



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 236 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 26th October, 2016)

WAIRIMU MUREITHI..... CLAIMANT

VERSUS

SPHINX PHARMACEUTICALS LIMITEDRESPONDENT

JUDGMENT

1. The Claimant herein Wairimu Mureithi filed her Statement of Claim dated 20/2/2014 on 21.2.2014 through the firm of Mudeshi Muhanda and Company Advocates. The Claimant claims unfair termination of her services and failure by the Respondent to adequately compensate her.

The evidence

2. The Claimant told Court that she was employed by Respondent in 2009 as a Laundry Lady at an initial monthly salary of Kshs.6,500/=. The salary was later increased to 10,000/= in 2011 as per Exhibit 1.

3. The Claimant however states that in the course of her work, the Respondent failed to provide proper protective clothing to her leading her to develop an allergic reaction from the detergents she was using. She states that she also developed fibroids that made her bleed for long hours and in the process she became anemic and sought for help from Respondent to assign her other duties. The Claimant was actually assigned other duties after this.

4. On 3.9.2013, she got sick again and was given sick off but on returning, she worked for some time and was told to go home until further notice as to when she would be called back.

5. She was called on 9th December 2013 and worked for 3 days and was told to go home. She later returned on 3rd January to inquire about her December 2013 salary but was informed she was now a casual worker and not a permanent one and there was no salary due to her.

6. She was then issued with a letter summarily dismissing her services dated 15.1.2014 by reason of absenteeism from work from 8.1.2014 to 15.1.2014.

7. She avers that she was not paid her terminal benefits and neither was she given an opportunity to defend herself. The Claimant therefore avers that her dismissal was unlawful and wrongful and she prays she be paid Kshs.182,000/= as terminal benefits as per paragraph 13 of her claim.

8. The Respondents on their part filed a Response to this claim dated 19th May 2014 on 22.5.2014 through Muriu Mungai & Company Advocates. The Respondent avers that the Claimant indeed was a Cleaning Lady at their facility initially earning 6,500/= which amount was reviewed to 10,000/= due to inflation.

9. They also state they provided the Claimant with all protective gear required for her working in the premises as required by law. They also state that with regard to her developing fibroids they were not to blame but that on 18th April, 2013, the Claimant was issued with a letter from Kenyatta National Hospital stating that she had uterine fibroids and had a metal plate in her left thigh which was placed to repair a fracture suffered from a traffic road accident. That as a result of the plate, it was recommended that she should not deal with cold water or cold areas in general.

10. That the Claimant had failed to disclose these issues which would forcibly impede her from performing her duties. However, the Respondent went ahead and accommodated her in areas where she would work for the Respondent without necessarily affecting her health. That in January 2014, the Claimant failed to report to work.

11. On 15.1.2014 when she reported to work and was asked for justification of her absenteeism and she stated that she was sick and needed some time off. The Claimant however failed to produce any documentary evidence substantiating her claim. They gave her an opportunity to defend herself and thereafter found her culpable and so summarily dismissed her. They also state that they paid her, her terminal dues and that they acted in a justifiable manner. They pray that the suit be dismissed with costs.

12. I have considered the evidence and submissions of both parties and issues for determination are as follows:

1. Whether there were valid reasons to dismiss the Claimant summarily.

2. Whether due process was followed before the Claimant was dismissed.

3. What remedies to award in the circumstances.

13. On the 1st issue, as per the Claimant's dismissal letter, the Respondent dismissed the Claimant due to absenteeism. The Claimant on her part denied being deliberately absent from work. She avers that she was sent home in December and told to await further instructions. On coming back in January to ask for her December 2013 pay, she was told she was a casual and there was no pay for her for December 2013. She was then informed she had been removed from the pay roll and was summarily dismissed.

14. To ascertain whether it is true or not that the Claimant was removed from the payroll in December 2013, the Claimant exhibited her pay slip for October 2013 dated 11.11.2013 whereas the Respondent insists she was only dismissed in January 2013. It was their duty to prove that contrary to the averment by the Claimant, they paid her, her December 2013 salary and dismissed her in January 2014 for absenteeism.

15. There is no evidence that she was dismissed in January 2014 for absenteeism when she was not even paid her December 2013 salary. This is an indication that even in December 2013, the Respondents were hell bent on dismissing the Claimant and without valid reasons in December 2013.

16. It is imperative that the Respondent should prove a valid reason to dismiss the Claimant as provided for under Section 43 (1) & (2) 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.

17. By not showing why her December salary was withheld, the Respondent's conduct shows dismissal in December 2013 for no valid reason and I find that as the position.

18. On the issue of due process there is no indication that the Claimant was taken through any disciplinary process. The hearing process envisaged is that provided for under Section 41 of Employment Act 2007 which states thus:

(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.

19. It is my finding that the Claimant was dismissed without being given a hearing and without any valid reasons and in the circumstances I find her dismissal unfair and unjustified in terms of Section 45(2) of Employment Act which states that:

"(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 employees 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.

20. I therefore declare the dismissal of the Claimant unjustified and unfair and I convert it to a normal termination and award her as follows:

1. 1 months' salary in lieu of notice = 10,000/=.

2. Unpaid 38 leave days not contested by Respondent = 20,000/=.

3. House allowance per month for 4 years = 15% of 10,000 x 12 months x 4 years = 1,500 x 12 x 4 = 72,000/=.

4. 12 months' salary as damage for unlawful termination = 12 x 10,000 = 120,000/=.

TOTAL = 222,000/=

5. Plus costs and interest.

6. Certificate of Service.

Read in open Court this 26th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muhanda for Claimant – Present

No appearance for Respondent