



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 94 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 6th May 2016)

JESSICA MWANZIACLAIMANT

VERSUS

ACTIONAID INTERNATIONAL KENYA.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant filed this Claim through a Statement of Claim dated 29th of January, 2014, through the firm of Orego and Odhiambo Advocates. The claim by the Claimant is for damages for unlawful and unfair termination.
2. She states that she was employed by the Respondent on 28th November, 2011, on a three year contract running from 15.12.11 upto 14.12.2014, in the position of Project Manager with a monthly salary of Shs. 139,680/=.
3. She states that in the course of her employment she rendered her services with great diligence, dedication and devotion to the Respondent and at her termination she was earning a salary of Shs. 161,000.00 per month.
4. The Claimant states that in the month of October 2013, she was involved in a function for the Respondent at the Silver Springs Hotel at the end of which she was summoned by her immediate supervisor and the Human Resource Manager who informed her that her services had been terminated.
5. In her letter of termination dated 10.10.13, the Respondent stated that the Claimant's contract of employment would be terminated with effect from 31.10.2013 for breach of Actionaid International Kenya Employee Handbook section 8.3.2 (c), (d), (u) and (v). The copy of the handbook was annexed as JM3 in the Memorandum of Claim.
6. She contends that on 7.11.2013, she lodged an appeal seeking either reversal of the decision to terminate her contract of employment without following the procedure set out in the Respondent's own internal processes or the law or an explanation why her contract was being terminated before it lapsed but the Respondent never replied prompting her to instruct her lawyers to issue a demand notice dated 18.12.13. The Respondent replied through a letter dated 29.11.2013 but posted on 19.12.2013.

7. The Claimant further contends that the Respondent unlawfully terminated her contract of employment and is entitled to relief for the reasons that:

a. The Respondent did not inform the Claimant of any allegations against her, if at all, in accordance with her letter of appointment, the handbook, the Employment Act Section 41 thereof or the rules of natural justice; They refer to Civil Appeal No. 199 of 2013; CMC Aviation Limited Vs Captain Mohammed Noor where it was stated that the mandatory process outlined in Section 41 must be adhered to during termination of employment.

b. The Respondent did not present the Claimant with any opportunity to defend herself against any allegations, if any;

c. The Respondent acted in a cruel and inhumane manner by terminating the Claimant's contract of employment without any notice whatsoever and issuing her with the letter of termination twenty days after it was first written and/or signed;

d. From the conduct of the Respondent it is evident that the appeal by the Claimant was never considered and the response made only after the letter of demand by the Claimant's lawyers;

e. In any event, the Respondent in the letter of appointment at paragraph 3.0 and 4.0 makes it mandatory that in all disciplinary proceedings including appeals, the affected employee is expected to appear before the disciplinary body (and may be accompanied by a colleague or a friend) that no such event occurred either preceding the termination or at the appellate stage;

f. It is evident that the Respondent had decided to terminate the Claimant's contract of employment without following its own internal procedures or the law.

8. She states that as a result of the aforesaid reasons she lost substantial amount of salary, allowances and other benefits she would have otherwise earned. She seeks for the claim to be allowed in the following terms:

a. Salary for the month of October 2013 Shs. 161,000.00

b. One month's notice Shs. 161,000.00

c. Twelve months salary compensation Shs. 1,932,000.00

TOTAL Shs. 2,254,000.00

9. The Respondent filed a Response to Claim dated 25th February 2014 where they admit that the Claimant was in their employment as a Project Manager - GATES to be based in their West Regional office in Kisumu at a monthly salary of Kshs. 139,680.00 under terms and conditions contained in their appointment letter.

10. The Respondent states that the contract of employment aforesaid was subject to the Claimant discharging her duties as stipulated in the appointment letter and observing and adhering to the Respondent's employee handbook.

11. The Respondent states that on various occasions during her contract of employment, the Claimant failed to adhere to the Respondents policies as contained in the Respondents handbook, was guilty of misconduct and was therefore in breach of the terms and conditions of her employment with the Respondent.

12. The Respondents state that during the staff appraisal for the period of January 2012 – December

2012 by Charles Owino Onyango and Philip Kilonzo the staff noted various weaknesses in her performance but the Claimant believed that they were incorrect.

13. However, she received a warning letter dated 1st August 2013, where the use of a taxi without prior approval was pointed out as it contributed to major misconduct under Section 8.3.2 (f) of the Action Aid International Kenya Employee Hand–Book and penalties range from written warning to termination of appointment or dismissal.
14. The Respondent has further attached a series of emails which were attached as evidence sent to the Claimant raising concern over her overall performance of her contract of employment. They showed that the Claimant was guilty of major misconduct as she showed a lack of seriousness and neglect of duties of the project leading to a red flag and withdrawal of further funding by the Bill Gates program.
15. When issued with a notice to show cause why disciplinary action should not be taken against her, as she had on top of other poor performance allegations, failed to submit the Budget for the year even after new deadlines were given to her hence putting the entire project into jeopardy, she responded with an email which response was found unsatisfactory.
16. The Respondent found that the response provided is clearly seen with a rude undertone and don't care attitude. Moreover, this communication proves that the Respondent had communicated to her prior to termination of contract.
17. The Respondent further states that they did not act in a cruel and inhumane manner as they had given the Claimant many opportunities to redeem herself, moreover, they paid her one months' notice in lieu of notice.
18. As regards her Appeal the Respondent states that the rejection was not due to whistleblowing as the Claimant alludes but was rejected vide a letter dated 29th November 2013 for reasons of gross misconduct. It was not mandatory that the Claimant appear before the committee.
19. The procedure undertaken by the Respondent to terminate the Claimant was in line with law, the Respondent Claims that all internal procedure was followed and termination was only because of her own conduct.
20. The Respondent insists that it was her incompetence in handling the program which led them to suffer embarrassment with the donors putting their reputation at risk, refusal to take advise, negligence and insubordination that made it difficult to work with her.
21. As to wrongful termination the Respondent claims that general damages are not awardable in cases where the claim is for wrongful termination. They refer to the case of **George Onyango Akuti vs G4s Security Kenya Limited**, Industrial Case Number 107 of 2013 at paragraph 16, 17, and 49.
22. For the foregoing reasons they urge the Court to rule that the contract was terminated on valid grounds and was fairly carried out.
23. Having considered the submissions of both parties, the issues for determination are as follows:
 1. ***Whether there were valid reasons to warrant termination of the Claimant.***
 2. ***Whether due process was followed before Claimant's termination.***
 3. ***What remedies the Claimant is entitled to in the circumstances.***
24. On 1st issue, the Respondent terminated the Claimant's services on 31.10.2013 on grounds of her

conduct in managing the project, responsibilities and responding to instructions issued summoning to major misconduct as per AA1K Employee Handbook Policy Section 8.3.2 Section c, d, u and v.

25. Under the Respondent Handbook Section 8.3.2 deals with major misconduct and list a raft of actions considered to be major misconduct and which will result to penalties ranging from written warnings to termination of appointment or dismissal.

26. The list has 24 items listed as major misconduct. Under 8.3.2 c, d, u and v, the items listed are Dereliction/gross neglect of duty by willfully neglecting, refusing or carelessly performing work; use of language or behavior, including sexual harassment which is insulting on the organization, staff and communities; insubordination (i.e. undermining authority and any action which may result in or create a situation detrimental to AA1K's work or reputation outside or inside the place of work.

27. The termination letter however does not state which of the 4 captioned items the Claimant is stated to have committed or provided documents, the exact reasons for which the Claimant was terminated.

28. Under Section 43 of the Employment Act:

“(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.

29. Under this Section reasons for termination must be proved. Proof of such reason will of necessity involve clarity of what the said reasons are. In case of the Claimant, it is not very clear what the Claimant particularly did as the reasons are not stated in the termination letter.

30. The Respondent avers in their submissions and pleading that the Claimant failed to do her work causing the organization to lose out on funding. The Claimant on her part stated that she did her work satisfactorily and was even involved in hosting a function at Silver Springs Hotel on 28th and 29th October 2013 before her dismissal vide a letter dated 10.10.2013 which the Claimant states had already been written and not delivered to her making her believe that her dismissal was predetermined and that there were no valid reasons for her dismissal.

31. It is for this reason that this Court finds that the dismissal was not anchored on proper reasons as envisaged under Section 43 of Employment Act.

32. On the 2nd issue, the procedure envisaged before termination is provided under Section 41 of Employment Act which provides as follows:

“(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”.

33.The Respondents own Policy provides the procedures to be followed before dismissal at Section 8.6 which states as follows:

“8.6 Disciplinary Procedures and Penalties

Staff will receive a verbal warning in the event of their first misdemeanor or minor misconduct. A repeated misdemeanor shall constitute major misconduct and will result in penalty for committing misconducts.

Penalties for major misconduct shall depend on the magnitude of the offence. They will involve:

- Written warning*
- Suspension*
- Termination*
- Dismissal*

Penalties for committing a gross misconduct will be summary dismissal.

Written warning will be given by the line manager with copies to the HHRODES if the offence does not subject the staff to dismissal from the organization.

The staff member will be served with two warning letters and the third will be a dismissal letter. However repeated receipt of written warnings shall subject a staff member to dismissal.

All warning communication must be signed by the relevant authority and be hand delivered to the staff.

In the event where a member of staff has committed a major misconduct, Head of Department, HHROD ES or the CD may institute an inquiry. In such cases, the staff may be suspended and issued with a letter stating the offence committed and the penalty applicable to such offence. A reply to such letter would be expected within three days, failure to which the intended action may be taken without further reference to the staff. This action will be taken by the Head of Department with a copy to the HHROD ES or directly by the HHROD ES. The suspension period will create room for investigations and will not exceed 30 days. No salary will be payable over this period. All cases not finalized within this period will be forwarded to the HHROD ES or CD for final decision.

Letters of termination or summary dismissal will be issued as follows:

- Head of Departments – CD*
- All other staff – HHROD ES*

34.It is apparent that the Respondent never followed the above procedure before terminating the Claimant.

35.It is therefore this Court’s finding that the termination of the Claimant was unfair and unjustified as provided for under Section 45(2) of the Employment Act:

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”.

36. Having found as above, I find for the Claimant and award her as follows:

1. 1 month salary in lieu of notice = 161,000/=

2. Salary for the month of October 2013 = 161,000/=

3. 8 months salary as compensation for unlawful

termination = 161,000 x 8 = 1,288,000/=

less 223,463

Balance to be paid = 1,386,537/=

4. The Respondents will pay costs of this suit.

Read in open Court this 6th day of May, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Manyonge holding brief for Njoroge for Respondent – Present

No appearance for Claimant