



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1259 OF 2010

LILIAN MUTHIGACLAIMANT

VERSUS

NEXT TECHNOLOGIES LTD..... RESPONDENT

JUDGEMENT

Issue in dispute – wrongful dismissal of the claimant

1. The claim is that the claimant was employed by the respondent, a company engaged in the business of information communication technology (ICT). Employment commenced on 2nd March, 2009 as the marketing executive under a contract of employment at a monthly wage of Kshs.33, 654.00. the claimant was confirmed into her position on 1st April, 2009 upon her satisfactory performance. Such came with work benefits of medical cover and gross pay increased to Kshs.40, 000.00 per month; and 21 leave days.

2. On 30th June, 2010 the claimant was served with a warning letter citing gross carelessness and negligence of the claimant. On 5th July, 2010 the claimant was suspended without pay for 2 weeks. On 18th August, 2010 the respondent was terminated from her employment effective 31st August, 2010.

3. The claim is that the termination was unfair, was without basis and justification and the claimant were denied the chance to defend herself. The law on fair procedure was not followed.

4. The claim is for;

Salary due for July, 2010 Kshs.40, 000.00;

Notice pay Kshs.40, 000.00;

Unpaid leave Kshs.52, 499.00;

Compensation;

Reinstatement; and

Costs.

5. The claimant testified in support of her case. That on 30th June, 2010 she got a warning letter alleging gross carelessness and negligence. The matter was resolved. However after a week she was suspended

vide letter dated 5th July, 2010 over gross carelessness. Upon resuming work on 31st August, 2010 the claimant got a termination letter for gross losses to the respondent. The claimant had been scheduled to start her annual leave on 1st September, 2010 but was terminated just before on 31st August, 2010 vide letter dated 18th August, 2010. There was no notice or hearing of any allegations to allow the claimant give her defence.

6. In defence the respondent has alleged that there was a tender done by the claimant while on probations for a printer but never sought the authority of her supervisor. The printer was ordered from abroad and there was an under quotation. The claimant had to call different suppliers and 3 such suppliers were required to quote before the process could be complete. Before getting the LPO [local purchase order] the claimant had to seek approval and the tender was approved but the LPO was only issued after the claimant's termination. That after getting the tender from Harambee Sacco the claimant did not put into account the VAT due; the respondent was to make a profit from the same and was approved.

7. The claimant also testified that it was the policy of the respondent to pay the due leave upon clearance. She did not do the handing over and has not been paid her leave pay.

Defence

8. In defence, the respondent admit they employed the claimant but she negligently undertook her duties in handling a tender proposal from Kenya National Auditors which she was required to do in line with tender documents. The claimant ordered for a multi-functional printer model from Red Dot Distribution who could not supply such a printer. The claimant then ordered for the same from Mart Network Solutions Ltd which was supplied but lacked a very important component known as a finisher. The claimant having noted such failure then ordered for the same with Ontrak Technologies but got the wrong product as it could not function with the sourced printer. The company had to do their own order for an appropriate product. The claimant was therefore negligent in undertaking her duties by failing to follow technical specifications for the tender.

9. Such negligence was apparent from the fact that the claimant had been employed as an agent of the respondent to undertake the tender with Harambee Sacco with a Power of Attorney dated 1st July, 2010 to act on behalf of the respondent in bidding and to meet the tender requirements but acted in a negligent manner; the claimant provided specifications for switches that were far superior and expensive than those required by the client forcing the respondent to bear the cost and thus incurring a loss; and the claimant failed to add VAT to the overall price of harambee Sacco in the Microsoft Officer 2007 tender and making the respondent bear the cost and resulting in incurring losses.

10. The defence is that the respondent acted fairly in terminating the claimant and acted in accordance with the human resource policy and procedures. That all due salaries were paid through her bank account. Such payment was put to the knowledge of the claimant.

11. In evidence, the respondent called 3 witnesses.

12. Cecilia Njoki, the Sales and Marketing manager of the respondent since 2005 testified that the claimant was in her department and her role was to bring business and work out quotations, tenders, proposal and projects. The tender by Kenya National Auditors and Kenya Cooperative Plaza and Harambee Sacco were tasked on the claimant. For the Kenya National Auditors tender the respondent was to supply a printer and what the claimant sourced did not meet the required specifications. The proposal and bid done lacked some required items, a finisher that was missing. 13. The printer purchased had no finisher and job separator which was a clear requirement by the client in the offer for the tender to the respondent. The offer and what was supplied did not match. This affected the respondent in financial losses, reputation and the chance to retain the client.

14. There was a second tender to LAN for Harambee Sacco but the claimant failed to follow the technical specification required by the client putting the respondent into losses in meeting the required needs for the client. A third tender for Harambee Sacco for a Microsoft sourced in United States Dollars

(USD) but the claimant did a Kenya Shillings and failed to put into account the VAT applicable. The respondent had to meet such cost.

15. Noting the lapses and reason of negligence the claimant was issued with a warning letter, a suspension and when the third incident occurred, the claimant was terminated. Before termination the claimant was called and the matters of negligence put to her and she gave her defence. The claimant refused to clear so as to be paid her terminal dues.

16. The second witness was Rosemary Nguni, the Finance Manager of the respondent. She testified that she worked with the claimant when she handled 3 tenders. In the Kenya National Auditors tender a printer was procured at \$11,500 and all costs put together, due to the respondent being forced to buy a missing part as required by the client and the costs for clearance and there was a total loss of Kshs.215,985.00. In the tender from Harambee Sacco the claimant made the respondent to procure products outside the set specifications and the total loss on the respondent was by having to buy the required product. The third tender for Harambee Sacco was for Microsoft but the computation done for the client was not inclusive of the VAT and the respondent had to pay the difference and incurring a loss of Kshs.496,993.10.

17. The losses in these three cases made the respondent lose a total sum of Kshs.3,289,069.70. The continued employment of the claimant became untenable.

18. July salary was paid less two weeks when the claimant was on suspension. August, 2010 salary was also paid through a bank deposit. The claimant had earned 21 days of leave and such the respondent is willing to pay upon clearance by the claimant.

19. The third witness was Sarah Njeri, the human resource manager of the respondent. She testified that while the claimant was employed with the respondent she negligently performed her duties resulting in termination. The claimant was responsible for 3 tenders of Kenya National Auditors, Harambee Sacco and for a Microsoft upgrade. As the responsible officer for the respondent, there were mistakes and losses by the respondent and the witness took disciplinary action against the claimant. In the first case the claimant got a warning and was then given a fair chance to change and continue working. On the second mistake the claimant was suspended to which she accepted and she signed to the same. On the third case, termination was appropriate noting the losses incurred on the respondent. The suspension was to serve the claimant to note that where there was a repeated offence and she failed to improve on her performance, termination would result.

20. The termination letter was issued in error and should have been dated 31st August, 2010 and not 18th August, 2010. The claimant was directed to hand over but failed to do so. Her case warranted dismissal and therefore notice pay is not due.

Submissions

21. Only the claimant filed written submissions.

22. The claimant submits that upon her termination, the respondent failed to comply with section 18 of the Employment Act as her case was not reported to the labour officer. The notice pay is due. That under section 43 and 45 of the Employment Act, the respondent has failed to prove reasons for the termination and therefore the same was unfair. Section 41 of the Act was not adhered to and the resulting termination was procedurally unfair. The respondent failed to issue the claimant with a certificate of service contrary to section 51 of the Employment Act. The claimant has relied on the following cases – **Donald Odeke versus Fidelity Security Ltd, case No.1998 of 2011; Timothy John Bakibinga versus DT Dobbie (K) Limited, Cause No.1417 of 2012; and John Gitonga Njeru versus Kenafic Industries Ltd, Cause No.318 of 2012.**

Determination

23. Both parties agree that by notice of 30th June, 2010 the claimant was issued with a warning letter for the reasons that there was gross carelessness and negligence as a sales executive and causing loss and reputation and damage to the respondent and that the long term damage for the same would result in customers taking business to competitions. On 5th July, 2010 the claimant was suspended for gross carelessness on assigned job and negligence causing loss and reputation damage to the respondent. The purpose of the suspension was for;

... to impress upon you the seriousness of this issue and to give you the opportunity to reflect upon your future compliance with our employment standards. ... this suspension should serve as a strong warning and that another incident of this nature will result in more severe disciplinary action up to and including dismissal.

24. Subsequent to the above, on 31st August, 2010 the claimant was issued with a termination letter from the reason that;

The reason for this termination is for continuously making careless mistakes in your duties and thus causing financial loss and reputation damage to the company. In the month of July you were suspended for this same reason, but unfortunately nothing seems to have changed.

25. The claimant's defence is that in the tender submissions made, she was dully supervised by a senior officer of the respondent and approvals given. That the losses incurred with regard to the Harambee Sacco tender would be accommodated by the respondent who had made a profit out of the same. The claimant testified;

... I was the Marketing Executive. I was not working alone. I asked the supplier for the goods and had to seek approval to get the LPO. ... in the Harambee Sacco tender, I got the order. I was with the technical department as they had to do the survey for me to do the tender. I was not able to state how much was needed. I used the tender department report to do the quotation. ...

26. There are instances where an employer is allowed to summarily dismiss an employee. Section 44(4) (c) provides;

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

...

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly

27. The claimant was confirmed as the Sales Executive of the respondent. With such employment, the claimant was issued with a Power of Attorney to act as the respondent's agent in the tender process for a client. I take it that such a responsibility was placed upon the claimant by the respondent out of trust and thus the responsibility to undertake the assigned duty carefully, diligently and with all the required professionalism. Such responsibility was to be undertaken for the benefit of the respondent business. The claimant became the overall responsible officer of the respondent in the tender.

28. The claimant can therefore not shift the responsibility to her supervisor; shift the duty of care and diligence once the power to undertake the allocated duties was placed on her. I find the claimant in handling the allocated work and in the tender to Kenya National Auditors sourcing for a printer she was not diligent and the respondent incurred losses. There was a warning that the claimant accepted and

signed to it. There was a second tender that did not follow specifications and the claimant was suspended over the same. In the third tender, the claimant again failed to adhere to the required specifications and the respondent incurred losses. Ultimately, the duty placed upon the claimant by the employer to undertake duties with responsibility was breached.

29. The sanction was dismissal. But the respondent opted for a termination of employment.

30. Termination of employment comes to a duty upon the employer. An employee must be given a hearing in terms of section 41 of the Employment Act. The employee must be heard in the presence of another employee of her choice. Even where the offences or alleged misconduct warrant summary dismissal, when the respondent took the option to terminate the claimant, the procedures set out under section 41 should have followed.

31. I find no effort to adhere to section 41 of the Employment Act by the respondent. The officers called to testify for the respondent are all senior officers and none talked to the fact of the claimant being invited to attend any disciplinary hearing and where the mandatory provisions of section 41 were followed. For such lapse, the termination of the claimant became procedurally unfair.

32. In arriving at such a finding I take into account the provisions of section 45 (2) of the Employment Act;

(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.

33. Save for the failure to abide fair procedure, the respondent had sufficient, valid and fair reasons to justify the termination of the claimant. The conduct of the claimant resulted in the respondent incurring losses and though not counter-claimed from the claimant, such are evident.

Remedies

34. For the failure to meet the procedural requirements mandatory under section 41 of the Employment Act, notice pay is due to the claimant. A ward of Kshs.40, 000.00 is appropriate.

35. On the claim for unpaid salaries for July and August, 2010, annexure 12 at page 18 to the Supplementary Defence is a confirmation of the payment of Kshs.21, 589.05 and Kshs.40, 000.00 into the claimant's bank account on 26th July, 2010 and 26th August, 2010 respectively. The claimant does not dispute that she is the holder of Account No.0140-587939801 at CFC Stanbic Bank. As such to make a claim for similar amounts on the evidence of the payments made would be double payment. Such is declined.

36. Unpaid leave is admitted for 21 days. Such shall be collected by the claimant from the respondent upon undertaking clearance. Work place policies are accepted as a good practice and where such clearance before payment of terminal dues is directed, the claimant is to abide and shall be paid.

37. For failure to accord the claimant fair procedure before termination of employment and putting into account the claimant conduct in terms of section 45(5)(e);

(e) the existence of any previous warning letters issued to the employee.

38. To award a compensation thereon would be to award an employee who has failed in her duties and caused the employer huge financial losses. An award of any damages would only add to such losses. This is a court of justice and equity. There shall be no compensation awarded.

39. The claim for reinstatement was not gone into at all. I take it the claimant is not keen on the same. However, reinstatement is only available where there is a finding that there is a remedy for unfair termination of employment and that the termination was substantively unfair. In this case, the termination was justified and as such, the remedy of reinstatement not available to the claimant.

In conclusion, save for the award of notice pay at Kshs.40, 000.00 the other claims are declined. Each party shall bear own costs.

Dated and delivered in open court this 30th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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