



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1259 OF 2015

MARY WAGIKUYU KOMU.....CLAIMANT

VERSUS

THE KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI

HOSPITAL.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Mary Wagikuyu Komu worked for the Nairobi Hospital in the position of Cashier from 14th December 2010 until 27th August 2014 when her employment was terminated. She brought this action claiming compensation for unlawful termination and payment of terminal dues.

2. The Claimant's claim is contained in a Memorandum of Claim dated 15th July 2015 and filed in Court on 21st July 2015. The Respondent filed a Memorandum in Reply on 1st September 2015 and the matter proceeded to hearing with the Claimant testifying on her own behalf and Paul Kinuthia Macharia for the Respondent.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Cashier on 14th December 2010 at an initial monthly salary of Kshs. 35,374 which was increased to Kshs. 56,716 from 22nd April 2014.

4. On 24th July 2014, the Claimant was arrested together with two other colleagues, Kennedy Wambua Sukali and Purity Wanjiru Muriithi on allegations of stealing by servant.

5. On 25th August 2014, the Claimant was issued with an inter-office memorandum by which she was accused of culpability in an alleged loss of over Kshs. 92,000,000. The Claimant was required to show cause why she should not be dismissed within 24 hours. She sought 14 days to seek legal counsel. The Respondent however proceeded to summarily dismiss the Claimant, a fact that was communicated by letter dated 29th September 2014 from the Respondent's Advocates.

6. It is the Claimant's case that her dismissal was illegal and unfair as she was never afforded an opportunity to be heard. She claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 56,716
- b) Salary for September 2014.....56,716
- c) Leave pay for 20 days.....37,810
- d) 12 months' salary in compensation..... 680,592
- e) costs plus interest

The Respondent's Case

7. In its Reply filed on 1st September 2015, the Respondent admits having employed the Claimant as a Cashier by letter dated 7th December 2010. The Claimant later became an Accounts Assistant.

8. Following a decline in its revenue, the Respondent carried out internal investigations sometime in 2013, which revealed fraudulent transactions between 1st January 2013 and 30th April 2013, resulting to losses of over Kshs. 92,000,000. The investigations also showed culpability on the part Respondent's employees in the Finance Department.

9. On 25th August 2014, the Respondent issued the Claimant with a letter requiring her to answer to allegations on her role in the said loss of Kshs. 92,000,000. The Claimant was also required to attend a disciplinary hearing on 26th August 2014.

10. The Claimant however did not appear at the disciplinary hearing and the panel recommended her termination on grounds of loss of confidence and failure to respond to or turn up for the disciplinary hearing. The Claimant's employment was terminated on 27th August 2014.

11. The Respondent also made a report to the Police to carry out independent investigations. The Claimant and her colleagues were later charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. At the time of writing this judgment, these charges were pending in the criminal court.

12. On 8th September 2014, after the Claimant had been dismissed, her Advocates wrote to the Respondent purportedly in response to the show cause letter dated 25th August 2015. The Advocates also sought a date to make representations on behalf of the Claimant.

Findings and Determination

13. There are two issues for determination in this case:

- a)Whether the Claimant's dismissal was lawful and fair;
- b)whether the Claimant is entitled to the remedies sought.

The Dismissal

14. The Claimant claims that her dismissal was neither justifiable nor procedurally fair. On its part, the Respondent states that the Claimant failed to respond to a show cause memo issued to her on 25th August 2014. She also failed to attend a disciplinary hearing scheduled for 26th August 2014.

15. On 25th August 2014, the Respondent's Finance Director wrote the following inter-office memorandum to the Claimant:

“SUBJECT: SHOW CAUSE

Reference is made to fraudulent transactions between 1st January 2013 and 30th April 2014 that resulted in losses of over Kshs 92 Million.

You are culpable for the losses by omission or commission. Show cause why disciplinary action should not be taken against you in this regard. Your response should reach the undersigned by Tuesday 26th August 2014, 2.00 p.m. when a disciplinary hearing will take place.

Please note that you may have another employee of your choice present for the hearing should you so wish.

(Signed)

John Gachoki”

16. From the evidence on record, the Claimant did not respond to the show cause memo nor did she attend the disciplinary hearing scheduled for 26th August 2014. She was therefore summarily dismissed by letter dated 27th August 2014. The dismissal letter states:

“Dear Ms. Komu,

RE: SUMMARY DISMISSAL

Reference is made to the show cause memo and invitation to attend a disciplinary hearing on 26th August 2014 which you did not attend.

You are hereby summarily dismissed with immediate effect.

Your final dues will be processed as follows:-

Pay:

- *Salary up to and including 27th August 2014.*
- *Five (5) leave days not taken.*

Less:

Any outstanding medical co-pay expenses

Please note that this does not include recovery of any medical expenses such as undelivered consultant’s bills that you may have incurred as at your last working date. Your final dues will be subject to statutory deductions. To enable us process your dues, you are required to submit the attached clearance form duly completed.

The Retirement Benefits Act allows you to access your own contribution and fifty per cent of the employer’s contribution if you have been in the scheme for the vested period but have not attained retirement age. You may also opt to transfer the employer’s portion to a new employer’s retirement scheme or to an individual retirement scheme (list attached).

Please advise us in writing how you would like your contributions handled. Yours sincerely,

FOR: THE NAIROBI HOSPITAL

(Signed)

Christina M. Were

FOR: CHIEF EXECUTIVE OFFICER”

17. According to the Respondent, this letter was sent by registered mail to the Claimant’s last known address. A certificate of posting stamped 28th August 2014 was produced in support of this assertion.

18. The Claimant testified that upon receiving the show cause memo, she sought legal counsel and her Advocate responded to the memo asking for particulars. From the evidence on record, the Claimant’s Advocate wrote to the Respondent’s Finance Director on 8th September 2014. This would have been after the date set for the disciplinary hearing and post dismissal. The Claimant told the Court that she had notified the Finance Director that she required more time to respond to the allegations made against her but no documentary evidence was produced in support of this averment.

19. The procedural fairness requirements set out under Section 41 of the Employment Act, 2007 are fulfilled by asking an employee facing disciplinary proceedings to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the allegations leveled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided.

20. It seems to me that the Claimant chose to ignore the summons issued to her by her employer and she cannot therefore come to Court and state that she was not given an opportunity to be heard. In **Jackson Butiya v Eastern Produce Kenya Limited (Cause No 335 of 2011)** this Court held that an employee who squanders the internal disciplinary mechanism provided by an employer cannot come to Court and say they were not heard. This is precisely what the Claimant did and her claim for unlawful and unfair dismissal must therefore fail.

Other Remedies

21. The claim for one month’s salary in lieu of notice is admitted and is payable. The Respondent did not produce any leave records to counter the claim for 20 days’ leave pay which therefore succeeds and is allowed. Evidently, the Claimant did not work in the month of September 2014 and the claim for salary for this month is therefore without basis and is dismissed.

22. Finally I enter judgment in favour of the Claimant as follows:

- a) 1 month’s salary in lieu of notice.....Kshs. 56,716
- b) Leave pay for 20 days (56,716/30x20).....37,810
- Total.....94,526**

23. The judgment amount will attract interest at court rates from the date of the judgment until payment in full.

24. Since the Claimant’s claim succeeds only in part, I direct that each party will bear their own costs.

25. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER 2016

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JUDGE

Appearance:

Mr. Thuita for the Claimant

Mr. Kiingata for the Respondent