



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 130 OF 2016

(Before D. K. N. Marete)

CAROLINE BASWETI ONGERI.....CLAIMANT

VERSUS

WAKENYA PAMOJA SAVINGS CREDIT

COOPERATION SOCIETY LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 29th July, 2016. The issues in dispute are therein cited as;

- a) *Breach of Employment Contract.*
- b) *Unpaid Terminal dues and other allowances.*
- c) *Whether the Claimant was unlawfully, unprocedurally and unfairly summarily dismissed from employment by the Respondent.*
- d) *Whether the Claimant is entitled to compensation for unfair termination from employment.*
- e) *Whether the Claimant is entitled to an award of Certificate of Service*
- f) *Whether the Claimant is entitled to an award of compensation for breach of contract; and*
- g) *Who shall pay for the costs of this suit.*

The Respondent in a Memorandum of Reply dated 15th September, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about 20th November, 2011, she was employed by the respondent. This lasted until 12th November, 2016 when she was irregularly, illegally and unprocedurally dismissed from such employment on baseless claims.

It is her further case that she worked under continuous, permanent and pensionable terms and rose through the ranks of Savings Clerk to Operations Manager a position she held up to the time of

termination. She was entitled to the following benefits;

i) *Basic salary of Kshs.109,765/= per month.*

ii) *House allowance of Kshs.54,883/= per month*

iii) *Medical allowance of Kshs.5,156/= per month*

iv) *Security allowance of Kshs.14,620/= per month*

v) *Subsistence allowance of Kshs.2,376/= per month*

vi) *Entertainment allowance of Kshs.4,000/= per month*

vii) *Telephone allowance of Kshs.8,000/= per month*

viii) *Car allowance of Kshs.14,000/= per month*

Making an aggregate salary of Kshs.212,800/= per month. And;

ix) *Thirty (30) working days leave.*

It is also her case that her duties were well laid out in her appointment letter dated 20th January, 2014 and her performance all this time was blemish free leading to her rise from the position of Savings Clerk to the operations manager of the respondent. This is well attested by the letter of the CEO dated 6th December, 2013 annexed as item 4 in the claimants list of documents.

The claimant's other case is that sometimes on 13th January, 2016. She received a show cause letter from the CEO enquiring as to why disciplinary action should not be taken against herself. She puts it thus;

11. That the Claimant avers that she received no further communication from the Respondent save for an oral invitation she received on 11th February 2016 to attend to a Finance and Administration Committee meeting and made representations in her defense; despite the short notice given by the Respondent.

She sums up her case of unlawful termination of employment as follows;

21. The Claimant would categorically wish to state that her dismissal from employment at Wakenya Pamoja Sacco Society Limited was unprocedural, unlawful, erroneous and tainted with malice since;

1. The Respondent did not give the Claimant Termination Notice as provided for under Section 3(1) c and Sec.36 of the Employment Act.

2. The Respondent terminated the Claimant's employment without following procedure laid down in the Employment Act and in particular as provided for under Section 15 and 41 of the said Act.

3. The Respondent terminated the Claimant's employment without proving that the reasons for termination was valid as provided for under Section 43 and 45 of the Employment Act.

4. The Respondent failed to give the Claimant a Certificate of Service contrary to Section 51 of the Employment Act.

5. The Respondent refused to pay the Claimant her allowance as provided for.

6. The Claimant was never accorded a hearing nor an opportunity to call her witnesses in her

defense as provided for under Section 41 and 44 of the Employment Act.

7. The Respondent breached the contract of employment and has continued to do so to date.

8. The Respondent did not act in accordance with just and equity and it failed to prove the reason for termination was valid contrary to Section 45(2) of the Employment Act,

Again,

22. It is further the Claimant's case that the said termination was unfair and unlawful and thus ought to be declared null and void and in breach of the rules and principles of natural justice for the following reasons;-

(i) Failure by the Respondent to conduct proper investigations into the allegations against the Claimant.

(ii) Failure to give the Claimant a fair hearing to present her grievances and representations to the Board of Directors of the Respondent.

(iii) Failure to give the Claimant sufficient time to prepare for defense.

(iv) Failure to adhere to the procedure for termination of services as stipulated in the contract of employment which require that an adequate notice of one month be issued to either party.

(v) Failure to totally substantiate the allegation laid against the Claimant.

She prays as follows;

i) A declaration that the termination was wrongful, unfair and unlawful and thus for an order for payment of all terminal dues and benefits owed and full compensation for wrongful dismissal from employment as particularized hereunder;-

a. 12 months pay or its equivalent as compensation and damages for unlawful termination.
(Kshs.2,553,600)

b. Kshs.1,596,000/= being severance pay tabulated as;-

Kshs.212,800 x 15 days x 15 years

30

c. Kshs.85,120/= being salary for days worked less advance

d. Salary of Kshs.212,800/= per month x 3 months(since April 2016 to date) =Kshs.638,400/=

e. House allowance of Kshs.54,883/= per month x 3 months (since April 2016 to date)
=Kshs.164,649/=

f. Medical allowance of Kshs.5,156 per month x 3 months (since April 2016 to date) =
Kshs.15,468/=

g. Security allowance of Kshs.14,620/= per month x 3 months (since April 2016 to date)
=Kshs.43,860/=

h. Subsistence allowance or Kshs.2,376/= per month x 3 months (since April 2016 to date) =
Kshs.7,128/=

i. Entertainment allowance of Kshs.4,000/= per month x 3 months (since April 2016 to date) = Kshs.12,000/=

j. Telephone allowance of Kshs.8,000/= x 3 months (since April 2016 to date) = Kshs.24,000/=

k. Car allowance of Kshs.14,000/= x 3 months (since April 2016 to date) = Kshs.42,000/-

l. Leave allowance of Kshs.379,956/= for five years tarbulated as;

$3/52 \times \text{Basic Salary of Kshs.109,765/=} \times 12 \times 5$

GRAND TOTAL = KSHS.5,562,181/=

ii) Certificate of Service as per Section 51 of the Employment Act.

iii) Costs and Interests of this suit from the time of filing until its conclusion.

The respondent's case is that the procedure for the claimant's dismissal was regular and procedural. She also avers that the claimant's performance was not as astitute as claimed at paragraphs 7 and 8 of the claim in that she was not always performing her duties diligently, competently and professionally. Her other lapses and issues of misconduct at the work place include;

- The Respondent was a habitual late comer and/or absentee from work without authority and/or reasonable excuse.
- The Respondent reversed, annulled and/or suspended the transfer letters which were initiated by the CEO without his knowledge and permission. The Claimant is answerable to the CEO.
- The Claimant failed to prepare and/or ensure the business plan for 2016 was adequately prepared and presented timeously.
- The Claimant failed to respond to the CEO's e-mail letter of 9/12/2015
- The claimant failed to obey lawful orders by her supervisor.
- The Claimant displayed unrestrained arrogance before the disciplinary meeting.

The claimant also involved in various acts of misconduct and insubordination resulting in a letter of show cause prompted by her disability to exonerate herself from the issues raised in the letter of show cause. This is exemplified as follows;

She employed diversionary tactics to justify her action to suspend transfer letters which had been issued by the CEO. The Claimant knew or ought to have known that she does not have the powers to revoke and/or suspend the transfers initiated by the CEO.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful? The claimant in her written submission dated 24th March, 2017 presents a case of unlawful termination in that she was not accorded a fair hearing in accordance with Section

41(1) and (2) of the Employment Act, 2007 as follows;

Section 41 (1)

Subjection 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 in 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.

Section 41 (2)

Notwithstanding any other provisions 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, chose by the employee within subsection (1) make.

It is the claimant's case that he was not accorded a fair hearing as above provided.

It is her further case and submission that the allegation of disobedience of orders from her superiors and insubordination were a mere fabrication of which she was not awarded an opportunity to rebut. She sought to rely on the authority of **Margaret Auma Ingwe v. Kenya Power and Lighting Company Limited (2015) ekLR**, paragraphs 35 – 36 and 38 where Ndolo, J. observed as follows;

...Following a notice to show cause issued to the Claimant on 18th May 2012 and her response dated 21st May, 2012, the Claimant was invited to a disciplinary hearing on 5th June 2012. The invitation letter which was dated 31st May 2012 was not served on the Claimant until 4th June 2012. The Respondent's third witness, Elizabeth Kalei who is the Chief Human Resources & Administration Officer told the Court the she did not know why the invitation letter was served late and the Court was left wondering whose responsibility it was to ensure that the Claimant was served in good time. The court was even more perturbed by Kalei's assertion that it was good human resource practice to notify an employee of an impending disciplinary hearing the day before.

On her part, the Claimant testified that her representatives and witness were not allowed to participate in the disciplinary hearing because she had submitted their names past the deadline set in the invitation letter. The dictates of section 42 of the Employment Act are not empty procedure. They are intended to avail employees facing disciplinary action an opportunity to prepare and present their defence before disciplinary action is taken against them.

Again, the claimant submits a case of a dismissal based on invalid reasons in contravention with section 43(1) and 45(2) which provide as follows;

43(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

Further, Section 45(2) in the Employment Act displays unfair termination as hereunder;

45(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.

It is her submission that the issues complained of were coaxed to instigate her termination and this was unlawful by all standards and imaginations.

The respondent in her written submissions dated 8th May, 2015 submits that the claimant failed to discharge her duties as stipulated in the letter of appointment and also failed to adhere to the guidelines/directions issued to herself thereby prompting the CEO to do a show cause letter dated 11th January, 2016 raising issues as follows;

- a) *Revoking the transfers which were initiated by the CEO.*
- b) *Approving of off duty to Marketing Manager without following the laid down procedure and status of his work.*
- c) *Refused to respond to the CEO's emails when he wanted to know the status of the Business Plan for 2016 and planned action*
- d) *On 6th October, 2015, the Claimant stormed into a meeting and immediately without permission the claimant said she has resigned from being a trustee without consultation. No apologies were offered by the claimant.*
- e) *The claimant reported to work late on 11/1/2016 without giving any explanation.*

The respondent further submits that the onus of proof of unlawful termination of employment squarely rests on the employee alleging the same. In this she seeks to rely on section 47(5) of the Employment Act, 2007, as follows;

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer”.

She further relies on the provisions of section 44 (3) and 44 (4) (c) (d) and (e) of the Employment Act to illustrate fair termination of employment as follows;

44(3) “Subject to the provisions of this Act, an employer may dismiss an employee when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the Contract of Service”

44(4)

a) ...

b) ...

c) An employee willfully to perform any work which it was his duty of 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.

d) An employee uses abusive or insulting language, or behaves in a manner insulting to him employer or to a person placed in authority over him by his employer.

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

As the claimant had admitted all the allegations leveled against her, there was no need to proof those allegations under section 43(1) of the employment Act.

In the case of **Thomas Sila Nzivo – vs – Bamburi Cement Limited (2014)eKLR**, also sought to be

relied on by the respondent, Rika, J; had this to say;

“The Respondent had reasonable and sufficient grounds to suspect the claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summary dismissing the claimant under Section 4(g) of the employment Act, 2007. The employer was not required to have conclusive proof of the claimant’s involvement, it was only expected to have reasonable and sufficient grounds...”

“Disciplinary proceedings at the employment place are not an exact fit of other proceedings. The employer invariably is the complainant and has the responsibility to investigate, hear the employee and make a decision. There are employment places with limited number of personnel, to enable different and independent managers undertake different roles in the disciplinary process. Employers are only required to meet the minimum statutory procedure on fairness as prescribed under Section 41 and 45 of the Employment Act 2007. There was no fundamental flaw in the procedure adopted by the Respondent.”

Again, in **Miriam Siwa v. Kenya Post Office Savings bank Limited (2014)eKLR** Rika J. again observed on valid dismissal as follows;

“On substantive justification, the Respondent’s evidence is that the Claimant was the Regional Manager responsible for Nairobi South Region. She was in charge of 13 branches, among them the Afya centre Branch. She was bound by her contract and the code of conduct render diligent service to the Respondent and perform her role properly and carefully.....”

The court finds that the Respondent had valid reasons to justify its decision to terminate the Claimant’s contract of employment. The claimant worked under a written contract. Her duties were well defined in a comprehensive description. The code of conduct was part of her contract of employment.”

The case of the respondent in support of lawful termination of employment is astounding. The claimant has not in the least rebutted this or even demonstrated a case of unlawful termination of employment. She falls short of the provisions of section 47 (5) of the Employment Act, 2007 as to the burden of proof of her case. It must therefore fail. I therefore find a case of lawful termination of employment and hold as such.

On a finding of a case for lawful termination of employment, the claimant is disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 17th day of October 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Koech instructed by Bett & Company Advocates for the Claimant.
2. Mr.Obosso holding brief for Getange instructed by BW’oigara, Getange & Company Advocates for the Respondent.