



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 131 OF 2014

CATHERINE MAKENA.....CLAIMANT

VERSUS

NAARI DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 27th May, 2016)

JUDGMENT

The claimant filed the statement of claim on 15.10.2014 through Muchiri Wa Gathoni & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination of the claimant's employment was unfair, unprocedural, wrongful and illegal.
- b. A declaration that the act of the respondent of not paying the claimant her terminal dues was unlawful, illegal and amounted to breach of the contract of employment.
- c. That owing to the breach of the terms of employment by the respondent as aforesaid the claimant is entitled to the general damages for breach of contract and the amount pleaded in paragraph 17 with interest from the date each item fell due (being Kshs. 429, 600.00 for 12 months compensation, payment in lieu of notice, overtime worked for 12 months, 9 days of work on public holidays, salary payment from February 2014 to 30.07.2014 and 21 leave days.
- d. Costs of the claim.

The response was filed on 14.11.2014 through Kiautha Arithi & Company Advocates. The respondent prayed for dismissal of the claim.

The respondent employed the claimant as the secretary manager effective 12.02.2013. She was not given a letter of appointment but her testimony was that there were relevant minutes on her appointment and despite repeated requests, she was not given the letter of appointment. Her evidence was that the respondent's chairman had refused to sign and issue the letter.

On 25.02.2014 the claimant handed over to proceed on maternity leave. She had requested for the leave on 14.02.2014. It was her testimony that while on leave she received only half of her salary for February 2014 and upon inquiry she was told that the chairman had directed as much. On 3.04.2014 while still on leave she received information that the chairman had announced at the meeting of the respondent's members that the claimant had been dismissed upon alleged embezzlement of the respondent's Kshs.250,000.00. The claimant wrote complaining that she had been denied resumption of duty after the maternity leave and on 14.07.2014 the claimant received a letter dated 14.07.2014 dismissing her grievance and attaching the letter of dismissal dated 20.02.2014. The dismissal letter of 20.02.2014 stated that the claimant had been summarily dismissed effective 15.02.2014 for the reasons as follows:

- a. Stealing milk from the society.
- b. Stealing old tyres from the store and selling them.
- c. Stealing batteries of the vehicle in the store.
- d. Stealing milk with fake receipts.
- e. No records for cash in and cash out as required by management.

The letter was signed by the respondent's chairman one G.K. Imathiu.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair. There is no evidence that the claimant received the termination letter of 20.02.2014 except as was belatedly enclosed in the letter of 14.07.2014. As at 20.02.2014 there is clear evidence that the claimant was at the workplace and no good ground has been shown why the letter could not be delivered to the claimant personally by hand delivery at the office. Thus the court finds that the claimant did not know about the termination until the fact of termination was conveyed by the respondent's letter of 7.07.2014.

The termination was not subjected to a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The allegations for termination set out weighty matters of fact which the court finds were not established at a disciplinary hearing before the claimant was terminated. Thus, at the time of termination it cannot be said that the respondent had established genuine or valid grounds as provided for in section 43 of the Act. As was held in **Shankar Saklani –Versus-DHL Global Forwarding (K) Limited [2012]eKLR** a hearing and notification in cases of dismissal including summary dismissal are mandatory. The court returns that the termination was unfair as it did not comply with the provisions of sections 41 and 43 of the Act.

The **2nd issue** for determination is whether the claimant is entitled to remedies as prayed for. The court makes findings as follows:

- a. The claimant is entitled to the finding that the termination was unfair.
- b. The claimant has prayed for 12 months compensation. She worked from 12.02.2013 to about 25.02.2014 when she proceeded on maternity leave. The court has considered that service of roughly one year and the manner in which the respondent's chairman published the termination without having subjected the claimant to due process to verify the allegations. In view of that aggravating factor and that the claimant was keen to continue in employment after the maternity leave, the court finds that the claimant is entitled as prayed for and is awarded **Kshs.180, 000.00** as prayed for (under section 49(1) (c) of the Employment Act, 2007) and **Kshs. 15,000.00** being pay in lieu of the termination notice.
- c. Overtime worked for 12 months and 9 public holidays worked were not established by way of evidence. The court further finds that the claims are inconsistent with the claimant's employment as the secretary manager and therefore the chief executive officer of the respondent and the prayers will fail.
- d. The court finds that the claimant is entitled to all withheld salary from February 2014 to 30.07.2014 when the termination was communicated and in view of her having taken maternity leave. She is awarded **Kshs.90, 000.00** as prayed for.
- e. The respondent has not provided any evidence to rebut the claim for 21 annual leave days and the court finds that the claimant is entitled to **Kshs. 10, 500.00** as prayed for especially that the claimant worked for over a year and is entitled to the accrued annual leave under section 28(1)(a) of the Employment Act, 2007.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to pay the claimant **Kshs. 295, 500.00** by 01.08.2016 failing interest to be payable at court rates from the date of this judgment till full payment.
- c. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 27th May, 2016.

BYRAM ONGAYA

JUDGE