



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 8 OF 2014

BETWEEN

PASCALIA MASYULA..... CLAIMANT

VERSUS

PAUL WAMBUA VALUERS RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Maina Advocate, instructed by Marende, Birir, Shimaka & Company Advocates for the Claimant

Mr. Mwangunya Advocate, instructed by Munyithya, Mutugi, Umara & Muzna Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010)

1. Ms. Pascalina Masyula filed her Statement of Claim on 23rd January 2014. The Respondent filed his Statement of Response on the 19th February 2014. The Claimant gave evidence, and closed her case on the 11th November 2014. The Respondent Paul Wambua who is a registered Valuer working in the name and style of Wambua Valuers, gave evidence on 10th December 2014. He called one other Witness, Office Messenger Benson Mwachiremba, who gave evidence on the same date, 10th December 2014, bringing the hearing to a close. The Parties confirmed to the Court the filing of their Final Arguments on 6th February 2015, and were advised Award would be delivered on 6th May 2015.

2. The Claimant states she was employed by the Respondent as an Assistant Secretary, on 7th January

2010. She was made a full Secretary on 25th August 2011. She was summarily dismissed on 24th October 2013. She earned a monthly salary of Kshs. 21,973 as of the date of dismissal. She considers the decision to summarily dismiss her was unfair and unlawful, and prays for the following orders against the Respondent:-

- a) Salary for the month of August, September and October 2012 at Kshs. 61,825;
- b) One month salary in lieu of notice at Kshs. 19,275;
- c) 9 days outstanding annual leave days at Kshs. 5,782;
- d) Gratuity at Kshs. 28,912; and
- e) Damages.

3. She testified she was confirmed in her position on the 27th July 2010, having been employed on 15th March 2010. Her salary was raised to Kshs. 15,000 commencing 1st July 2010. There were subsequent increments made in her favour. Last review was on 2nd March 2012. She last earned Kshs. 19,275 per month. She worked up to the month of September 2013 when she was summarily dismissed.

4. She explained the circumstances surrounding her dismissal as follows- She, on 2nd September 2013, used her private flash disk to store official documents. She forgot to delete the documents from her flash disk, and forgot the gadget in the office. She called her colleague Mwachirembe, who had remained behind in the office, requesting him to eject the flash disk for her. He did not understand what the flash disk was, or how it functioned.

5. The following day, 3rd September 2013, she reported for duty. She found the office locked, which was unusual. She was informed by Mwachirembe the Respondent's Wife, would come and open the office herself. When Mrs. Wambua arrived, she advised the Claimant to go home. The office, the Claimant was told, would communicate to her in due course.

6. On 10th September 2013, the Claimant visited the office. She was pursuing her August 2013 salary which to that point remained unpaid. She found Mrs. Wambua in the office. Mrs. Wambua informed the Claimant that she was under investigation. It was alleged the Claimant had transferred official letterheads and valuation reports to her private flash disk. The Claimant explained she had stored these documents in her private flash disk to enable her transfer them to another computer in the office. The last time she visited the office, she was accompanied by her Uncle. It was then revealed to her by the office that she had been undercutting the office, and carried out valuation individually. She was accused also, of preparing recommendation letter for a previous Employee of the Respondent. All the flash disks in the office were full. She explained she used her own to enable her transfer the data to the office computer. This explanation did not stop the Respondent from firing the Claimant.

7. Pascalia approached the County Labour Office Mombasa for assistance. The Respondent was invited by the Labour Office for conciliation. He ignored that endeavour. The Claimant sought legal assistance. Her Advocates wrote to Wambua on 18th October 2013. They demanded the Respondent pays to the Claimant her salary for August, September and October 2013, totaling Kshs. 65,025, intimating demand for other dues would follow. It was on receipt of the demand letter, that the Respondent wrote the letter of summary dismissal dated 24th October 2013.

8. The Claimant testified she was not heard. Every time she presented herself to the office, she was ignored. She wrote a second letter of demand. The Respondent deposited her August salary. She seeks the outstanding benefits and compensation for unfair dismissal, as stated in her Claim.

9. Cross-examined, Pascalia revealed she was employed by another firm called Supreme Candidate Limited, after her exit from Wambua Valuers. She joined her new Employer in February 2014. She

confirmed she was employed by the Respondent on 15th March 2010. Clause 3 of her contract of employment required her to observe confidentiality at the office, while Clause 8, required her to be of general good conduct. She did not have authority to write recommendation letters for departing Employees. She was a Secretary. Paul Wambua signed all the recommendation letters.

10. She was initially employed on probation for 6 months. She was confirmed, promoted and her salary routinely raised. Wambua was not malicious. The flash disk incident took place on 2nd September 2013. Her flash disk had company data. Mrs. Wambua told the Claimant the Respondent would investigate her. The Claimant was not advised how long the investigation would take. The letter to the Claimant from the Respondent, dated 18th September 2013, indicated the preliminary investigation suggested there was impropriety. The Claimant was required to show cause. Her response would determine the decision to be made by her Employer.

11. Pascalia responded on 19th September 2013. She replied that all the allegations were false. She was said to be undercutting her Employer. It was not true. It was alleged the Employer had lost income as a result of the Claimant's actions. The Claimant did not respond to this allegation specifically. She could not carry out valuation of properties. She did not say this in her response. She asked the Respondent to delete what was his from the flash disk, and pay her dues. She did not demand for August salary. She asked for all dues, but did not imply, that termination had already taken place by 19th September 2013. August salary was paid in September 2013. She worked for 1 day in September 2013. The Respondent prevented her from working for the rest of September and October 2013.

12. The Claimant told the Court that her contract did not mention gratuity anywhere. She disagreed with the suggestion that she was the cause of her own problems. Redirected, Pascalia testified she did not leave employment of her own volition. She was not asked by the Respondent to report to work after she left. She replied to all the allegations in the letter to show cause. She was not given any opportunity to be heard. She had informed Mr. Wambua that the other flash disks used in the office, were full. She did not breach the confidentiality clause. She used the disk in the office, to the benefit of the office. She did not have any warnings. She did not write any recommendation letter. She prays the Court to allow her Claim.

13. The Respondent concedes to have employed the Claimant. She was summarily dismissed by the Respondent for gross misconduct. She undercut the Respondent's costing resulting in loss of clients and income to the Respondent; she carried out valuation for the Respondent's clients individually and without the authority of the Respondent; she issued former Employees letters of recommendation without the authority of the Respondent; she collected information from the Respondent and stored it in a personal flash disk, in contravention of her contract of employment; and on being asked to show cause why disciplinary action against her should not issue, she answered her Employer in arrogant and improper manner, asking the Employer to delete what belonged to the Employer, and return her flash disk to her. She authored her own misfortune, and does not merit the assistance of the Court as prayed. She did not work in September and October 2013, and does not merit salary for these months; she is not entitled to 9 days of annual leave pay; gratuity is a voluntary payment, made at the discretion of the Employer, and is not payable to the Claimant due to her misconduct; and her claim for damages is undeserved.

14. Paul Wambua told the Court the Claimant was employed by his firm from 5th March 2010. She applied for the job in January 2010, was interviewed and recruited. There were conditions for her employment, which included observation of official secrecy and etiquette. She was placed on probation of 6 months, and confirmed on 27th July 2010. Wambua testified he is a reasonable Employer giving tea, lunch to Employees for free, and paying overtime for work done in excess of the hours. He increased Employees' salaries based on cost of living adjustments.

15. On 2nd September 2013, other staff had closed their day and left for home, leaving the Head Messenger Mr. Mwachirembe at the office. He ordinarily is responsible for locking the premises. The Claimant called Mwachirembe past 8.00 p.m., directing him to go to the Secretaries' desk. Wambua was still in the office and needed some documents from the Secretaries' office. He went there, and found Mwachirembe in phone communication with the Claimant.

16. She was trying to explain to Mwachirembe something. The Head Messenger did not understand her. He told her ‘*hata boss yuko hapa,*’ [Kiswahili for ‘*even the boss is around*’]. Wambua realized she was talking to Mwachirembe about the flash disk. He found out she had stored official documents—including a list of registered valuers, charging schedule, and recommendation letter for an Employee who had left.

17. Wambua found the language in the recommendation letter very disturbing. He described it as below par. He had nothing to do with this letter. The concerned Employee had joined Kenatco. Wambua wrote Kenatco advising he was not the author of this letter. The Claimant was asked to show cause, through a letter dated 18th September 2013, why disciplinary action should not issue against her. She was asked to present herself before a disciplinary panel on 20th September 2013. The Respondent wished to understand the Claimant’s actions. She wrote an arrogant response on 19th September 2013. She asked the Respondent to delete what belonged to him, and return her flash disk and pay her dues. She alleged to have used her flash disk to transfer data. The office had its own flash disks. The Respondent engaged his Lawyers. He summarily dismissed the Claimant on 24th October 2013. She was accorded the opportunity to be heard. She was paid August 2013 salary and 2 days’ salary for work performed in September 2013. Her Claim has no merit.

18. The Respondent told the Court on cross-examination that the Claimant’s salary was reviewed from time to time. She was performing well. Mwachirembe appeared not to understand the Claimant. The Claimant disconnected the call saying to Mwachirembe of the Respondent, ‘*Kama ako hapo, ahana nayo,*’ [Kiswahili for ‘*if he is around, leave it*’]. The Respondent only had the Claimant working as the Secretary. There were 2 computers. Pascalia doubled up as the Receptionist. The office flash disks had not been reported to be full. Wambua did not know if the Claimant was using his documents for private gain. Her explanation on transfer of the documents was lame. The computers were interlinked. The recommendation letter was not on the Respondent’s letterhead, but was purported to be signed by the Respondent. The letter to the Claimant was clear she was to appear before a disciplinary committee. The committee was made up of the Sales Executive, the Accountant and Mr. Wambua. The Claimant should have presented herself and given an explanation. She did not work from 2nd September 2013 to 24th October 2013. Wambua would not say the Claimant was still an Employee during this period. She was not referring to the August salary in her letter where she asked the Respondent to return her flash disk, and pay ‘*my dues.*’ The dispute was left hanging in the Ministry of Labour. The Respondent suspected the Claimant could have been doing business with other valuers.

19. Redirected, Wambua testified the relevant flash disk belonged to the Claimant. She did not deny that official records were stored in her flash disk. She asked the Respondent to delete what belonged to him. She was issued letter to show cause. She responded. She was notified to attend the disciplinary meeting on 20th September 2013; she did not. She instead reported the dispute to the Labour Office, who wrote to the Respondent asking for the Respondent to pay certain benefits to the Claimant.

20. Mr. Benson Mwachirembe testified the Claimant was his workmate. He closed the Secretary’s office at around 8.00 p.m. on the 2nd September 2013. He proceeded to the Valuer’s office. He received a call from the Claimant. She asked him to go back to her office, and remove some blue object. It was while in the Claimant’s office, and in phone conversation with her, that Wambua joined him. Mwachirembe asked the Claimant to explain to Wambua what she was looking for. She disconnected the call. Wambua took the blue object. Wambua later showed the Witness documents extracted from the blue object. These documents included recommendation letter for a former Employee named Mackenzie; letterheads; and reports. He saw all these documents. Mwachirembe confirmed that Wambua is a reasonable Employer, providing the Employees with free tea and lunch. He testified further on cross-examination that it was possible Pascalia disconnected his call on 2nd September 2013, upon the expiry of her credit. He however clarified on redirection that he could not say with certainty why the Claimant hang up on him.

21. The Claimant submits termination was unfair. She was not specifically invited for a disciplinary hearing on 20th September 2013. She was not accorded the procedural guarantees contemplated under Section 41 of the Employment Act 2007. Even after 20th September 2013, no other attempt was made to

hear the Claimant out. She concedes she has received the August salary. Her contract was terminated on 24th October 2013. She merits the salary for September and October 2013. Her claim for 9 days of annual leave was not disputed by the Respondent. She submits that she is entitled to compensation for unfair termination, and not damages. She prays for costs.

22. The Respondent submits the Claimant's contract was terminated lawfully and fairly. She was engaged in acts of gross misconduct, as outlined in the Respondent's letter to her, dated 24th October 2013. She breached clause 3 of her contract, which stated "office secrets are privy to those in office." The Respondent submits the Employee has a duty to always act in the Employer's best interest, in good faith, which includes the duty not to divulge confidential information about his Employer's business to others, without the consent of the Employer [see *IYS & TEES LIMITED v EVERLYNE MEDEGWA & ANOR* [2009] e-KLR]. The Respondent holds he has discharged his duty to prove reason, fair and valid reason, for the termination of the Claimant's contract of employment, as required under Section 43 and 45 of the Employment Act 2007. On procedural justice, the Respondent submits the Claimant was invited for a hearing, after being asked to show cause why disciplinary action should not issue against her. She instead opted to reply arrogantly to the Respondent and was unapologetic. The nature of employment did not call for a sophisticated hearing. Section 41 was, substantially complied with by the Respondent. The Respondent prays the Court to dismiss the Claim.

23. The questions to be considered in determining this dispute, as in most employment disputes, are these- whether the Respondent proved a fair and valid reason or reasons in justifying termination; two, whether he carried out the decision fairly; and three, whether the Claimant merits compensation and terminal benefits as prayed. These questions are based on the requirement of the law under Section 41, 43, 45, 47 and 49 of the Employment Act 2007 and Section 12 of the Industrial Court Act 2007.

The Court Finds:-

24. It was conclusively shown that Pascalia Masyula was first employed by Paul Wambua Valuers, as an Assistant Secretary with effect from 15th March 2010. It is not correct as stated in paragraph 3 of her Claim that she was employed on 7th January 2010. The letter of appointment indicates she was employed on the 15th March 2010, the 7th January 2010 being the date of her application for the job.

25. She was placed under probation for 6 months, during which she earned a monthly salary of Kshs. 12,000. She was subsequently confirmed as Secretary, and her salary gradually increased. She was summarily dismissed by the Respondent in a letter dated 24th October 2013. At the time of dismissal her monthly salary stood at a gross of Kshs. 21,973, and net of Kshs. 19,275 as shown in her letter of salary review dated 2nd March 2012.

26. In the substantive justification of the summary dismissal, the Respondent alleged the Claimant was involved in acts of gross misconduct. These activities included:-

- The Claimant authored a recommendation letter in favour of a former workmate, recommending him for employment by Kenatco. She purported the letter was written by the Respondent.
- She was discovered to have private and confidential information belonging to the Respondent, stored in her private flash disk.
- She failed to respond to the letter to show cause appropriately, choosing instead, to arrogantly advise the Respondent to delete his information and return her flash disk to her.

27. The Claimant denied she authored a recommendation letter in favour of her former colleague. She did not however deny that documents belonging to her Employer, were found stored in her private flash disk. The flash disk was availed to the Court, as were the contents.

28. Among the documents was the poorly written recommendation letter in favour of James Mutuku Mackenzie. The letter was indicated to be drawn by Wambua. He denied having drawn this letter and was appalled by the low level of the language used in that letter, which was attributed to him. The Claimant

did not come out clearly to explain to the Court how this draft ended up in her flash disk. It was not a genuine official document, but a falsified document. Even assuming the Claimant's explanation that she was merely using her private flash disk to transfer data to the office computer was correct, why would this data comprise a falsified document?

29. There was no good reason given by the Claimant why it was necessary to have the official documents in her private flash disk. The presence of these documents which included valuation reports; list of valuers; and schedule of fees chargeable by valuers was sufficient to create reasonable suspicion in the mind of the Employer that the Claimant was acting to the detriment of the Employer's Business.

30. The Claimant's request to Mr. Mwachirembe to remove the flash disk from her office even when Mwachirembe did not know what the flash disk really was; her immediate disconnection of her call to Mwachirembe on learning that Wambua was in the presence of Mwachirembe; and the fact that she did not seek to talk to Wambua then, in light of the breakdown of communication between her and Mwachirembe, all suggest to the Court that the Claimant was not acting above board. If indeed her use of the private flash disk was necessary and innocent, she should not have hang up on Mwachirembe, or shied away from asking him to give the phone to Wambua.

31. The Claimant's conduct amounted to gross misconduct. Whereas the failure to respond to the letter to show cause appropriately appears to this Court to fall in the grey zone, the falsification of a recommendation letter, its storage alongside other official documents in the Claimant's flash disk, were clearly cases of gross misconduct. It was difficult to explain the storage of the Employer's documents in her private flash disk. It was completely unacceptable to have a falsified letter of recommendation in that flash disk. The Respondent demonstrated fair and valid reasons, justifying his decision to terminate the Claimant's contract through the letter of summary dismissal. He satisfied the requirements of Section 43, 45 and 47 of the Employment Act 2007 on substantive justification.

32. The Respondent wrote to the Claimant the letter dated 18th September 2013 requiring her to show cause why disciplinary action should not be taken against her. She was advised to do so on or before 20th September 2013. She wrote the letter dated 19th September 2013 explaining her position. The Respondent did not show any other procedural step taken, in satisfaction of Section 41 and 45 of the Employment Act 2007, after the 19th September 2013. The letter of summary dismissal issued on 24th October 2013. There was no disciplinary hearing. There is no law which justified disregard for fair procedure. The Respondent wrongly assumed the Claimant did not deserve what he characterized as a sophisticated hearing.

33. The Respondent testified he scheduled disciplinary hearing for 20th September 2013. This was not shown to have taken place. There was no notice that the Claimant would be heard on this date. The letter to her from the Respondent dated 18th September 2013 merely asked her to show cause on or before 20th September 2013. Section 41 required she is granted a hearing, in the company of a workmate, or a shop floor trade union representative if she was a member of a trade union. These protections were disregarded.

34. She is entitled to compensation for the procedural lapse. This lapse, weighed against the finding against her on substantive justification, entitles her to minimal compensation. ***The Court grants her 2 months' gross salary at Kshs. 43,946 in compensation for unfair termination.***

35. Her letter of summary dismissal is dated 24th October 2013. Her contract of employment was alive, up to this date. She left employment on the 2nd September 2013, but was only disengaged on 24th October 2013. She remained an Employee of the Respondent between 2nd September 2013 and 24th October 2013, and should have received her salary up to and including the date of termination in accordance with section 18 (4) of the Employment Act. She was paid her August 2013 salary. ***The Respondent shall pay to the Claimant her September salary at Kshs. 21, 973 and 24 days' salary for October 2013, at Kshs. 20, 282 – total salary at Kshs. 42,255.***

36. Pascalia did not explain to the Court which period, her 9 days of annual leave relates to. This was not brought out in her evidence, as to require the Respondent to supply the actual annual leave records. She was employed for 3 years. Which period out the 3 years, the 9 annual leave days accrued, remained unspecified in her pleadings, evidence and submissions. The claim is declined.

37. The Claimant did not substantiate her claim for gratuity. There was no provision for gratuity in her contract. She did not draw the mind of the Court to any other legal instrument- such as Wage Order or Workplace Policy- granting her gratuity. The Respondent furthermore stated in his Memorandum before the Labour Office that Pascalia was subscribed to the N.S.S.F. If she meant to pray for service pay rather than gratuity, she would be ineligible to receive service pay, under Section 35 [6] of the Employment Act 2007.

38. *She is allowed 1 month basic salary of Kshs. 19,275 in notice pay.*

39. The Court exercises its discretion, in favour of no order on the costs and interest.

In Sum, IT IS HEREBY ORDERED:-

a) Termination was fair on substantive justification, but fell short on procedural fairness.

b) The Respondent shall, within 30 days of the delivery of this Award pay to the Claimant 2 months' gross salary in compensation at Kshs. 49,946; arrears of salary at Kshs.42,255; and notice pay at Kshs. 19,275 – total Kshs. 111,476.

c) No order on the costs and interest.

Dated and delivered at Mombasa this 13th day of May 2015

James Rika

Judge