



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2011 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 5th July 2016)

ESTHER OMARIBA.....CLAIMANT

VERSUS

MARIE STOPES KENYA LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant filed her Statement of Claim herein dated 11th November 2014 on the 12th of November 2012 through Havi & Company Advocates. The Claimant seeks damages for unfair and wrongful termination and prays for judgment against the Respondent in the following terms:

- (a) That the Respondent be and is hereby ordered and directed to pay the Claimant Kshs. 1,327,954.00.*
- (b) That the Respondent be and is hereby ordered and directed to pay the Claimant interest on the sum of Kshs 1,372,954.00 at court rates from 5th June 2012 until payment in full.*
- (c) That the Respondent be and is hereby ordered and directed to remit Kshs.600.00 to the Claimant's NSSF account for the months of March 2007, February 2009 and August 2013.*
- (d) That the Respondent be and is hereby ordered and directed to pay to the Claimant costs of this suit together with interest thereon at Court rates from the date of filing of suit until payment in full.*
- (e) Any such order or further relief as this Honorable Court may deem appropriate.*

Facts

2. The Claimant was employed by the Respondent on the 23rd of April 1991 as an Enrolled Community Nurse and rose through the ranks to the level of Franchise Coordinator. In her new position, it was indicated in the contract of service that her remuneration would be Kshs 70,000 per month and that she would be entitled to per diems, fuel and lunch allowances amounting to Kshs 32,000 per month.

3. The Claimant states that there were additional terms of the contract of service between the Respondent and herself under the Employment Act Cap 226 which stated that the Respondent would not terminate the

contract wrongfully or unfairly; and that the Respondent would summarily dismiss her if she had fundamentally breached her obligations arising from the contract of service.

4. The Claimant was summoned by the Respondent on the 12th of February 2014 to discuss allegation that she had misappropriated funds. At the meeting she presented financial statements which she believed absolved her from any wrong doing but on the 12th of February 2014, she received a letter indicating that her contract had been terminated.

5. The Claimant states that the termination was unfair and was done on unsubstantiated allegations. She further states that she was not heard in any proceeding that would culminate in summary dismissal; and moreover, there was an alleged hearing on the 16th of January 2014, which did not take into account all the facts and circumstances surrounding the allegations.

6. The claim is opposed by the Respondent who filed a Memorandum of Response dated 29th March 2015 through the Federation of Kenya Employers. In the Response they admit that the Claimant was in their employment.

7. The Respondent state that the Claimant was employed as a Franchise Coordinator whose duties were to ensure that the Respondents KURHI and TUPANGE projects through the social franchise network AMUA were successfully conducted. The specific responsibilities were:

(a) Expand and scale up AMUA social franchise brand.

(b) Monitoring and reporting on AMUA franchise performance against set key performance indicators.

(c) Implement multiple and integrated health interventions.

8. For smooth running of the social franchise, every staff member involved through a personal account would receive a staff payment and advances to carry out organizational activity where payment cannot be made directly to the organization by bank transfer or by cheque. No second advance would be granted until the first one was fully settled or utilized. Should sums not be utilized, the staff would surrender the unutilized monies to the finance department.

9. The Respondent states that from 1st October 2013, the Claimant herein was unable to account for her advances. She consistently failed to surrender the unutilized staff payments & advances to her prior to September 2013 despite several demands from the finance department.

10. The Respondent states that the projects entrusted to the Claimant were lagging behind because there were lack of funds for staff payments and advances.

11. The Respondent states that on or around the 10th of January 2014, a dispute arose between the Claimant and a colleague as the colleague demanded that the Claimant surrender advance totaling 78,000.00 made to her by her colleague, a Miss Teresia Mbithe. The disputes which were done via email were copied to the Line Manager a Dr. Michael Njuma who took up the matter and informed the Director of Programmes, Elena Bonometti and the Deputy Director further action Corporate Services, Rhoda Awino for their further action.

12. The Respondent further states that the Claimant was urgently asked to present the status of her activities in relation to the advances she received but failed to do so. She was then invited for a disciplinary hearing to explain her refusal to surrender the unutilized advances. It emerged at the hearing that together with her colleague Tabitha, the latter would request for advances but did not obtain a written confirmation and when given, would issue part of it to the Claimant. The monies issued to the Claimant would be used for her own personal activities.

13. It was upon deliberation of the disciplinary hearing, that the Respondent decided to issue a warning letter to Teresia Mbithe and surcharge her with the unaccounted for Kshs.78,000.00 but as the Claimant had compromised the Respondent's projects and activities, she was to be summarily dismissed.

14. She was paid her terminal dues which were:

(a) Salary for the month of February 2014,

(b) Due but untaken annual leave of 12 days

(c) Leave travelling allowance.

15. They asked the Claimant to prepare a written request for her pension contribution with Jubilee Pension Scheme which would be immediately facilitated by the Respondent.

Claimant Submissions

16. The Claimant submits that while the Respondent has the right to summarily dismiss an employee, they are still bound by the Employment Act Section 44 and do it within the laid down procedure and demonstrate that there was cause for dismissal under Section 44 of the Act.

17. The reasons given for her termination were an afterthought and fell out of procedure laid down under Section 45 of the Act. She submits that the conclusion of the January 2014 meeting, the recommendations were:

“Way forward

Since no documents were signed, it is difficult to hold Esther accountable for the money Teresia claims to have given her. Teresia will have to pay back the money and receive a warning for not following procedure as outlined by MSK.

Esther on the other hand seems to have issues with MSK money and got herself in a situation in the first place where her salary was been deducted because she had not forwarded surrenders. This in itself is a breach of MSK policies. Confirmation is also needed to determine her performance in this case...”

18. The Claimant states that the Respondent has not given any specific warnings or measures directed to her through her employment.

19. She relies on the case of **Isaac Adede Opany vs. Nelson Andayi Havi t/a Havi & Company Advocates Cause No 2040 of 2013 (UR)** where the Court in holding that the Claimant's summary dismissal was unlawful stated:

“The Respondent was permitted to summarily dismiss but even then the dismissal has to accord the Claimant procedural safeguards. Section 41 is not ambiguous and provides that 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 employer or shop floor union representative of his choice present during this explanation. It further goes on to provide that 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 marked. This applies even to summary dismissal and I do not think that the submission made by the Respondent is a correct position of the law. In his decision, Ongaya J. held that the power of summary dismissal must therefore be exercised

sparingly and in the most obvious cases of gross misconduct.”

20. The Claimant states that even though the Respondent had the power to summarily dismiss the Claimant herein, the process taken fell below the provision provided for by law and that she should be awarded as prayed.

21. The Respondent submits that the Claimant's summary dismissal was justified, lawful and fair. They submit that she took it upon herself to channel the Respondents advances to her own activities instead of executing it towards the projects and thus compromising the objectives of the Respondent organization.

22. They further submit that at all material times the Claimant was aware of the accounting policy on staff payment and advances as she had been in their employment for over 20 years. They submit that her failures and subsequent dismissal are within Section 44 of the Employment Act.

23. The Respondent also submits that they faithfully contributed toward the Claimant's pension, and NSSF and allegations of non-remittance are false.

24. For the foregoing reasons, they state that the claim should be dismissed with costs.

25. Having considered evidence of both parties, the issues for determination are as follows:

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether due process was followed before dismissal of Claimant.

3. What remedies to grant in the circumstances.

26. On the 1st issue, from the letter of dismissal by the Respondent they state as follows:

“Following the disciplinary hearing held on 16/01/2014 between Teresia Mbithe, Dr. Michael Njuma – your line manager, Rhoda Odhiambo – P & D manager and yourself, this letter informs you that your employment with Marie Stopes Kenya has been terminated under Section 44 subsection (4 g) regulations of the Employment Act 2007, and Marie Stopes's rules and regulations which stresses clearly that advances should be used for what it was intended for and accounted for within 5 working days of returning from the field -----.”

27. The reason thus advanced for this termination is failing to account for advances. Concerning this issue, the Claimant told Court that on 13.1.2013, she held a meeting with her employer to reconcile money she was supposed to have been given and what she was actually given.

28. She states that she was not informed that it was a disciplinary hearing. She also avers that she was not found liable to any loss of money.

29. The question then is whether the reason/s given for the termination were valid or not. From the Respondents point of view the Claimant misappropriated funds advanced to her for private use. The funds were to be surrendered within 60 days and that the Claimant never surrendered these moneys and so she couldn't be given her next allocation.

30. This even led to the amounts been recovered from her salary in October and November 2012. That what followed was she was now helped by one Mbithe who was to request for money and advance to the Claimant. That the 2 also disagreed. A disciplinary hearing was then organized on 19th and Claimant was invited to it but she refused to admit to her mistakes.

31. The reason given in the termination is failing to surrender funds advanced to her. This reason is seen to have been true because in October and November 2012, 29,000/= was deducted from the Claimant's salary and it is not contended that due to her inability to surrender funds advanced to her, the Claimant

had to get funds through a colleague to run her projects. This reason is a reason that did not exist and which made the Respondent to dismiss the Claimant.

32. This is in tandem with Section 43 of Employment Act 2007 which states as follows:

"(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".

33. I therefore find there was a valid reason to warrant termination of Claimant's employment. This reason was not however a valid reason for summary dismissal because the Respondent compromised this by even recovering the moneys owing from Claimant from her salary.

34. The Respondents have insisted that they summarily dismissed Claimant in tandem with Section 44 of Employment Act and their own Manual.

35. Section 44 (4) (g) – deals with commission of criminal offence but there is no proof that the Claimant committed any criminal offence and neither was she even charged in any Court of law.

36. For the mistake of failing to account for funds advanced to her, termination would have been the better option and this would have been effected after due hearing.

37. The next issue is whether there was due process. The Respondents insist they took Claimant through a hearing which Claimant denies. Indeed there is no evidence that there was. Indeed there is no letter inviting Claimant to any hearing. Though the dismissal letter refers to a disciplinary hearing held on 16/1/2014 there is no proof that Claimant was invited to any disciplinary hearing.

38. Respondent's Appendix 10 deal with a report of a disciplinary hearing held on 16/1/2014 but the body of minutes there is no indication that what was ongoing was a disciplinary hearing. The meeting even concluded that:

"Since no documents were signed, it is difficult to hold Esther accountable for the money Teresia claims to have given her. Teresia will have to pay back the money and receive a warning for not following procedure as outlined by Marie Stopes Kenya".

39. Esther on the other hand seems to have issues with Marie Stopes Kenya money and got herself in a situation in the first place where her salary has been deducted because she had not forwarded the surrenders. This itself is a breach of Marie Stopes Kenya Policy. Confirmation is also needed to determine her performance in this case.

40. No decision was ever reached to terminate or dismiss Esther yet on 12th February 2014 this meeting is referred to and she is dismissed.

41. This Court finds that due process as envisaged under Section 41 of Employment was not followed.

42. I therefore find the dismissal of the Claimant unfair and unjustified and even in the absence of a disciplinary hearing, the termination would also not suffice despite the reasons.

43. I therefore find for Claimant in this case and award her:

1. 12 months salary as compensation for unfair dismissal = 12 x 80,500/= 966,000/=.

2. Claims for contribution from pension can be claimed directly from the fund.

3. NSSF contribution of 600/= for March 2007, February 2009 and August 2013.

4. Costs of this case.

Read in open Court this 5th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Shitubi holding brief for Havi for Claimant – Present

Miss Kamau for Respondent – Present