



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.76 OF 2013

LINSEY ATIENO OJWANGCLAIMANT

VERSUS

FUSION CAPITAL LIMITEDRESPONDENT

JUDGEMENT

1. The claimant was on 1st February, 2009 employed by the respondent as an Assistant Accountant based at the Nairobi office. On 7th June, 2011 the claimant's terms and conditions of employment were revised vide letter dated 9th September, 2011 with a transfer to Kigali, Rwanda branch despite her employment contract not stating that she was required to work outside the country.

2. In January, 2012 the claimant reported to the office in Kigali and was promoted to Senior Accountant. In November, 2012 the claimant was directed to clear with the Rwanda office while taking her annual leave as she was to report back at the Nairobi office upon completing the same but surprisingly she was then directed to report to Kigali where she found her replacement and thus was not assigned any duties and was to wait for a space in Nairobi.

3. When the respondent office closed for the Christmas holiday the claimant travelled home and was called to report to the Nairobi office where without warning or reason was issued with a termination letter dated 21st December, 2013 to take effect on 1st January, 2013 on the reasons that there was gross misconduct which fact had never been communicated with her or a hearing held.

4. The claim is that the termination was unfair and unjust for the reasons that there was no notice or payment thereof; termination notice was allegedly issued on 21st December, 2013 while termination was to take effect on 1st January, 2013; and termination of employment on false allegations. Upon termination, no dues were paid thus subjecting the claimant to suffering and inconveniences which amounted to discrimination. The claimant has remained jobless and is seeking;

1. Reasonable payment in lieu of notice at Kshs.130,000.00;

2. Service pay for 4 months for 4 years worked at Kshs.520,000.00; and

3. General damages for unlawful termination.

5. The claimant is also seeking general damages for the unwarranted termination, interests on due payments and costs of the suit.

6. The claimant testified in support of the claim that upon employment by the respondent she was

confirmed in her position and work station was defined as Nairobi. There was no provision for work elsewhere.

7. In 2011 the claimant was transferred to the respondent's Kigali office in Rwanda from 1st October, 2011. The claimant had a discussion with the head of operations but did not accept the transfer as she needed to think about the transfer. She was not comfortable with the transfer as at the time was planning for her wedding and going back to school. A letter of transfer was however issued before the claimant could accept the proposal for a transfer. The service charter had stated that she was supposed to consent to the transfer. The claimant moved to the Kigali office effective 11th January, 2012 as Senior Accountant. She was to stay in Kigali for one (1) year to help set up the office.

8. While in Kigali, a new office accountant was employed. This was before the claimant went on annual leave due from 15th November, 2012. The claimant had expected to resume work at the Nairobi office and thus handed over her duties before leaving Kigali. On 4th December, 2012 the claimant had expected to be allocated new duties.

9. While the claimant was still on leave, she got a call from the respondent to report to the Kigali office and a flight ticket was also sent. She was to do an official handing over but once in Kigali, she was not assigned any duties. The Rwanda country manager acknowledged the handing over from the claimant and was supposed to report back to Nairobi on 3rd January, 2013. She was released for Christmas holiday on 20th December, 2012.

10. The claimant travelled back to Nairobi for the Christmas holiday and got a call from the respondent office. The practice was to get vouchers and when a letter was issued to her she thought it was a voucher. On the way home, the claimant read the letter only to realise it was a termination letter over alleged misconduct. That on 9th December, 2012 she had discussed the respondent on social media. There was no prior warning or hearing before the termination for the claimant to give her defence to the allegations against her. She had never discussed the respondent over social media and what she posted was personal. The claimant in defence has filed a *Facebook* account post but not aware how the respondent was able to access the account s it is personal and has a password. The claimant had used her *Facebook* account for personal communication as it is a fun and social friends place but the respondent accused the claimant of discussing its internal and confidential matters in public. In the posting the claimant was lamenting that she had a painful experience as her honeymoon was cut short but did not mention the respondent or any confidential matter or work of the respondent.

11. The termination was summary and without any justification. The remedies sought are due.

Defence

12. In response the respondent admit they employed the claimant on a contract of one year and was issued with letter of appointment dated 1st February, 2009. The employment was confirmed by letter of 11th July, 2010. In June, 2011 the respondent reviewed terms of employment of all employees including that of the claimant and signed Staff Services Agreement (SSA) on 7th June, 2011. Following the unsavoury conduct of the claimant, she was dismissed from employment.

13. By September, 2011 the claimant was the most experienced Accountant in the respondent business in Nairobi and was therefore selected for posting in a new subsidiary in Kigali to set up the Accounts department for an initial one year and subject for review. The SSA notified the claimant that she was to work for any office of the respondent with her consent. By letter dated 9th September, 2011 and discussions with the claimant the respondent communicated its decision to send the claimant to Kigali office from 1st October, 2011. This was postponed for 3 months to allow the claimant time to organise herself in Kenya and thus reporting to Kigali was rescheduled to 10th January, 2013. The claimant was also promoted. The claimant accepted the transfer; was paid relocation and travel costs and a return ticket.

14. The claimant purported to end her engagement in Kigali prematurely on 15th November, 2012 without seeking formal recall. It was without hand over of books of account, cheque books and petty cash to the supervisor. The claimant was asked to return to Kigali to complete the handover. She did not take this well and became verbally abusive to her supervisor, grudgingly reporting to Kigali on 6th December, 2012.

15. By letter dated 21st December, 2012 the respondent summarily dismissed the claimant with effect from 1st January, 2013 in terms of clause 18.2 of the SSA with regard to breach of trust and confidence. The claimant had discussed internal confidential company matters and management decisions with third parties on social media. Such conduct amounted to a breach of trust aimed at causing embarrassment to the respondent and brining the management into disrepute. This constituted a serious and inexcusable act of misconduct and was in contravention of the terms and the confidentiality agreement signed with the respondent. The facts, dates ad content of the social media discussion are well within the knowledge of the claimant.

16. The termination of the claimant was fair, lawful and justified. The actions of the claimant warranted the summary dismissal.

17. The claimant was directed to avail herself on 4th January, 2013 to clear and collect her terminal dues but failed to do so to date. By 31st January, 2013 the claimant owed the respondent Kshs.79, 035.00 in form of staff loan which continue to accrue interest at 18% per annum until payment in full. The remedies sought are not due and should be dismissed with costs.

18. in evidence the respondent witness was Susan Kagundu the Executive Director, Finance and Operations at the head office in Nairobi. The respondent has branches in Rwanda, Uganda and Tanzania.

19. Ms Kigundu also testified that upon the employment of the claimant, she was issued with contract and signed the SSA. Her employment was reviewed and was posted to Rwanda office at the time the claimant was the most experienced Accountant and was to help set up the Rwanda office in the Account department. In terms of the SSA her consent was obtained and all allowances paid.

20. The claimant reported to Kigali office in January, 2012. This was not discriminatory and was normal practice.

21. In November, 2012 the claimant travelled to Nairobi to prepare for her wedding on 24th November, 2012 and it had been expected she would do handing over of her work. To move without formal handover was contrary to the terms of contract. The claimant was required to do handover to the supervisor or to the officer taking over her duties in Kigali.

22. On 21st December, 2012 the claimant was terminated from her employment with the respondent for discussing internal and confidential matters on social media. This was contrary to her contract. The confidentiality clause in the SSA addressed how the claimant was to deal with internal information of the respondent.

23. At the time of termination, the claimant owed the respondent in staff loan which has not been repaid and continues to attract interest of 18% until paid in full. The remedies sought are not due as the claimant committed acts of misconduct that warranted the dismissal

24. Both parties filed written submissions.

25. The claimant submits that the termination of employment failed to follow natural justice and she was not given a hearing. The respondent failed to follow the SSA and the law. The remarks the claimant made on social media was her right to expression and opinion. The respondent failed to follow laid down procedures and compensation is due as held in **Abisalom Ajusa Magomere versus Kenya Nut Company Ltd [2-14] eKLR** And **Abraham Gumba versus Kenya Medical Supplies Authority [2014]**

eKLR.

26. The respondent in submissions reiterates the statement of defence and submissions therein.

Determination

27. The cause of action arose following the termination of the claimant by the respondent vide letter dated 21st December, 2013 and taking effect from 1st December, 2013. Despite the conflict in dates the reason for termination was that;

This is to inform you that the company has decided to terminate your service as a Senior Account with effect from 1st January, 2013.

This action has been taken due to your gross misconduct contrary to your terms and conditions of employment. You discussed company management and its decisions to unauthorised persons on social media on 9th December, 2012 as per attached copies.

28. Attached is a schedule of messages from different posts which in my view revolves around *back to Kigali for two weeks*. This seems to be a conversation among friends commiserating with a friend for being separated with another from a honeymoon and sent to Kigali and the recipient of this sympathies has vowed *it was the most painful and shocking experience ... my hubby is now alone now ... in am going back home on 21st It will be my last trip to Kigali ... whatever happens aint leaving my hubby again ...*

29. These posts have been associated with the claimant. She did not deny the contents save that her defence was that it was a discussion among friends and did not know how the respondent was able to access her *Facebook* account and password. The respondent on their part have a case that the claimant was discussing internal management matters of the respondent via social media which was in breach of the SSA and the terms of trust and confidentiality.

30. What is apparent it that the claimant got her wish instantly as she was summarily dismissed and was therefore not required to return to Kigali again. She however claim this amounted to unfair dismissal of her employment. The defence is that the dismissal was justified noting the gross misconduct of the claimant.

31. From the letter of termination, the same is on the single fact of the alleged misconduct of the claimant discussing company management and its decisions to unauthorised persons on social media on 9th December, 2012.

32. In the SSA that the claimant signed with the respondent and attached to her contract of employment, clause 18.2 spelt out matters that warranted summary dismissal. The Court of Appeal in the case of **Bamburi Cement Limited v William Kilonzi [2016] eKLR** held that;

In terms of section 44 of the Act an employer may only resort to summary dismissal when the employee has, by his or her conduct fundamentally breached his or her obligations arising under the contract of service. It is only a misconduct that is gross in nature that will entitle the employer to summarily dismiss an employee. The following instances of misconduct will amount to gross misconduct as to justify the summary dismissal of an employee, that is to say;

- i. absenteeism from work without leave or other lawful cause,*
- ii. intoxication to the extent of being incapable of performing his or her duties during working hours,*
- iii. wilful neglect to perform his/her work or doing so carelessly and improperly;*

iv. using abusive or insulting language towards his or her employer;

v. failing or refusing to obey lawful commands issued within the scope of his or her employment by his or her employer or a person placed in authority over him/her by the employer,

vi. if arrested for a cognizable offence punishable by imprisonment and is not released on bail or bond or otherwise lawfully set at liberty within 14 days, or

vii. If an employee commits or, on reasonable and sufficient grounds, is suspected of having committed a criminal offence against or to the substantial detriment of the employer or the employer's property.

This list is not exhaustive and there will be other instances not enumerated above.

33. The Employment Act thus allow an employer to have internal policy that outline instances that warrant summary dismissal based on the nature of business of the employer and the peculiar circumstances that may warrant considerations that amount to gross misconduct and thus subject to summary dismissal. Such is to ensure business interests are protected at all material times by the employees.

34. In the above cited case, the Court of Appeal went further to cite the Canadian Case of **Mc Kinley versus B.C.Tel.** (2001) 2 S.C.R. 161 and where it was held that;

Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

35. The claimant testified that she never indicated to the respondent that she was unhappy with her posting to Kigali, Rwanda but expressed the view that her consent was not obtained while she was sent there. However, the claimant noted that all due allowances and transfer provisions of air tickets were issued and there is no claim of any unpaid salary. That at the time the claimant was planning for her wedding and wanted to go back to school. This seems to be the matter on the social media conversation with her friends. The fact of having to leave her spouse and go to Kigali and having to cut short the honeymoon. It is clear that the claimant was not happy with her posting to Kigali and expressed herself to her friends via social media.

36. in the **Case of Bar Bulescu versus Romania, Application No.61496 of 2008**, the European Court of Human Rights held that whilst human rights law gave employees a reasonable expectation of privacy at work, this right was subject to an employer's legitimate objective of managing its resources effectively. Therefore, an employer could, if the circumstances justified it, be entitled to monitor employees' emails provided this was limited in scope and a proportionate means of achieving its legitimate objective. See also the case of **Angela Wokabi versus Tribe Hotel [2016] eKLR.**

37. However, even where an employee has committed gross acts of misconduct that warrant summary dismissal, due process of the law requires that notice and hearing be guaranteed for the employee to explain herself in defence and upon such consideration, and putting all into account, a sanction to follow. Section 41(2) of the Employment Act requires that;

(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..

38. At the hearing, the employee is given a fair chance to explain herself. To thus terminate employment without following due process denies an employee the rights set out in law and negates the natural justice principles. An employee should not be condemned unheard unless the employer is able to demonstrate that it was practically impossible to hear the employee noting the circumstances of each case. Without such demonstration here, I take it the claimant was called to the office on 21st December, 2012 and handed her letter of termination without prior notice, hearing or knowing the reasons for the same. She only learnt of the dismissal on her way home when she opened the letter earlier issued to her thinking it was the Christmas voucher only to see it was her termination of employment.

39. Such I find to be a brutal mode of termination while the respondent had the time and resources to call and table their case against the claimant and allow her to articulate her defence. Such chance was denied of the claimant. The respondent became the accuser, prosecutor and judge of their own cause. Had the claimant been called to explain her circumstances following her social media posting, however gross the case was found by the respondent to be, the claimant's defence was stifled. The resulting termination resulted in procedural unfairness. Had the defence been put into account, there is a fair chance the harsh sentence of summary dismissal may have been less and an alternative sanction issued.

Remedies

40. Notice pay is due in a case of unfair termination of employment where there is no notice. The claimant is awarded Kshs.130, 000.00.

41. The claim for 4 years' service pay is premised on the evidence that the claimant worked for the respondent for 4 years and under section 35(5) is entitled to service pay. However, service pay is due to an employee who is not registered with NSSF and NHIF and or the statutory due payable have not been paid. Service pay can also be paid if it forms part of the terms and conditions of service agreed upon by the parties. In evidence the respondent confirmed the claimant's statutory dues were paid. As such, service pay is not due.

42. On the finding that there was procedural unfairness, the claimant is entitled to compensation. Putting into account the evidence, 6 months gross wage in compensation is appropriate. He claimant is awarded Kshs.780, 000.00.

43. At the time of dismissal, the claimant owed the respondent in staff loan. Section 119 of the Employment Act allow an employer to deduct from the employee's wage or salary amounts that have been advanced as loan of other facility with approval and consent of the employee on the agreed terms. Section 19(1) (h) thus provides that;

(h) [an employer shall deduct] an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section;

44. The claimant does not deny the fact of owing the respondent sums of Kshs.79, 035.00 repayable at 18% per annum until payment in full. Such monies advanced to the claimant are due and owing and shall be deducted from any dues and monies payable to the claimant by the respondent on the agreed terms. The claimant benefited from the loan facility advanced by the respondent on the agreed terms. Repayment shall also be on the agreed terms.

45. It is a good practice for an employee to undertake clearance with the employer before terminal dues are paid. Such is to ensure that there are no liabilities or credits advanced and not repaid. The employee is also protected against any claims that may follow after termination of employment. Such clearance

therefore serves a good purpose and is a best practice in any business entity.

46. The claimant shall therefore ensure clearance with the respondent by payment of the due loan facility with the interests due to date. The respondent shall also pay the owing terminal dues.

Accordingly, judgement is hereby entered for the claimant and the finding that the termination of employment was procedurally unfair; compensation is awarded at Kshs.780,000.00; notice pay Kshs.130,000.00; less loan facility advanced at Kshs.79,035.00 payable at 18% from the date when due until paid in full. The claimant is also awarded 50% of her costs.

Delivered in open court and dated this 29th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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