



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1443 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 27th June 2016)

C A SCLAIMANT

VERSUS

C S LIMITED... RESPONDENT

JUDGMENT

1. The Claimant filed her Memorandum of Claim dated 17th August 2015 in this Court on 17/8/2015 through the firm of Gomba and Company Advocates. She seeks the following prayers:
 - a. *A declaration that the Respondent was required to issue a policy statement on sexual harassment and/or incorporate the same in their contract of service and failure to do so violated Section 6 of the Employment Act.*
 - b. *A declaration that the Respondent's actions in dismissing the Claimant from employment was unlawful and unfair.*
 - c. *The sum of Kshs. 422,726.85 particularized as:*

<i>Salary for July 2015</i>	<i>KShs 27,727.70</i>
<i>1 months salary in lieu of notice</i>	<i>Kshs 27,727.70</i>
<i>Service pay Kshs 27,727.70 x 1/2 x 3</i>	<i>Kshs 40,909.05</i>
<i>12 months salary compensation for unfair dismissal</i>	<i>Kshs 327,272.40</i>
TOTAL	Kshs 422,726.85

- d. *Damages for sexual harassment*
- e. *Certificate of Service*
- f. *Costs of this suit*
- g. *Interest on the amount.*

Facts of the matter

2. The Claimant was employed as an LPO /Receiving Clerk at a monthly salary of Kshs 15,000.00 per month; she carried out her duties diligently and dutifully which even earned her a salary increment where her new wage was Kshs 27, 272.70.
3. The Claimant avers that she was constantly sexually harassed by various staff members some of whom were in management. The Claimant further avers that the lack of a Sexual Harassment Policy by the employer added to her frustration and harassment.
4. The Claimant avers that on the 16th of March 2015, she was unwell and sought medical attention at the Ngara Health Clinic, where she was granted sick leave for three days. However, when she reported back on the 20th of March 2015, she was asked to show cause why disciplinary action should not be taken against her as she did not report to duty on the Saturday 18th of July 2015, which she was to reply to on the same day.
5. The Claimant further states that she replied to the letter stating that she was on bed rest and produced evidence of the same, but was summarily dismissed on the 21st of July 2015. She claims that the termination was unlawful, unfair and malicious and was without legal basis.
6. She also states that she lodged a complaint against one Mr. Pius Patel for harassing her which letter was dated 20th July 2015, where instead of finding assistance, she was issued with a letter to show cause and later dismissed. She also states that the Respondent through the Human Resource Manager Ms. Jane Mwangi told her:

“Instead of engaging with your Manager and supervisor in a civil manner, you choose to present your grievances to the Head Office which is unprocedural” this she states shed light on her dismissal.

7. The Claimant states that in her letter of appointment there was no policy statement on Sexual Harassment which was contrary to Section 6(2) of the Employment Act 2007 which states as follows:

“(2) An employer who employs twenty or more employees shall after consulting with employees on their representatives if any issue a policy on sexual harassment”.

8. She submits that in the more than 2 ½ years that she was employed, no such policy was in place and the attached policy on page 6 of the Respondents page is just but an attempt to cover up the illegality.
9. The Claimant submits that her dismissal was procedurally and substantively unfair. She relies on the case of **David Gichana vs Mombasa Maize Millers Limited [2004]e KLR** where Hon. J Radido stated;

“Section 43 of the Employment Act has placed a statutory obligation upon the employer to prove the reasons for terminating the services of an employee. Section 45 of the Act on the other hand requires the employer to prove that the reasons for terminating are valid and fair”.

10. The Claimant states that no such reasons were issued to her, and that it was her act of submitting a letter complaining of sexual harassment that led to her being issued with a letter to show cause. It was a desperate attempt to cover up and protect the managers and the Respondents did not have a legitimate reason to fire her.
11. The Claimant states the burden of proof is upon the Respondent to prove that the said dismissal was procedurally fair. Which position was emphasized by Justice Radido in the above mentioned

case of David Gichana Omuya where they stated:

“And what does Section 41 of the Act require. The first observation is that the responsibility established in upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the court that it has observed the dictates of procedural fairness”.

The ingredients of procedural fairness as I Understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly it would follow naturally this an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representation by the employee before making it the decision or dismiss or give other sanction.”

- 12.They submit that the Claimant was never accorded a disciplinary hearing and her dismissal was abrupt and sudden. Further, she testified how Mr. Patel and Mr. Mukesh who were both managers used to touch her behind and look at her indecently, they even called her “banchot” and “churta” acts which fall within sexual harassment as defined in Section 6(1)(b)(d) of the Employment Act. The Respondent she states failed to address these specific claims and just denied all allegations in general.
- 13.During cross examination, the Claimant states that Ms. Mwangi the Respondent’s witness also failed to properly state how one would go about reporting incidents of harassment should the aggressor be your manager.
- 14.They submit that they should be awarded as prayed.
- 15.The Respondent has filed a Memorandum of response dated 15th September 2015 through Macharia Mwangi and Njeru Advocates where they admit that the Claimant was in their employment at a salary of Kshs 27,272.70.
- 16.They state that their code of conduct comprehensively sets out what constitutes sexual harassment on employees and that the employees are requested to report to management or any other person of authority if they feel that they have been sexually harassed. They state that this was known to the Claimant and she never at any point made allegations of sexual harassment to the Respondent.
- 17.They further stated that without authorization, the Claimant absented herself from work between the 16th of March 2015 and the 18th of March 2015 and neither did she communicate as to her whereabouts.
- 18.They state that in her response to the show cause letter, she did not explain why she was absent from work on the given dates and had not made it previously known that she had been sexually harassed at the office. Moreover, the Respondent submits that these allegations are just but an afterthought in an attempt to disparage the disciplinary process invoked by the Respondent.
- 19.The Claimant did not attach to her response any medical treatment note or evidence of her seeking medical attention and the Respondent is then left to conclude that she had willfully absconded from work.
- 20.The Respondent states that ample time was given to the Claimant to respond to the show cause letter and that upon her termination, her dues were calculated in full inclusive of her salary for

July 2015, and notice in lieu of termination amounting to 89,923.00 which she has refused to collect.

21. The Respondents submit that in view of the foregoing, the Claimant is only entitled to the above stated amount and not the compensation for unfair termination.

22. They pray for the Court to dismiss the claim with costs, but in the event that the Court finds otherwise, they are of the opinion that a sum of Kshs 500,000.00 would be adequate and reasonable in the circumstances.

23. Having considered evidence from both parties, the issues for consideration by this Court are as follows:

1. ***Whether there were valid reasons to summarily dismiss the Claimant.***
2. ***Whether due process was followed in the process.***
3. ***What remedies if any the Claimant is entitled to.***
4. ***The Sexual Harassment Policy.***

24. On 1st issue, the letter of termination of the Claimant is dated 21.7.2015. The letter states as follows:

“Dear C,

Termination of Services

Despite several verbal and written warnings issued to you which you are well aware of, you seem to have failed to take instructions of duty from the people put in authority over you.

You are fond of engaging in altercations with your Managers and Supervisors whenever you are given instructions.

In the latest incident you were asked to show cause why disciplinary action should not be taken against you for failing to report to work on Saturday, 1st July 2015. Instead of engaging with your Manager and Supervisor in a civil manner you choose to present yourself in the Head Office and never went back to the branch until the next day when you reported to Head Officer at 12.30 pm.

In regard to the above, we feel you are not ready to grow with the organization hence our decision to terminate your services with immediate effect. You will be paid your terminal dues in full as per the regulations in force”

25. So the reasons given in this letter to terminate the Claimant’s services are:

1. ***Instead of engaging with your Manager and Supervisor in a civil manner, presenting her grievances to the Head Office.***
2. ***Engaging in altercations with her Managers and Supervisors whenever instructions are given to her.***

26. The letter also stated that she had been served with a show cause letter to explain why disciplinary action should not be taken against her for failing to report to work on 18th July 2015.

27. The show cause letter in question is Claimant’s Appendix at page 7 dated 20th July 2015. The reply was expected the same day. She was informed that she didn’t respond, disciplinary action would be taken against her at the discretion of the Manager.

28. At Appendix 6 of Claimant's documents is yet another letter addressed to the Respondent's Director complaining of harassment and intimidation at her work. She also complained of having been treated unfairly earlier on when she failed to report to work.

29. This letter is also dated 20th July 2015, It is not clear which of the 2 letters of 20th July 2015 was written earlier but the fact remains that the Claimant reported that matter of harassment and this matter was taken in bad light and on 21.7.2015 she was dismissed.

30. From my understanding, the reason/s given for dismissing Claimant are not valid reasons given that she was dismissed for seeking help at the Head Office of the Respondent.

31. On due process, none was accorded to the Claimant as envisaged under Section 41 of Employment Act, 2007 which states:

“(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”.

32. It therefore follows that the dismissal of Claimant was unfair and unjustified in terms of Section 45(1) of Employment Act which states as follows:

“No employee shall terminate the employment of an employee unfairly”.

33. On the issue of Sexual Harassment Policy, it is the Respondents position that they have one such Policy which they displayed to at their page 5-8 of their documents. This document however is their Code of Conduct and Policies covering the entire HR Spectrum.

34. The Sexual Harassment Policy however envisaged by the Employment Act is that stated under Section 6 of Employment Act which states as follows:

1. An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker:

a. directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express:

- i. promise of preferential treatment in employment;**
- ii. threat of detrimental treatment in employment; or**
- iii. threat about the present or future employment status of the employee;**

b. uses language whether written or spoken of a sexual nature;

c. uses visual material of a sexual nature; or

d. shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its

nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.

2. *An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.*
3. *The policy statement required under subsection (2) may contain any term the employer considers appropriate for the purposes of this section and shall contain:-*
 - a. *the definition of sexual harassment as specified in subsection (1);*
 - b. *a statement:-*
 - i. *that every employee is entitled to employment that is free of sexual harassment;*
 - ii. *that the employer shall take steps to ensure that no employee is subjected to sexual harassment;*
 - iii. *that the employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment;*
 - iv. *explaining how complaints of sexual harassment may be brought to the attention of the employer; and*
 - v. *that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.*
4. *An employer shall bring to the attention of each person under the employer's direction the policy statement required under subsection (2).*

35. The details in such a Policy are very explicit and the one displayed by Respondents does not meet the requirements of the law. It is therefore my finding that the Respondent does not have a Sexual Harassment Policy as per the law and are therefore in breach and should therefore be punished as provided under Section 88 of Employment Act.

36. I therefore find for Claimant and enter judgment for her as follows:

1. *1 months salary in lieu of notice = 27,272.70/=.*
2. *Salary for July 2015 = 27,272.70/=*
3. *Service pay for 3 years being $\frac{1}{2} \times 3 \times 27,272.70 = 40,909.08/=$*
4. *12 months salary as compensation for unfair dismissal = $12 \times 27,272.70 = 327,272.40/=$.*

TOTAL = 422,726.85/=

5. *Plus costs and interest*

37. As for the issue of the Sexual Harassment Policy, I do find the Respondents guilty of failing to have the Policy and I direct the Respondents to appear in Court to answer to the said charge.

Read in open Court this 27th day of June, 2016.

Further orders

Mention on 4/7/2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gomba for Claimant

Akongga for Respondent