



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1335 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 12th July 2017)

MAGDALENE M. NGEACLAIMANT

VERSUS

NATIONAL CEREALS AND PRODUCE BOARDRESPONDENT

JUDGMENT

1. Before the Court is a Memorandum of Claim dated 30th July 2015 where the Claimant prays for judgment against the Respondent for:

(i) The Sum of Kshs. 11,405,400.00.

(ii) Any other relief the Court will consider necessary and entitled.

(iii) The costs of this claim.

(iv) Interest at Court rates on (i) above from the date of termination.

2. The Claimant was employed by the Respondent as a Clerical Assistant in 1992 and stayed in her employment until 29th February 2012. She worked hard and diligently rising through the ranks from Job Group C to Job Group F.

3. The Claimant states that she was unfairly and un-procedurally terminated, as there was no reason for her termination, she was entitled to the law of natural justice and was never issued with a notice of intention to terminate or given the opportunity to defend herself. She also states that she was not paid her dues.

4. The Respondent has filed a Statement of Reply dated 25th April 2016 where they admit that the Claimant was their employee at the stated period but deny that her termination was unlawful and unfair. They state that in the course of her employment, she received several warnings and Notice to show Cause dated 9th May 2002, 31st July 2008, 21st August 2008, 26th April 2011 and 21st September 2011.

5. state that her conduct throughout her employment was found wanting as she would desert duties without informing her superiors, decline advice to seek treatment at a reputable hospital so that she could go back to work, and that when she was sent on transfer to Kibwezi depot she declined to report to the station and refused to consider an alternative station, prompting her suspension.

6. They state that the Claimant duly responded to a suspension letter on the 12th of January 2012 and that in line with employment law and procedure, she was invited to a Central Staff Advisory Committee meeting where charges against her were read and after consideration decided to dismiss her.
7. They state that she was issued with a dismissal letter on dated 29th February 2012 and was paid her final dues which were calculated at Kshs. 47,090.45 paid out via cheque number 285707.
8. They state that the Claimant has no further claim against them and that the claim should be dismissed with costs to the Respondent.
9. The Claimant has filed submissions on the 3rd May 2017 where she submit as follows:-

“That she worked under 8 different Depot Managers with no complaint and it is only when she went under the supervision of the 9th one that her problems began. She submits that there was a plan to get her employment terminated from that point and she faced numerous difficulties in conducting her duties”.
10. She submits that she suffered from a health condition known as lumbago and sought medical assistance from various reputable institutions but was often met with hostility for the days off she had to take to see a doctor. Her supervisor went as far as hiding her sick off request further frustrating her employment.
11. She submits that she always supplied sick offs to the Regional Auditor Mr. Matoga who failed to remit them to Mr. Nzomo leading her to being accused of frequent absence from duty which frustrated her employment. She submits that there were very few complaints from her Managers of her absenteeism putting the Respondent to strict proof thereof.
12. The Claimant submits that on several occasions she found her salary had been deducted and on enquiring, she was met with threats to be sacked prompting her to reach out to the union who wrote a letter dated 20th May 2011 for full payment further adding to the tension.
13. She submits that these deductions were illegal and should be reimbursed by the Respondent. She further submits that the Respondent further refused to pay her December 2011 salary adding that she got an accident on the 15th of December 2011 which she reported to the Registry Supervisor Joyce Ngugi for upward transmission of the information but was instead suspended.
14. She submits that the Depot Manager was not providing her with proper instruction to carry out her duties, and went as far as accusing her of stating that he had raped her which was to put her in bad light as a person who made false accusations. He further accused her of insubordination and poor performance which she denies and reiterates that she was good and hard worker.
15. She submits that she was transferred to Machakos and accepted the transfer and in October 2011 got another transfer to Kibwezi but was not sure where to report. Upon enquiry from the Regional Manager, she was referred to the HR Manager who she went to see explaining reasons as to why she preferred Machakos to Kibwezi. She stated that her illness and that of her ailing mother made Machakos convenient as it was near the GOK hospital.
16. She submits that the Manager asked her to go back to her Manager, asking them to cancel the transfer which was not done.
17. She submits that her dismissal came before her suspension expired and that she was not invited to attend the staff advisory committee meeting to defend herself. Further, the minutes suspending her were not signed by the correct person.
18. She submits that there was no proper reason for the action taken, and no warning letters were sent to

her, she was not invited to attend the Staff Advisory Committee meeting to defend herself and was not even aware that one was taking place. She asks the Respondent to provide proof of her attendance. She further submits that they are in total breach of the CBA and the Ministry of Labor confirms that the dismissal was wrongly and unlawfully executed.

19. She submits that her dismissal was unprocedural as no warning letters had been issued to her, and the ones issued in 2008 cannot be taken into account as they were old matters that have since expired. She denies all allegations of insubordination again stating that old incidents should not be taken into account.

20. She submits that she was yet to reach her retirement age, making her exit premature adding that the Ministry of Labour through a Conciliator found the same. She attaches a letter to this effect. She submits that reinstatement was recommended by the Conciliator but turned down by the Respondent who instead proposed payment of 6 months compensation which was not anywhere near terms of reference of the CBA.

21. The Claimant reiterates that the treatment she went through was harassment and discrimination and asks the Court to grant the prayers sought.

22. The Respondent has filed written submission dated 28th June 2017 where they have submitted that the Claimant habitually absented herself from work and would only produce sick off sheets upon being served with a desertion notice contrary to the Respondent's procedure, which requires that the said sick off sheets are produced within 48 hours of attending work.

23. They submit that the Claimant was advised to seek better medical treatment at the Respondent's expense to enable her resume her duties but the same was declined. She was given an opportunity to respond to the production of proof of absence thereon. They deny all claims of discrimination, harassment and unjust salary cuts made by the Claimant.

24. They submit that she was transferred to the Respondent's Machakos depot which she subsequently appealed on the 6th October 2011 requesting that the same be put on hold until 1st of December 2011. The Respondent further submits that she was then redeployed to the Kibwezi depot where she also did not report. She was subsequently invited for a meeting at the Human Resource Manager's office on the 15th of December 2011 where she did not give proper reason for her non-corporation only asking to be transferred back to Machakos.

25. The Respondent submits that she was via letter dated 15th December 2011 lawfully suspended requiring her to show cause as to why disciplinary action should not be taken against her. She responded to the letter albeit late showing that she was in full understanding of the charges before her, and was invited to the Central Staff Advisory Committee Meeting held on the 2nd of February 2012 where she attended and defended herself. It was the recommendation of the committee that she be dismissed on account of insubordination and behaving in a manner insulting to a person in authority.

26. The Respondent submits that the termination from employment was fair and in accordance with the law and the Collective Bargaining Agreement.

27. They ask the Court to look at Section 43 and 45 (1) in coming to a decision on unfair termination which states as follows:

“Section 43: proof of reasons for termination:-

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 contract genuinely believes to exist and which cause the employer to terminate the services of the employee’.

28. Section 45 of the Employment Act 2007 provides that:

- 1) *“No employer shall terminate the employment of an employee unfairly.*
- 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”.*

29. Further they rely on the matter of **Evans Kamadi Misango vs. Barclays Bank of Kenya Limited [2015] eKLR** where the Honourable Judge had this to say while analyzing the provisions of Section 43 of the Employment Act pages 4 to 5 paragraph 21 to 23:-

“To my mind the burden placed on the employer by Section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. The HALSBURY’S LAWS OF ENGLAND (4th EDITION VOLUME 16) at page 482 expounds this principle as follows:

“in adjudicating on the reasonableness of the employers conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach (the range of reasonable test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take another; the function of a tribunal as an industry jury is to determine whether in particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; but is it falls outside the band it is unfair”.

30. The learned Judge then went on to state:

“It is not the role of the court to re-enact the internal disciplinary process already undertaken at the workplace. The responsibility of the court is to examine the legality and reasonableness of the action taken by an employer against an employee and if the set of standards are satisfied, then the court will not interfere. By his own admission at the disciplinary hearing whose record has not been challenged, the Claimant failed to take certain precautionary measures at the time he issued the subject cheque book to the fraudster...The Claimant failed to live up to this standard and the Court finds that the Respondent had a valid reason for terminating his employment”.

31. They ask the Court to consider the same authority. They re-emphasize that the Claimant failed to report to her duty station and on that point it was a fair and valid termination.

32. They submit that the Claimant was accorded a fair hearing and due procedure was followed by the Respondent in dismissing her from service. They submit that both the procedure followed was both substantively and procedurally fair. That it was in line with Section 41 which states that:

1. .."Subject to the Section 42 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 reasons for which the employer is considering termination and that the employee is 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 representation 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".

33. Summary Dismissal is provided for under Section 44 where it is stated:

1) Summary dismissal shall take place where an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice that to which an employee is entitled to by any statutory provision of contractual term.

3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee lawful cause, but the enumeration of such matters or the decision of the 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:

a) Without leave or other lawful cause an employee absents himself from the place appointed for the performance of his work.

b) An employee uses abusive or insulting language or behaves in a manner insulting to his employer or to a person's placed in authority over him by his employers.

c) An employee knowingly fails or refuses to obey lawful and proper command which it was within the scope of its duty to obey, issued by his employer or a person is placed in authority over him by his employer.

d) An employee knowingly fails or refuses to obey lawful and proper command which was within the scope of its duty to obey, issued by his employer or a person in placed authority over him by his employer".

34. They submit that in line with Section 44 the Respondent has a right to summarily dismiss the Claimant as she failed to report to her duty station and refused to obey proper command. They submit that in spite of her behavior they still went on and followed the laid out procedure before dismissing her. It was after her oral and written defense that the decision to dismiss was made.

35. The Respondent submits that they went further and complied with the terms of the Collective Bargaining Agreement as follows:

Clause 27:1

“the Board will take disciplinary action against any employee who commits offences such as the following:

a) If the employee absents himself or herself from duty without leave, authority or excuse acceptable to the Board without reporting for more than 48 consecutive hours she will be regarded as having vacated office.

b) If an employee fails to report for duty within 14 days commencing from the first day of absence without any report and authority s/he will be summarily dismissed.

c) When an employee absents himself or herself without authority s/he will be summarily dismissed.

Offences that will require three warning letters before dismissal include insubordination, sleeping on the job, habitual lateness.

Clause 27:5:5

Once the board suspends an employee from service the case should be concluded within 3 months.

Clause 32:5

For cases of suspended or interdicted employees each person shall be accorded a chance to defend himself/herself against the offence for which the disciplinary action has been taken”.

36. It is the Respondents submission that they complied with all requirements.

37. As to the prayers, the Respondent submits that the prayer for the salary for Kshs. 6,120,000.00 being her salary for 20 years would amount to unjust enrichment as it implies that she did not draw any salary for the period that she worked which is not the case.

38. They submit that her second plea for Kshs 4,896,000.00 being future earnings before retirement is also wrong as it is not contemplated under the law. The Respondent submits that Section 49 of the Employment Act contemplates remedies for wrongful and unfair dismissal to be:

1) Where in the opinion of a labor officer summary dismissal or termination of a contract of an employee is unjustified, the labor officer may recommend to the employer to pay the employee any or all of the following:

a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service.

b) where dismissal terminated the contract before the contemplation of any service upon which the employees’ wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal arising between the date of dismissal and the date of expiry of the period notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.

c) the equivalent of a number of months wage or salary not exceeding twelve months on the gross monthly wage or salary of the employee at the time of dismissal.

39. They submit that the figure of Kshs.4,896,000.00 being dues remaining for sixteen 16 years is not envisaged under the law and would be unfair and unreasonable as a remedy.

40. To this end they rely on the matter of **DK NJAGI MARETE vs. TEACHERS SERVICE COMMISSION – INDUSTRIAL CAUSE No 379 of 2009** held:

“What remedies are available to the Claimant “This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

41. In the High Court Civil Case No. 1139 of 2002 between **Menginya Salim Murgani vs. Kenya Revenue Authority** Hon. Justice Ojwang (as he then was) stated that it would be injudicious to find an award of damages upon sanguine assessment of prospects. In that case the Plaintiff was 38 years old when his contract was terminated, he asked for remuneration he would have received between the age of 38 and the expected mandatory age of 55 years. The Court observed that the Plaintiff was an able bodied intellectually and professionally well-endowed man likely to find occupational engagement outside the Defendant’s employment. The Court applied the principle, then confined to civil law that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on and not sit back waiting to enjoy anticipatory remuneration.

42. They ask the Court to be guided by these authorities and dismiss this part of the claim.

43. As to the Staff Provident Fund, the Respondent submits that the Claimant had received 75% of the monies from the fund before filing of the claim and that the fund being under control of a third-party Alexander Forbes Financial Service Limited, the Respondent’s only mandate was to make proper remission and the balance is only payable once she attains the age of 50.

44. They submit that the sums are not payable to the Claimant and were lawfully withheld due to absenteeism from work. No evidence was adduced during the trial with regard to the claims to warrant or justify payment of the same under the said heads. Section 19 of the Employment Act 2007:

“19(1) Notwithstanding Section 17 (1) an employer may deduct from the wages of his employee:

a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labor to which the employee has agreed to contribute;

b) a reasonable amount for any damage done to or loss of any property lawfully in the possession or custody of the employer occasioned by the willful default of the employee;

c) an amount not exceeding one days wages in respect of each working day for the whole of which the employee without leave or other lawful cause absents himself from the premises of the employer or other place proper and appointed for the performance of his work”.

45. They submit that the tabulation of her staff saving scheme as part of her dues has been done and that the same is ready to be issued after clearance with the Respondent.

46. In conclusion they submit that they followed procedure in dismissing of the Claimant and urge the Court to find so. They submit that the claim for Kshs.11,405,400.00 is unwarranted and ask that the Claimant is awarded payment of her terminal dues of Kshs.47,090.00 and have the claim dismissed with costs.

47. I have considered all evidence and submissions from both parties. The issues for determination are as follows:

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

2. Whether due process was accorded to the Claimant before dismissal.

3. What remedies if any are available to the Claimant in the circumstances.

48. The Claimant's dismissal letter dated 29th February 2012 stated as follows:

“Refer to our suspension letter dated 15th December 2011 and the staff Advisory Committee held at Head Office on 2nd February 2012.

This is to inform you that the Management has deliberated on your case and has come to the conclusion that you were absent and also refused to obey lawful instructions by an officer placed in authority by the employer.

The Management has therefore decided to dismiss you from Board's Service with effect from 15th December 2011 for insubordination and behaving in a manner insulting to a person placed in authority by the employer.

You will be paid your benefits that you are entitled to in accordance with the terms and conditions of service.

However please note that payments of the above dues will be subject to your completing the clearance certificate which has been forwarded to the Regional Human Resource Officer-----“.

49. This matter was referred to the Claimant's Union who wrote a letter to the Respondent dated 20.3.2012 indicating that action taken against the Claimant was against the Parties CBA and asked the Respondent to lift the suspension against Claimant.

50. The matter was also referred to a Conciliator who was appointed by the Minister of Labour and the Conciliator recommended that the Claimant be reinstated as the Respondent did not handle the Claimant's suspension and subsequent dismissal in a proper way because of mishandling the Claimant's transfer.

From evidence on record, the Claimant had previously been suspended from work vide a letter dated 15/12/2011 but received by Claimant on 12/1/2012. The letter indicated that the Claimant had been invited to a meeting at the Human Resource Management's office to discuss issue of her transfer and was asked to choose a place where she could be transferred and she walked out of the meeting indicating she only wanted to report to Machakos.

52. This act was viewed as an act of insubordination and so she was given 1 week to show cause away disciplinary action should not be taken against her. This letter was received by the Claimant on 12/1/2012. There is reference to a disciplinary hearing held on 2.2.2012 and Minutes supplied to Court by Respondent for this meeting do not indicate that the Claimant was ever heard nor was she present at this meeting.

53. It is also not clear whether Claimant was ever invited to such disciplinary hearing as no evidence of a letter of invitation was produced by the Respondent.

54. The issue of transfer of the Claimant is also one of the reasons that led to Claimant's dismissal. The Respondents have alluded to this fact and indicated that she was transferred to Kibwezi in October 2011 but she declined to report.

55. The Claimant on her part has produced evidence to the effect that she was sickly and attended treatment in Kitengela and other hospital and had written to the Respondent requesting that she be transferred to Machakos. She indicated that she had been transferred on 27th September and 27th October 2011 to 2 different places and asked for time to organize herself.

46. A reply came on 27th October 2011 indicating she should go to Kibwezi by 1st December 2011. By

then she was in Machakos and decided to report to her Union. When the Union wrote to the Respondent complaining about the manner in which she had been treated, the Respondent decided to stop her salary and then on 22.12.2011 she was suspended and then dismissed in February 2012.

57. The reasons for the dismissal of Claimant are two fold – absenteeism and insubordination. On insubordination, the Claimant has denied the same which rotates around the transfer.

58. On absenteeism, she has pointed out her health condition which causes her to be in and out of hospital every now and then. Whereas health related condition could justify absenteeism, the Respondents' Manual indicated that the Respondent should be informed of any such absenteeism within 24 hours. It appears the Claimant didn't adhere to this Policy.

59. The issue of transfer however is not very clear given that the Claimant had been transferred to 2 different places within a short period of 2 months which was an inconvenience on her part and would not have allowed her to settle down early with her children.

60. In view of these two reasons the Respondent may have had good reasons to subject Claimant to disciplinary process but not to dismiss her. This is in line with Section 43 of Employment Act which states that there must be valid reasons to dismiss an employee which reasons must be established at the time. Establishment of such reasons would ordinarily follow due process during which hearing process as envisaged under Section 41 of Employment Act, the presence or otherwise of these reasons would be adjudicated upon.

61. In case of the Claimant, no due process took place and in the circumstances the Claimant was condemned unheard. Thus in line with Section 45 of Employment Act:

1) ***"No employer shall terminate the employment of an employee unfairly.***

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:-

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

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

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

62. The dismissal of Claimant was unfair and unjustified and I declare it so. I therefore find for Claimant and award her as follows:

1. 1 months salary in lieu of notice = 51,000/=.

2. 12 months salary as damages for unfair termination

= 12 x 51,000 = 612,000/=.

3. Unpaid half salary for December 2011 = 25,500/=.

Total = 688,500/=

Less statutory deductions

4. Pension dues owing.

5. The 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 12th day of July, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person – Present

Akwabi holding brief for Lutta for Respondent