



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**SUIT NO. 403 OF 2016**

**JANE NYOKABI KARUNGU.....CLAIMANT**

**VERSUS**

**MANPOWER SERVICES (K) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed her suit on 16<sup>th</sup> March 2016 seeking a number of reliefs against the Respondent for her termination. She pleaded that the employment commenced on 1<sup>st</sup> November 2010 and that she was issued with a show cause letter on 30<sup>th</sup> November 2015 and was required to respond to it by 1<sup>st</sup> December 2015. She averred that she gave very good reasons why she should not be subjected to disciplinary process. She averred that she was summarily dismissed on grounds of alleged misconduct and the dismissal was with effect from 2<sup>nd</sup> December 2015. She averred the dismissal was unlawful and unfair as the Respondent failed to consider the very reasonable explanation given to the show cause letter and that the reasons for termination were not founded in law as the Respondent was only keen to terminate her services without reason. The Claimant pleaded that the procedure adopted by the Respondent was unlawful under Section 41 of the Employment Act since she was not subjected to a disciplinary process as had been indicated in the show cause letter, no explanation was given prior to the termination, the Claimant was not afforded an opportunity to have an employee of her choice at the time of the explanation and no opportunity was accorded to her to make representations before the termination. The Claimant thus sought maximum compensation of 12 months salary, severance pay for the years worked, interest at court rates, costs of the suit and any other relief the court may deem appropriate in the circumstances.

2. The Respondent filed its defence on 21<sup>st</sup> April 2016. In the defence, the Respondent averred that the dismissal of the Claimant was lawful and the Claimant had voluntarily accepted the termination by acknowledgement of the payment of the terminal dues. The Respondent averred that the Claimant had been previously terminated from employment and was reabsorbed after a plea of forgiveness and reinstatement. The Respondent averred that the procedure adopted by the Respondent in terminating the Claimant's services was in accordance with the law and the Claimant is therefore not entitled to payment as sought in her claim. The Respondent thus urged the dismissal of the Claimant's suit with cost.

3. The Claimant testified on 15<sup>th</sup> November 2011. She testified that she was employed by the Respondent from November 2010 till 30<sup>th</sup> November 2015. She stated that she worked as a secretary cum graphic designer and performed her duties per the job description which was design of advertisements to be placed in newspapers. She was given a show cause letter on 30<sup>th</sup> November 2015 requiring her to explain why she should not be subjected to disciplinary proceedings on allegations that she had refused to be trained by a fellow employee named Ken. She was also accused of being slow in her work. She stated that she was aware during the course of her employment on 30<sup>th</sup> November 2015 she had experienced a challenge in using one of the drafting applications called Adobe Illustrator and when she sought the assistance of Ken he retorted that if the Respondent had wanted her to learn how to use that application she would have been taken to college to learn. She stated that she reported the incident to another senior employee named Josephine who did not take any action. She indicated that due to her keenness to be able to deliver she started practicing using the application and gained experience with time developing several advertisements which appeared in the newspaper. She responded to the show cause letter explaining the above facts and that she was willing to upgrade her education in order to be in a position to draft all types of advertisements. She stated that she was dismissed from employment through letter of 1<sup>st</sup> December 2015 and in the letter the Respondent claimed she was guilty of gross misconduct since she had declined to be trained by Ken. She stated that at no time did he indicate that he wanted to train her on behalf of the Respondent and that it was Ken who declined to train her. She stated that it was surprising that her alleged misconduct was on 30<sup>th</sup> November 2015, the show cause letter was issued the same day and her termination was done on 1<sup>st</sup> December 2015. The Claimant was not invited to attend any disciplinary hearing despite the same having been alluded to in the show cause letter and she thus held the termination to be unlawful as she was not given the reasons for termination prior to termination, was not afforded an opportunity to have a fellow employee at the disciplinary hearing or opportunity to make her representations before termination. She testified that her prior dismissal was because she had a child who was unwell and having shown the evidence of the many hospital visits her employer had rescinded the decision to terminate her. She testified that she used to work with Ken as a graphic designer and that she asked him to train her and he refused to do so stating that he was trained in college. She informed the personal assistant of the MD Josephine and wrote a letter to that effect. She testified that she did not refuse to be trained.

4. In cross-examination, she testified that she would be comfortable using either English or Kiswahili which was a national language and that she did not have a problem in English usage. She stated that the computer is not used in either English or Kiswahili as it was graphic design. She conceded that they designed adverts in English and that the computer had spell check. She testified that she would design the advert and it could be in any language and the language did not come in. She stated that she told her lawyer who drafted the statement for her to sign. She was referred to appendix 5 & 6 of the claim and confirmed the handwriting was hers. She testified that she wrote the letter and that she was never a grammar teacher but was a graphic designer. She confirmed that she was paid salary in lieu of notice, outstanding leave for 2014-2015 and that she was a member of NSSF.

5. In re-examination, she testified that she was a graphic designer and her work was to receive and design adverts to ensure the typing fits the space and it is not costly. She stated that the draft was presented when it was prepared and that Mr. Muhindi was rude to her and she couldn't ask for a meeting. She testified that they spoke through the PA.

6. The Respondent called Francis Kithui Muhindi the MD of the Respondent and he testified that he knew the Claimant. He stated that the Claimant's character was lax and when there was work for her to do she would take long to do the work. He testified it would require lots of correction of the spelling mistakes and grammatical errors. He appealed that she should check the work using the dictionary before submitting the same and there was no appreciable improvement. He kept counseling her to reread the work before submitting it to him and he reckoned that she took long as these were advertisements for clients. He testified that he asked Ken who was a casual then to come and train her and he learnt that she had declined to be trained. He stated that he had asked Josephine his PA who informed him that the Claimant had declined to be trained stating that she knows. He then asked her to show cause why she should not be dismissed. He stated that in her response she indicated that she had raised the issue of training earlier and that Ken had declined. He testified that she had never raised that issue earlier and he had given her ample time to read and improve her English. He stated that he had been sympathetic earlier and had reinstated her to employment after her earlier termination. He testified that he was cordial with the Claimant and even shared her birthday cake when she brought it to the office. He stated that she never came to see him to discuss the matter any further and that she was paid her dues and no correspondence was received from the labour office and that all he got was her lawyer's demand letter. He stated that is when he knew there was a problem with the Claimant and the Respondent.

7. In cross-examination he testified that the Respondent dealt with recruitment and posted advertisements as well as undertook staff training. He recalled the Claimant commencing work in 2010 and stated that she was employed as secretary and graphic designer. He stated that he warned the Claimant and that he would always caution her as a father. He stated that of all the misfits he would have sacked her earlier. He testified that on the day she refused to be trained by Ken was the 30<sup>th</sup> of November 2015 and that he had requested for her to be trained to enable her improve her speed, proof reading as there were drafts presented with errors. He asked her to show cause why she was not trained. He stated that she did not ask for a meeting and he had not informed her that she could not contact him. He conceded that he did not call her for a disciplinary meeting and she responded the following day. He stated that he was informed by Josephine that Jane had declined to be trained. He testified that the Claimant was poor in her work and slower. He stated that as supervisor he had to go over the adverts and he spent so much time correcting them. Even words like agriculture were spelt incorrectly, once with a k. He testified that her work was late and that the words she type set were required to be correct. He admitted receiving the demand letter from her advocates and that he responded through his lawyer maintaining that the Respondent acted within the law.

8. He was re-examined and stated that the Claimant had refused to be trained by Ken. His complaint was on the corrections he repeatedly had to do. He stated that her letter had many errors. That marked the end of oral testimony.

9. The Claimant filed submissions on 27<sup>th</sup> November 2017 while the Respondent filed submissions on 7<sup>th</sup> December 2017. The Claimant submitted that the procedure under Section 41 of the Employment Act was blatantly ignored by the Respondent. It was submitted that it was not for the Claimant to request for the meeting but for the Respondent to arrange the meeting. The Claimant submitted that there were unjustified reasons for the termination and that the duty to prove the reasons for termination was on the employer failing which the termination shall be deemed to have been unfair. On the allegation of poor performance, the Claimant submitted that the offer letter dated 16<sup>th</sup> September 2010 indicated that there would be no probation as she had proved herself during the short contract. The Claimant submitted that the poor performance allegations were an afterthought and were being raised orally 5 years later with no evidence to back it up. The Claimant submitted that she exhibited keenness to learn as indicated in her show cause letter. The Claimant relied on the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** where the court held that a termination is unlawful where there is procedural unfairness by failure to follow the law. On the refusal to be trained, it was the Claimant's submission that the best evidence is direct evidence and that the evidence given by the Respondent's witness was hearsay evidence as neither Ken nor Josephine were called to prove that she had refused to be trained by Ken. Reliance was placed on the case of **David Situma Muyoi v Texas Alarms (K) Ltd [2017] eKLR** on hearsay evidence. The Claimant submitted that her dismissal was unfair pursuant to Section 43 and 45 of the Employment Act because the procedure followed by the Respondent was unlawful and the reasons thus not valid or fair. The Claimant urged the court to allow her claim as prayed with costs.

10. The Respondent submitted that the issues in dispute were:-

- i. Whether the Claimant's termination of employment was lawful?
- ii. Whether the Claimant deserves any compensation?
- iii. What the order as to costs of this cause?

The Respondent submitted that the Claimant was not entitled to severance pay as she was a member of NSSF and that the provisions of Section 35(6)(d) applied. It was submitted that the Claimant claim was without merit and should therefore be dismissed with costs.

11. The dispute is on the dismissal of the Claimant and it is apparent the incidents preceding and revolving around 30<sup>th</sup> November 2015 were focal. The Claimant was given a show cause letter dated 30<sup>th</sup> November 2015 which required her to respond as to why disciplinary action

should not be taken against her. In the response to the show cause letter dated 30<sup>th</sup> November 2015, she inelegantly states that she had improved her usage of Adobe Illustrator and was unaware that her colleague Ken had been directed to train her. To rephrase her, Ken refused to train her telling her to seek the training she needed in college. She clearly had some challenges in doing her work as she openly admits. What followed the letters of 30<sup>th</sup> November 2015 was the dismissal dated 1<sup>st</sup> December 2015. In the dismissal letter it was stated that the reason for dismissal was for the gross misconduct in refusing to be trained on 30<sup>th</sup> November 2015. Additional cause was in view of the many grammatical errors in typesetting and even more so in her handwritten response to the show cause letter. In the premises, the provisions of Section 41 of the Employment Act become focal as the section deals with dismissal for misconduct.

12. Section 41 of the Employment Act 2007 provides as follows:-

41(1) Subject 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 is 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.

(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.

13. The Employment Act Section 43 provides 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.*

(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.

14. From the above provisions of the law, the employer was bound to accord the employee the safeguards under these provisions of the law. It is apparent the cause of the dismissal may have been ground for dismissal. What is unfathomable is the manner the dismissal was executed. If there was to be a disciplinary action it should not have been merely threatened or offered. It should have taken place as provided for in law and as suggested in the letter of show cause. The Claimant was entitled to have the Respondent explain the dismissal as provided under law. In addition, no prior warning was exhibited as the purported refusal to be trained was not sufficient cause for summary dismissal. No evidence of the refusal was tendered by the Respondent as neither Josephine, the PA to the MD, nor Ken was called to testify. Hearsay evidence is tenuous at best and it is difficult to test the veracity of what one says he was told by another who is not called to testify.

15. In the case of **Abraham Gumba v Kenya Medical Supplies Authority** (*supra*) I awarded a sum equivalent to 10 months as compensation. In the case of **David Situma Muyoi v Texas Alarms (K) Ltd** (*supra*) my brother Makau J. awarded 6 months compensation. Under Section 49 of the Employment Act, the court has to consider a slew of factors when awarding any relief in a matter such as this. Radido J. has given an elaborate analysis of this in the case of **Alphonse Maganga Mwachanya v Operation 680 Limited [2013] eKLR**. One of the factors to be considered is the extent the employee contributed to the dismissal. It was not lost on the court that the Respondent expected the Claimant to demand a hearing in terms of Section 41 and that in the Respondent's considered view, after the show cause letter was received a hearing was superfluous. In the present case, the Claimant had worked for 5 years and was paid all her other terminal dues including notice. In my considered view, a compensation of 3 month's salary would suffice for the unlawful dismissal. The Claimant will also have the costs of the suit.

It is so ordered.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of December 2017**

**Nzioki wa Makau**

**JUDGE**