



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 306 OF 2015

MARY SARU MWANDAWIRO.....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brings this suit seeking terminal dues and compensation for unfair dismissal from employment by the respondent on 17.9.2014. The claimant avers that dismissal was without giving her a fair hearing. In addition she avers that the dismissal was unconstitutional because she was discriminated on account of her ill health.
2. The respondent has denied that the claimant was unfairly dismissed. She avers that the claimant forfeited her appointment by absenting herself from work for more than 10 days. She also denies that the claimant was discriminated on account of her ill-health and prays for the suit to be dismissed for want of merits.
3. The suit was heard on 21.9.2015 when the claimant testified as Cw1 while the respondent called Rose Mcharo and Irene Mbogho as Rw1 and Rw2 respectively. All the documentary evidence filed was admitted by consent during the trial. Thereafter the parties filed written submissions.

Analysis and determination

4. After carefully considering the pleadings, evidence and the submissions presented before it, the court finds that the claimant was formerly employed by the respondent on permanent and pensionable terms. That by letter dated 12.4.2012 she was translated from her substantive office as Accountant (Marine claims) to Accountant (claims), Grade HM3 (Supernumerary) with effective from 20.1.2012. That she tried in vain to challenge the said translation and on 19.6.2013, she requested for retirement on ground of abolition of office but her letter was not responded to. That on 17.9.2014 the respondent wrote to the claimant informing her that she had forfeited her employment due to her unauthorized absence from duty for continuous period of more than ten days. That the claimant was not heard before the forfeiture. That the claimant appealed against the said forfeiture on 24.9.2014 but the appeal was also dismissed without a hearing. The issues for determination are:-
 - a. Whether the termination of the claimant's employment was unfair.
 - b. Whether the claimant is entitled to the reliefs sought.

Unfair termination

5. Cw1 testified that he wrote the letter dated 19.6.2013 requesting to be retired on ground of abolition of office after the restructuring of the respondent's establishment. That no response was made by the respondent until 17.9.2014 when she received the respondents letter terminating her services on ground of absenteeism for over ten consecutive days without permission. She however denies the alleged absenteeism and maintains that she was attending work daily until 24.9.2014 but with low morale due to the demotion and lack of anyone to report to. According to Cw1 the termination letter was malicious and unfair because she was not heard before the dismissal. That she should have been retired just as she had requested.
6. On cross examination, Cw1 admitted that her translation to supernumerary status did not affect her job Grade and benefits. That she was at the time attending work half day with permission because of her ill-health which required her to attend physiotherapy daily. She however did not produce any medical evidence or written authority to work half day. She further admitted that she had previously received warning letters for related misconduct.
7. Rw1 is a Senior HR officer in charge of Administration and discipline for the respondent since 1995. She confirmed that the respondent did restructuring of her establishment which led to the claimant being rendered Supernumerary (excess labour or employee without holding any position). She maintained that only the employer is entitled to call for retirement on ground of abolition of office under clause B6(K) of the respondents HR Manual.
8. Rw2 is the respondent's Senior HR officer in charge of recruitment and staff Appointments for 17 years. She testified that on 28.8.2014, a report was made to her office by the Head of Financial Accounting that Cw1 was not reporting to work and asked for action. That the first action taken was stoppage of Cw1's salary. Thereafter she did investigations which revealed that Cw1 and 3 other employees had absented herself from duty since 1.8.2013 without any sick leave.
9. Rw1 denied that Cw1 was attending work during the period she was accused of absenteeism. That had she done so, she could state that in her appeal against the forfeiture dated 24.9.2014. That in her said appeal she only asked for the lifting of the forfeiture and substitute it with retirement on ground of abolition of office but the appeal was dismissed for lack of merits.
10. Rw1 explained that retirement on ground of abolition of office is only available if the employee is 50 years and above as such the Cw1 could not get it. Rw2 further stated that Cw1 had a history of gross misconduct including absence from duty and insubordination.
11. On cross examination, Rw2 confirmed that forfeiture of appointment is equal to dismissal from employment. She maintained that Cw1 had absented herself from work and that warranted a dismissal. She admitted that an employee has a right to be heard on his appeal against the forfeiture. She further admitted that Cw1 was never heard on his appeal. She admitted that under the Employment Act (EA) an employee is entitled to hearing in company of another employee before dismissal. That in this case the claimant was never heard because she was absent.
12. After careful consideration of all the material presented before it, this court finds that there existed a valid and fair reason to warrant summary dismissal of the claimant. The claimant admitted in paragraph 2 of her appeal that she deliberately missed work by stating that:-

“It is in appropriate to hand me a forfeiture as a result of un authorized absence from duty knowing that as a Supernumerary Staff (not holding any position in the Organization Structure), I had no duties and I reported to no one. Hence there was no duty to absent myself from and no work place or boss to report my presence to”.

13. Under section 44 (4) (a) of the Employment Act (EA), absence from work by any employee without leave constitutes gross misconduct that warrants summary dismissal. Consequently the employer had all the right to dismiss the claimant summarily in this case. However, the court finds fault in the procedure followed before dismissing the claimant. As admitted by the defence witnesses, the claimant was never given a personal hearing before dismissal and also on her appeal.
14. Under section 41 of the Employment Act (EA), employer is required in mandatory to give a personal hearing to his employee in the presence of another employee of his choice before dismissing him for misconduct under section 44 of the Act. The reason why Cw1 was not given

hearing as required by the said Law is because Cw1 was absent. In this court's view that was not sufficient reason to deny the claimant a hearing. The respondent knew or had the reason to know both the physical and telephone or email address for the claimant. The same way the termination letter and the letter of dismissal of her appeal were served on the claimant should have been used to serve a show cause letter and an invitation for disciplinary hearing.

15. The right to fair hearing before dismissal for misconduct is not an option. It is given by the statute Law. It cannot be ousted by a contract between parties or a regulation formulated by the employer. According to the defence witnesses, forfeiture of appointment is equal to summary dismissal. Consequently, the court finds and holds that the failure to accord the claimant a hearing before dismissal rendered the termination of her employment contract unfair within the meaning of section 45 (2) (a) of the Employment Act. The said provision deems termination of employment to be unfair if it was done without following a fair procedure which basically involves giving the employee a hearing before dismissal as prescribed under section 41 of the Employment Act.

Reliefs

16. In view of the foregoing finding the court makes declaration that the termination of the claimant employment contract on basis of forfeiture of appointment is unfair. Under section 49 (3) of the Employment Act, the claimant entitled to reinstatement or re engagement. However as testified by the claimant her substantive post of Accountant (Marine claims) was no longer available to her and that is why she had been translated into Accountant (claims) Supernumerary or simply put, excess labour. In addition she did not wish to be reinstated because she never prayed for the same. Instead she prayed for damages. Considering the fact that the claimant contributed to her dismissal through misconduct, the court awards her 8 months gross salary as compensation for the unfair termination. In awarding the said compensation, the court has also considered the length of the period of service by the claimant being 30 years and also the impossibility of her getting an alternative employment of equal pay. Based on the August 2014 payslip, her gross salary at the time of her termination was kshs. 221,033.10/= per month. Consequently, the court awards her kshs. 1,768,264.80/=.

17. The claim for future salary which the claimant would have earned had she worked till normal retirement amounting to kshs.43,020,686/= is dismissed. The reason being that the claim is not based on any known law, precedent, or custom. It is also against the public policy to pay salary for work not done. Such relief is only available in case of fixed term contract of employment or where an employee's future earnings are compromised or curtailed due to permanent bodily injuries.

18. The claim for General damages for loss of earnings is also dismissed for lack of legal basis. Likewise the prayer for damages for discrimination on medical status is also dismissed for lack of evidence. The letter of forfeiture of her appointment did not cite her alleged medical condition as the reason for her termination. The reason for dismissal was absence from duty without authority for over 10 days consecutively.

Disposition

19. For the reason stated above judgment is entered for the claimant in the sum of **Kshs.1,768,264.80/=** plus costs and interest.

Signed, dated and delivered at Mombasa this 19th day of February, 2016.

ONESMUS MAKAU

JUDGE