



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 932 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 25<sup>th</sup> May, 2015)**

JANE WANGUI GICHUKI.....CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (K) LIMITED .....RESPONDENT

**JUDGMENT OF THE COURT**

1. The Claimant herein Jane Wangui Gichuki filed her Statement of Claim on 19/6/2013 through the firm of Nyabena Nyakundi & Company Advocates. The Respondent is an incorporated company with Kenya Railways whose head office is in Nairobi in the Republic of Kenya. The issue in dispute herein is the purported unlawful dismissal of the Claimant herein from her employment and refusal by the Respondent to pay her terminal benefits.

**Claimant's case**

2. The Claimant through her Statement of Claim and oral evidence given in court on 23/9/2014 avers that she was employed by the Respondent on 25<sup>th</sup> October 2006 as a Telephone Operator. Her salary was 33,000/= but the same rose and at the time of her dismissal was now Kshs.51,626/=. She attached copies of her letter of appointment and pay slip as proof of this fact.
3. She further avers that she served the Respondent with due diligence and faithfulness until 30<sup>th</sup> August 2012 when the Respondent terminated her service on allegations that she had been involved in fraudulent transaction involving LPO No. 9850. The dismissal letter was attached as Appendix 2.
4. It is the Claimant's case that before her dismissal, she had received some letters asking her to explain her involvement in the forged LPO No., 9850 for supply of 17 materials by a company known as Data Works. The said letters are marked Appendix 3(a), 3(b) and 3(c).
5. The Claimant by her letters Appendix 4 (a), 4(b), 4(c), and 4(d) explained that she followed due process and found out that the LPO was forged and that the company Data Works was not in the Respondents System. The Claimant avers that there was no valid reason for the Respondent to terminate her employment since she had fully explained the circumstances surrounding the forged LPO in issue.
6. The Claimant also contends that she worked for the Respondent and had a clear employment record. She asserts that the Respondent terminated her without giving her any notice or letter to show cause and without according her a hearing as provided for under Section 41 of Employment

- Act 2007. The Respondent, she avers have also refused to pay her salary arrears and other dues contrary to the provisions of the law.
7. The Claimant therefore prays that she be reinstated in employment without loss of benefits or in alternative payment of her terminal dues as enumerated in paragraph 10 of her Statement of Claim all totaling Kshs.929,263/=.
  8. After her evidence in chief the Claimant was cross examined by Counsel for the Respondent and she stated that she was later promoted as an Administrative Assistant and was responsible for buying items and protective clothing.

She avers that on 20/6/2012 she received an email from a person asking if he could deliver some items during the day. She asked the person to visit their offices and when he did, she confirmed that the LPO he was referring to had been forged and did not appear in their data base. She forwarded the same email to 2 people. She denied colluding with the buyer.

9. In her cross examination, the Claimant also stated she conducted herself with honesty and to the best of her ability in the investigations and did not neglect her duties.

### **Respondent's case**

10. The Respondents filed their Statement of Response on 16/7/2013 through the firm of Messrs Ochieng, Onyango, Kibet & Ohaga Advocates. They also called one witness their Employee Relations Manager. It is the Respondent's case that the Claimant was grossly negligent in her duties in failing to report the suspected fraudulent scheme to her superiors and also failed to cooperate in issuing a statement to the Railways security Officers who were investigating the fraud. They also aver that the claimant had been involved in acts of negligence in her work and had been given a warning on 25<sup>th</sup> July 2012 which was valid for 12 months as per page 3 of their documents.
11. The Respondents also contend that in relation to this case, she failed to escalate a detection of fraud involving one Mr. Ndungu which she discovered on 20<sup>th</sup> June 2012. There was a lapse of about 1 month and then the matter was investigated by the company. On 6/8/2012, the Claimant wrote a letter explaining the situation to the Security Department.

The Claimant was issued with a show cause letter which is at page 15 of Claimant's documents. She responded to this letter as at page 1 (g) of her list of documents dated 17/7/2012. That the matter was also reported to the police for investigations and one Elijah Kibii was arrested and charged in court which matter is still pending in court.

12. The Respondents have also stated that at the time the police were investigating the case, the Claimant was expected to write a statement and she declined to do so. They also aver that the Claimant never indicated that she was interested in a hearing after being given an opportunity to do so vide the letter of 14/8/2012.

After her response was considered, a decision was made to summarily dismiss her.

13. The Respondents contend that the Claimant was found culpable having been found negligent as per the company's code of conduct as listed at page 10 to 36 of Respondents list of documents.
14. In cross examination, the Respondents witness stated that a meeting to determine the case was held but the Claimant was not called in as she had not indicated that she wanted to be heard, so an oral hearing was not held. He also stated that the Respondent does not have any communication from the police asking the Claimant to write a statement nor her refusal to do so. He stated that the committee of 4 decided to dismiss the Claimant but this was done in the absence of the Claimant.

### **Issues for determination**

15. Having considered evidence adduced before court and submissions of the parties, the issues for determination are as follows:

- i. ***Whether there were valid reasons to warrant dismissal of the Claimant.***
- ii. ***Whether due process was followed before Claimant was dismissed.***
- iii. ***What the Claimant is entitled to prayers sought.***

16. On the 1<sup>st</sup> issue, Section 43 of the Employment Act 2007 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. On the other hand Section 44(4) of Employment Act 2007 states as follows:

***“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-***

- a. ***without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;***
- b. ***during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;***
- c. ***an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;***
- d. ***an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;***
- e. ***an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;***
- f. ***in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or***
- g. ***an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”***

18. In either case, whether it is a case of normal termination or summary dismissal, the reasons must be clear and proved and falling within the ambit of the law.

19. The Respondent quote extensively from [www.lawdonut.co.uk/law/employment-law](http://www.lawdonut.co.uk/law/employment-law) on the definition of summary dismissal as follows:-

***“Most employers would identify intoxication, fighting or other physical abuse, indecent behaviour, theft, dishonesty, sabotage, serious breaches of health and safety rules, offensive behavior (such as discrimination, harassment, bullying, abuse and violence) and gross***

*insubordination as examples of gross misconduct, you may wish to specify other offences such as offering bribes, downloading pornography, misusing confidential information or setting up competing business as gross misconduct. Other lesser offences, often relating to work and work performance, for example poor time keeping, absenteeism, use of workplace facilities, personal appearance, negligence or substandard work do not usually amount to gross misconduct.”*

20. The Respondent also quoted clause 4(a) of Respondents Code of Conduct which states that:

*“Negligence of duty amounts to gross misconduct. If an employee willfully neglects to perform any work which it was his/her duty to have performed or if he carelessly and improperly performs any work which from its nature it was his/her duty, under his/her contract to have performed carefully and properly”.*

21. The question then is whether the act of failing to report to a superior an act of fraud is gross misconduct.

The Claimant has submitted that the Claimant handled the issue as properly as she could. She asked the “fraudster” to visit their office. She wrote an email and copied to two staff members and in her view the matter rested there having found that the LPO was not in their data base.

22. The Respondents on their part submitted that this was an act of gross misconduct failing under negligence of duty as per the Respondents code of conduct. The Respondents aver that this is lack of integrity and dishonesty.

The Respondent cited **CFC Stanbic Bank Limited vs Danson Mwashako Mwakuwona [2015] eKLR**- Court of Appeal at Mombasa Civil Appeal No. 3 of 2014 where the Court of Appeal allowed an appeal on the grounds that the trial court had failed to consider reasons for the dismissal of the Claimant and arrived at the wrong decision that there were no valid reasons to warrant dismissal. That indeed is the correct position and this court is bound by the decision of the learned Judges of Appeal.

23. In the case cited though, there were indeed valid reasons to warrant the dismissal. In this case however, negligence of duty cannot be a reason for summary dismissal even if it is stated in the code of Regulation of the Respondent.

Furthermore, the basic minimum is as found in the law - in this case the Employment Act 2007 Section 44(4).

Failing to report to a supervisor discovery of fraud is definitely wrong and could warrant some disciplinary measures but summary dismissal in this case is very harsh considering the act complained off.

24. The allegation that the Claimant disclosed confidential information to a stranger is neither here nor there as her communication with ‘Mr. Ndungu’ was within her normal cause of duty.

25. Also the issue of failing to co-operate with police is not proved as there is evidence that the Claimant had indicated that she was willing to record a statement if the HR Department authorized her to do so.

26. From the above analysis, this court finds that there were no valid reasons to warrant dismissal of Claimant summarily.

27. On the 2<sup>nd</sup> issue; the procedure followed before the Claimant was dismissed. Indeed she was given a show cause letter. She replied to it. The show cause letter had indicated that if she wished she would be given an opportunity to appear for a disciplinary hearing. The Respondents submitted that the Claimant failed to indicate whether she wanted a hearing.

28. Section 41 of Employment Act 2007 states as follows:

**“(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.”**

29. The wording of this section shows that the disciplinary hearing is mandatory. It is the employer to jumpstart the process by summoning the employee for the hearing and not the other way round of an employee asking for the hearing.

The contention that the Claimant failed to indicate if she wanted to be heard or not offends the express provisions of this section and it therefore follows that the dismissal of the Claimant was unfair and unjustified and I declare it so as provided for under Section 45(2) of Employment Act which states as follows:

**“(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.**

30. Having found as follows, the Claimant had asked court to order her reinstated on duty. Section 49(4) of employment Act 2007 provides what should be taken into account before reinstatement is ordered and provides as follows:

**“(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following:-**

- (a) **the wishes of the employee;**
- (b) **the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**
- (c) **the practicability of recommending reinstatement or re- engagement;**
- (d) **the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**

*(e) the employee's length of service with the employer;*

*(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;*

*(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;*

*(h) the value of any severance payable by law;*

*(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;*

*(j) any expenses reasonably incurred by the employee as a consequence of the termination;*

*(k) any conduct of the employee which to any extent caused or contributed to the termination;*

*(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and*

*(m) any compensation, including ex gratia payment,*

*in respect of termination of employment paid by the employer and received by the employee."*

Considering this provision, I do not find it practicable to order reinstatement given the circumstances under which the Claimant was dismissed. The Claimant had already served the Respondent for 6 years and I believe she can move on with her life. She has not established before court that she is incapable of securing another job. I decline to order reinstatement to work.

31.I however grant the Claimant the following remedies:

1. **1 month salary notice in lieu of notice = 51,625/=**
2. **12 months salary as compensation for unlawful termination = 51,625 x 12 = 619,500/=**

**TOTAL DUE = 671,125/= less statutory deductions.**

**3. She be issued with a Certificate of Service.**

The Respondent will meet costs of this suit.

Read in open Court this 25<sup>th</sup> day of May, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent