



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 349 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th June, 2017)

LILIAN MAKANDI RUKUNGACLAIMANT

VERSUS

FRANCIS MBURU

T/A ROBICO CHEMICALSRESPONDENT

JUDGMENT

- 1.** The Claimant herein filed her claim on 10.3.2011 through the firm of Nyabena Nyakundi & Company Advocates alleging wrongful dismissal by the Respondents.
- 2.** It is the Claimant's case that she was employed by the Respondents on 1st March 2003 as an Office Assistant at a monthly salary which was adjusted from time to time until it was 8,000/= as at 28th September 2009. She exhibited her Appendix 1(b) – the payslip for September 2009 as proof of the amount of salary she was paid.
- 3.** It is Claimant's position that she served the Respondents diligently until on or about 28th September 2009 when Respondent suspended her from employment after she was charged at the Nairobi CMs' Court in criminal case No. 1757/2009.
- 4.** This case was terminated on 21-9-2009 when the Claimant was acquitted. The Claimant did not however provide the certified copy of judgment of the said criminal case.
- 5.** The Claimant avers that the suspension was to be in force until the conclusion of the criminal case No. 1757/2009. She however states that upon the conclusion of the criminal case she went to the Respondent with a view of being allowed into her previous employment but the Respondent refused to allow her resume her duties.
- 6.** By a letter dated 1.11.2010, the Claimant sought intervention of her advocate on record in demanding her reinstatement. The Respondent never responded to the said letter hence this suit.
- 7.** The Claimant's claim is for reinstatement without loss of benefits or payment of her terminal dues and compensation for wrongful dismissal as enumerated under paragraph 10 of her Memorandum of claim. She also seeks for payment of costs and interest at Court rates.

8. The Respondent filed a Statement of Defence to this claim on 17.6.2011 through the firm of P.K. Njoroge and Company Advocates. The Respondents reply is a mere denial save for paragraph 3 where they admit suspending the Claimant pending conclusion of the criminal case No.1751/2009 but that no commitments had been given as regards payment of salary upon termination of the criminal case.

9. The Claimants filed their submissions before Court on 28/1/2017 after Court ordered the Respondents' case closed due to their non-attendance on 17.1.2017 when the case was set for defence hearing.

10. I have considered evidence adduced on record, perused the pleadings filed herein and the submissions filed by the Claimants. The issues for determination are as follows:

1) Whether there were valid reasons to warrant dismissal of Claimant.

2) Whether due process was followed before Claimant's dismissal.

3) What remedies are available to the Claimant if any?

11. The Claimant was not given any termination or dismissal letter. After her suspension, the Respondent never communicated to her. The Claimant's attempt to enlist a response bore no fruits and the Claimant presumed she had been dismissed and rightly so under Section 43 of Employment Act:

“(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.

12. Reasons for dismissal must therefore be given by the Respondents as provided under the law. In this case however there was no termination letter and so the Claimant was dismissed without any reasons being attached to the dismissal by the Respondent.

13. On due process, the process envisaged is as provided for under Section 41 of Employment Act which envisages a disciplinary hearing where the Respondent calls evidence and allow the Claimant to question the said witnesses if any and at the same time allow the Claimant an opportunity to give her version of the story. The Claimant would also be allowed to call her witnesses if need be.

14. This process was conspicuously omitted by the Respondent and as such the Claimant was dismissed without following due process.

15. Under Section 45(2) of 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”.

16. In case of the Claimant, there were no valid reason to warrant dismissal and no due process was

followed. I therefore make a finding of unfair dismissal of the Claimant by the Respondent.

17. On the last issue, the Claimant sought a raft of remedies including reinstatement. Reinstatement is however not a viable option at the moment three (3) years having elapsed since the dismissal and there being a bar to such a reinstatement under Section 12(3) (vii) of Employment & Labour Relations Court Act.

18. I will however award the Claimant as follows:

1. 1 month's salary in lieu of notice Kshs. 8,000/=.

2. Salary arrears from November 2009 to September 2010 during suspension period = 88,000/=.

3. House allowance from November 2003 to September 2010 being 15% of basic pay = 15 of 8000 x 82 months = 98,400/=

4. 12 months compensation for unlawful dismissal = 12 x 8,000= 76,000/= .

Total = 270,400/=

5. Issuance of a Certificate of Service.

6. Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

Read in open Court this 29th day of June 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo holding brief for Nyaga for Respondent

Nyabena holding brief Rakoro for Claimant