8. In evidence the Respondent's witness stated that the Claimant was terminated strictly and in accordance with her contract and the relevant provisions of the Employment Act. As a result of lengthy discussions and exchange of views of RW1 and the Respondent's directors they found it necessary to dismiss her.
9. They state that the Claimant was guilty of misconduct on several occasions. That she failed to cooperate with the General Manager like for instance there was a meeting of the company staff and its directors and the Claimant failed to attend without excuse. They state that the Claimant consented to the termination but she failed to hand over.
10. In submissions the Claimant states that she was wrongfully terminated as the provisions of Section 44 of the Employment Act on Summary Dismissal were not followed. They rely on the case of **Shankar Saklani vs. DHL Global Forwarding (K) Ltd Cause N. 562 of 2012** where it was held:
- “A hearing and a notification on the part of the employer are mandatory where it is contemplated to terminate the contract of employment on the grounds of misconduct, poor performance or physical incapacity of the employees.”***
11. That the General Manager alleged insubordination as the reason for termination whereas the details of the said insubordination were not disclosed to her. She had a right to a fair and public hearing as enshrined in Article 50 of the Constitution.
12. They further rely on the case of **Metah Mzee vs. SDV Transami t/a as Bollore Africa Logistics Kenya Ltd Cause No. 79 of 2012** where it was held:
- “In my view, summary dismissal was not just and equitable in the circumstances. .. because I would have expected the Respondent to confront the Claimant with the details of its investigations so that he could exhaustively reply to the same... In conclusion, I do find that in summarily dismissing the Claimant, the Respondent did not act in accordance with justice and equity and therefore the dismissal was unfair”.***
13. Having established that she was unfairly dismissed, she prays for her Claim to be allowed as drawn.
14. The Respondent on the other hand stated that the Claimant was insubordinate and when confronted about it she agreed to leave the Respondent. That they did have a sitting with the board members and the Claimant and the decision to terminate her was made.
15. They state that the Claimant is not entitled to the prayers sought as there was reason to terminate her and there was some semblance of a hearing before dismissal.
16. Having considered evidence of the parties herein, and the submissions filed the Respondent consent that they didn't give the Claimant any hearing.

17. They aver she was guilty of insubordination and that she agreed to leave the Respondent's employment. There is however no evidence of this agreement or even a notice to show cause over this insubordination. The Board apparently sat and decided to terminate the Claimant's services.

18. The Respondents admit not complying with requirements of Section 41 of Employment Act though some semblance of hearing was given.

19. Section 41 of Employment Act states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

20. The Court finds that there were no valid reasons to terminate the services of the Claimant as envisaged under Section 43 of Employment Act 2007 which provide as follows:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

21. Having found as above, I find the termination of Claimant unfair and unjustified as per Section 45 (2) of Employment Act which 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.

22. In that case, I find for the Claimant and I award her as follows:

1. 12 months' salary as damages for unfair termination

= 12 x 74,750 = 897,000/=.

2. 1 month salary in lieu of notice = 74,750/=

3. 7 years' service pay = $\frac{1}{2}$ x 74,750 x 7 = 261,625/=

4. Leave days not taken 49.5

$$= 74,750 \times 49.5/30 = 123,337.50/=$$

Total = 1,356,712.5 less statutory deductions

5. Certificate of Service

6. Costs and interest

Read in open Court this 23rd day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odera holding brief Miss Nthiwa for Claimant – Present

No appearance for Respondent