



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 312 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 12th January, 2015)

LYDIA CHEPKOSGEI MUTAI CLAIMANT

-VERSUS-

KENYA POWER LIMITED RESPONDENTS

JUDGMENT

The claimant herein Lydia Chepkosgei Mutai filed her Memo of Claim on 7.11.2013 through the firm of Kasamani & Co. Advocates. The claimant's contention is that she had been employed by the respondent as a clerk Grade IV on 9.8.1994 in the Finance Division, North Rift area earning a salary of Kshs 1,989/= per month plus a house allowance of Kshs 1,375/= on salary scale "E" governed by the Union Agreement between the respondents and the recognized union. The claimant successfully completed her probation period and was confirmed in employment as clerk Grade IV on 30.3.1995. She was subsequently promoted and upgraded from clerk Grade IV scale F on 20.8.1995 and on other subsequent promotions. On 30.10.2012 she was made a supervisor and her salary and allowances was increased from the initial sum of Kshs 3,364/= to Kshs 94,160/= per month as at January 2013. In the course of duty, it is the claimant's contention that she received various salary adjustments following her promotion and on 23.12.99, she was given a letter of commendation for her good work.

On 11.2.2013, the claimant received a show cause letter asking her to explain within 72 hours an alleged fraudulent reallocation and misappropriation of Kshs 14,221,877.30/=. She responded to this letter on 14.2.2013 denying any fraud. By a letter dated 19.3.2013, she was ordered to attend an inquiry hearing into the misappropriation of Kshs 14,221,877.30/= at the respondent's boardroom at Kisumu on 25.3.2013 at 10 am. The claimant made her presentation before the board of inquiry as demanded on 25.3.2013 and her previous suspension was lifted and she was ordered to report back to work with immediate effect.

However on 10.5.2013, she was served with a letter of termination which letter referred to the misappropriation of the Kshs 14,221,877.30/= previously discussed at the disciplinary hearing.

It is her contention that she never stole any money from her respondent and that the termination of her services was unilateral, up-handed and in breach of her terms of employment. She now prays that she be paid Kshs 38,397,264/= being lost earnings that she would have received had she been allowed to work upto age 60 years. She also prays for interest and costs of this suit.

The respondent filed their Memo of Response on 10.1.2014 through the Federation of Kenya Employers. It is their position that in November 2012, the claimant was invited to participate in an audit exercise involving the respondent's Internal Auditor in Western Region. The Audit Report (**App KP-1**)

revealed irregular reallocation of revenue at the respondents Western region office. The claimant was then suspended from duty via a letter dated 20th November 2012 (*App KP-2*).

The claimant was thereafter subjected to a Disciplinary Committee meeting on 25.3.2013. She was thus accorded due process. The suspension was lifted after this and she was ordered to report to work with immediate effect.

The respondents aver that their letter of 28th March 2013 was therefore, not a consequence of the proceedings of 25th March 2013 nor the outcome thereof. The respondent's position is that after the disciplinary hearing of 25th March 2013, the respondent considered the Audit Report, the claimant's response to the show cause letter and her explanation in the course of the Disciplinary Committee hearing and was not satisfied with her explanation and consequently terminated her services vide a letter of 16th May 2013.

The respondents further aver that while terminating the claimant's services, the respondents stated the reasons for the said termination and specifically indicated that it was pursuant to a disciplinary process that started from November 2012 to 25th March 2013. That the claimant appealed against this termination on 21.5.2013 as evidenced from her letter marked KP-3. This appeal was considered and rejected as per Exh KP-4.

The claimant also made a counter-claim against the claimant for Kshs 356,242/= as outlined in the termination letter and supporting documents marked KP-5. The respondent have also averred that they were not obliged to employ the claimant until she attained 60 years nor were they obliged to give her an annual salary increase of 10% as claimed. They asked the court to dismiss the claimant's case.

Having considered all the averments of both parties and having considered the pleadings and submissions, the issues for determination by this court are as follows:-

1. **Whether the respondents had valid reasons to terminate the services of the claimant**
2. **Whether due process was followed before termination of the claimant.**
3. **Whether the claimant is entitled to prayers sought.**
4. **Whether the counter-claim by the respondent is established.**

On 1st issue, evidence adduced shows that the claimant served the respondent well from 9.8.94 and even at one point was given a letter of commendation. Trouble set in on 11.2.2013 when the claimant was served with a show cause letter for apparently misappropriating Kshs 14,221,877.30 from the respondents. There was some disciplinary process that followed and on 25.3.2013 her previous suspension was lifted.

The termination letter served on the claimant dated 16.5.2013 stated that her services were being terminated because of her being involved in fraudulent reallocation and misappropriation of Kshs 14,221,877.30 to undeserving customer's account which resulted in the company loosing substantial revenue. She apparently had given an explanation to this issue on 11.2.2013 but the explanation was not found to be viable.

Under S. 43 of the Employment Act:-

“43(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."

The law envisages that the reason for termination of the contract should be those that existed at time of termination of the contract.

On 11.2.2013, the claimant received her notice to show cause letter and she was expected within 72 hours to explain why disciplinary action could not be taken against her for misappropriating Kshs 14,221,877.30/=. She made a reply on 14.2.2013.

After her explanation, she was called before a disciplinary panel on 25.3.2013. The minutes of the disciplinary hearing are as per **App. No. 17**; in claimant's list of documents. After this disciplinary hearing the claimant was served with a letter dated 28th March 2013, lifting her suspension and was asked to report on duty with immediate effect.

The letter lifting the suspension made referred to another letter dated 20th November 2012. The letter of 20th November 2012. **App KP-2** (respondent's documents) had suspended the claimant pending further investigations into the Kericho office. These reallocation were thereafter the subject of a disciplinary hearing which ended on 25.3.2013. The lifting of the suspension was therefore related to the concluded disciplinary hearing which apparently exonerated the claimant from all blame.

The termination letter seems to go back to the same issues already addressed in the disciplinary hearing which culminated in the claimant's suspension being lifted. What then was the new thing that came up in May 2013 which caused the respondent to terminate the claimant. There seems to be no new thing or reason which would have warranted the termination of the claimant on 17.5.2013. This contravenes the provision of S. 43 of the Employment Act 2007 which makes this termination unfair within the meaning of S. 45 of the Employment Act 2007.

On the issue of due process, there was no new thing that cropped up after 25.3.2013. The process that the claimant was subjected to was concluded on 25.3.2013 thereby closing the chapter of the disciplinary process and also lifting her suspension on 28.3.2013. It is therefore apparent that terminating the claimant's services on 17.5.2013, was based on non-existent reasons and without subjecting her to due process.

Is the claimant then entitled to prayers sought? The claimant prays for payment of wages or salaries she would have earned had she continued to work upto age 60 years.

S. 49 of the Employment Act 2007 is clear on remedies available in such cases of unfair termination.

Considering the law, I find that the claimant is entitled to the following remedies:-

- 1. 3 1/2 months salary in lieu of notice which was already paid.**
- 2. 12 months salary as damage for unfair termination = 12 X 94,160 = Ksh 1,129.920/=,
Less statutory deductions.**
- 3. Issuance of a certificate of service plus costs and interest.**

On issue of counter-claim, though pleaded, the respondent's didn't adduce any evidence towards the same and so the counter-claim is dismissed.

HELLEN S. WASILWA

JUDGE

12/1/2015

Appearances:-

Kasamani for claimant present

N/A for respondents

CC. Wamache