



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1630 OF 2011

CAROLINE WANGECHI WANJOHI.....CLAIMANT

VERSUS

AVENUE HEALTHCARE.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 28th September 2011 seeking resolution of a dispute she framed as summary dismissal. In her suit she averred that she was employed by the Respondent in July 2007 as a client services representative until she was summarily dismissed on 29th March 2011. She averred that at the time she was earning Kshs. 25,750/- a month. The Claimant averred that she was issued with a letter of summary dismissal which indicated she was entitled to dues for days worked and accrued leave but the same had not been paid hence the suit. The Claimant averred that the Respondent alleged that the Claimant had stolen some items from it. She contended that she had gone shopping that day and had in her possession receipts for all the items found in her vehicle which was thoroughly checked by the Respondent's guards when she left the Respondent's premises. She claimed 3 months pay in lieu of notice Kshs. 77,250/-, salary in lieu of leave 77,250/-, service pay for 3 years 8 months Kshs. 566,500/- making a grand total of Kshs. 721,000/-. The Claimant also sought a declaration that the termination was unlawful and untimely, an order that the Claimant be paid her terminal dues of Kshs. 721,000/-, general damages for the unlawful termination, costs of the suit and any other relief the honourable court deems fit and just to grant. To her claim, the Claimant attached the documents in support of her claim which were the certificate of service, the summary dismissal letter, payslips, demand letter and letter of transfer.
2. The Respondent filed a Statement of Response and Counter Claim on 14th October 2011. In the defence, the Respondent averred that the Claimant was summarily dismissed for gross misconduct. The Respondent denied that it had failed to pay the Claimant any dues rightfully accruing to her and that it had calculated her dues which were basic salary Kshs. 25,340/-, house allowance 7,147/-, leave pay (4.5 days of leave) Kshs. 4,873/- making a grand total of Kshs. 37,360/- and appropriated the dues as follows – PAYE Kshs. 5,166/-, NSSF Kshs. 200/- NHIF Kshs. 320, meals, Kshs. 940/-, welfare deduction Kshs. 100/-, company loan Kshs. 17,500/-, medical bill deduction Kshs. 1,914/- and Barclays Scheme loan 11,220/- making a total of 37,360/-. The Respondent averred by way of counter claim that on 26th March 2011 the Claimant was inspected by the Respondent's guards at its premises along 1st Avenue Parklands as she left the premises at 15.50 hours and on inspection was found to be in possession of various partly used items that is 2½ rolls and a tub of Morning Fresh, property of the Respondent. The Respondent

- averred that the Claimant declared she had purchased the items but failed to produce any receipts for the same to substantiate this declaration. The Respondent averred that the Claimant had received prior warning on her under performance. The Respondent claimed from the Claimant the cost of treatment not covered by the Respondent's medical scheme Kshs. 35,667/-. The Respondent thus prayed for the dismissal of the Claimant's suit and entry of judgment for the Respondent on the counterclaim. The Claimant filed a Response to counterclaim on 28th October 2011 and denied being indebted to the Respondent.
3. The Respondent filed a list of documents on 30th May 2012 that included the warning letters issued to the Claimant, report from security department, letters of appointment and transfers, calculation of final dues, letter of offer of Barclays scheme loan and her letter of irrevocable authority, billing dated 12th October 2011 and correspondence between the hospital and Claimant's counsel among others. The Respondent also filed a list of witnesses.
 4. The Claimant testified on 30th September 2014 while the Respondent's witnesses testified on 10th November 2014 and 23rd February 2015. The appearances were as follows:- Mr. Mureithi appeared for the Claimant while Mr. Kimanathi appeared for the Respondent.
 5. The Claimant testified that she was employed by the Respondent in 2003 and resigned to pursue further studies in 2007 and was reemployed later the same year and worked till March 2011. She testified that between 2007 and 2009 she was not taken to front office but was a personal assistant in 2009 was appointed as a customer service representative. She testified that on 26th March she left her house and purchased car mats and reported to the office at 9.00am. Her services were terminated 3 days later. She testified that she was accused of stealing some items from the office which was Axion paste and tissue papers. She denied doing so. The dismissal letter was dated 28th March 2011 and she testified that the Respondent never had any evidence and the security guards never confiscated the items and she was not searched. She testified when the vehicle was searched she said she had the receipts and as she was giving him the receipts the askari told her to just go. She testified that she was not told there had been a theft, there was not warning letter and no suspension in respect of the incident. The Claimant testified that the Human Resources manager gave her the letter and the meeting took less than 5 minutes. The Claimant testified that the basic pay was Kshs. 25,000/- and plus benefits was 37,000/-. She stated that she was told she owed a medical bill of Kshs. 35,000/- and she was not sure how this was so. She thus sought payment of her benefits for years worked plus the dues for leave and the notice due. She testified that she also was defamed and labelled a thief. She testified that she was not dismissed for alleged theft and she asserted she did not steal and there is no report showing that she stole.
 6. In cross-examination she testified that the appointment in 2007 was a reappointment. She had been described as a secretary in one appointment and later the same year she was given the post of client services. She conceded that there was a letter dated 8th February 2008 and she signed it. She testified she was entitled to one month notice but she sought 3 months because she was called a thief. She admitted that the dues for NHIF and NSSF were deducted from her pay. She was shown her resignation letter of 1st February 2007 and she testified that she left and after a few months went back and sought to be employed. The Claimant testified that she wrote the letter of apology as she had spoken to the personal administrator to slot her course in the evening and the reason for her anger was that she had been asked to work for extra hours yet she had a baby. She testified she was a diligent worker. She conceded that she received a warning from the Respondent for being late to follow up on a renewal for a client. She testified that she left home along Thika Road at about 7.00am and reached work at 9.30am and that the shopping was in two places. She testified she went to Tuskys and Nakumatt. She stated that the car was not leaded it was like a monthly shopping. She did not keep the receipts and she disposed of them when she got home in the evening. She testified that the watchman saw her receipts. She went to work on Monday and on Tuesday was told she had been caught with items that were stolen. She testified that she received her dismissal letter and no one gave her time to discuss the issue. Only the watchman asked for receipts. She testified that she shopped at Tuskys Pioneer and Highridge Nakumatt. She testified

- that she took loans with the SACCO and Barclays and she cleared them. She admitted that she signed a form to authorise deductions from her salary and that it was irrevocable authority for deduction of 11,169.11. She stated she could recall owing a medical bill but did not recall how much was owed to the Respondent. The Claimant testified she did not incur other expenses.
7. In re-examination she testified that her certificate of service confirmed that she was employed as a client services representative and her pleadings referred to this position. The Claimant testified that she only got to know of the theft allegations on Tuesday 4.30pm. She testified that she did not discuss with Etta Ligale. She stated that the company is owed money.
 8. The Respondent's first witness was Francis Juma Masika. He testified he recalled the day in question and that he was on duty at the Respondent's premises. He testified that the Claimant was leaving at around 15.30 hours and as normal he had to check what the Claimant was carrying in the vehicle. He testified that he found some items in the car – 2 packets of Omo 2kg each, 2 tissues and a used tissue, used soap and steel wire. He requested her to give him the receipt if the items were hers and she failed to do so. He tried to get a receipt and she said she had left the receipt at home. He testified that at the time an ambulance came and the Claimant had to be asked to move to give it way. He testified that after that the Claimant left before he had finished his work. He wrote a report and presented it on Monday to his boss. He testified that in his report he indicate there were 2 packets of Omo 2kg each, fish trimmings, Axion soap, 2 rolls of tissue, one used. He testified that he handed over the report on Monday to Irene Kaberere and the Claimant was called by Irene and asked in his presence if she had a receipt and the Claimant did not even answer. He testified that he did not know what happened after that as he was sent away.
 9. In cross-examination he testified that he handed over the report on Monday 28th and he did not know if the report was stamped. He stated that when staff come in with items they inform the security guards that there are items in the boot. He confirmed that the Claimant's name was not on his report and that there was meat, Omo, Axion soap which was used, steel wire and 2 rolls of tissue. He did not write Morning Fresh in the report. He stated that he did not confiscate the items.
 10. In re-examination he testified that staff are not searched on entry but are required to declare items. He testified that he is the one who prepared the report. He saw the Claimant on Monday.
 11. The second defence witness was Irene Njoki Kaberere who testified that she is the support services manager. She testified that on 28th March 2011 the security supervisor reported to her that there was an incident involving the Claimant that had taken place on 26th March. The supervisor told her that he had caught the Claimant with some items. She testified that the Claimant was to produce receipts and she did not. The Claimant indicated that the receipts had got lost and she asked the Claimant how she could have lost the receipts yet she had a case to answer and the Claimant said the househelp had misplaced the receipts. She told the Claimant that was not acceptable and the Claimant pleaded for forgiveness but she told the Claimant she had to go for disciplinary hearing. She reported the incident to the operations manager and left it at that.
 12. In cross-examination by Mr. Mureithi she testified that she got a report from security. She confirmed that she did not stamp the report when she received it. The report was forwarded to Etta Ligale and is stamped 29th March which was a Tuesday. She testified she handed it over to Etta and had received it from Masika but was not sure of the date. She testified that she did not prepare the report and the goods said to have been stolen were not produced. She testified that she called the Claimant and spoke to her and Masika was present. She stated that she does not work on Saturday and that the report was made on Monday. She testified that vehicles are checked when leaving. She stated that the security officer indicated that as the Claimant was being checked an ambulance came and the Claimant drove away.

13. In re-examination she testified that the Claimant did not work for an uninterrupted period. She stated that the report was handed over on Monday or Tuesday and was given to operations manager. She testified that the Claimant was to come with receipts.
14. The third defence witness was Joyce Mwangi. She testified that she was the client services manager and that she had worked as client services coordinator and that she reported to work and found some items missing and was later called in by her boss Etta for a disciplinary hearing for the Claimant. She was informed that a report had been received from Masika touching on the Claimant. The witness testified that the Claimant explained that she had passed through Nakumatt and bought some items. The Claimant was asked for the receipt and said she did not have any. She testified that she was called for a disciplinary hearing for the Claimant and Etta was present. She testified that the Claimant was asked about the Axion and said that she had carried it from home. The Claimant stated that it was to be used by the mechanic who was to buff her car. The Claimant stated that she had receipts which were at home. She testified that Etta told the Claimant that investigations would be carried out and reminded the Claimant the organisation had zero tolerance to theft. She testified that there is a policy that requires staff to indicate the items they have to security as they are checked when leaving.
15. In cross-examination by Mr. Mureithi she testified that the report was received by Etta on Monday. She testified that she was not there when the termination letter was issued. She was not aware if the letter was given the same day. She stated that there was a complaint that there was improper use of tissue. She was not aware of the investigations undertaken and stated that Etta would be best placed to deal with that. She testified she was not aware of any theft involving the Claimant or any other incident with the Claimant.
16. The fourth witness was Etta Brenda Ligale. She testified that she is the Chief operating officer of the Respondent and was the custodian of the HR & personnel records and oversees security. She recalled the 29th of March when she arrived at work and received a call from the support services manager Irene Kabere who indicated there was an issue that they sought to bring to her attention. Irene told her that there was a report brought by security officers that there was an incident the Saturday preceding involving the Claimant. She testified that she called the security officer and then the Claimant and sought to know about the incident. She also called Joyce the Client services manager. She testified that the Claimant stated that as the Claimant left she allowed security to search her vehicle and the security officer required the receipts for the dishwashing paste, some tissue and a number of other items. She testified that the Claimant indicated that these had been bought that morning and requested to bring receipts on Monday as proof of purchase. The Claimant was permitted to leave with the items. The Claimant indicated that she gave the items to the househelp who may have disposed of the receipt. She testified that she had made some corrections on the report and indicated fish trimmings instead of meat. She testified that she is the one who prepared the dismissal letter. She testified that the Claimant owed the Respondent Kshs. 35,367/- for medical expenses.
17. In cross-examination she testified that there were items missing in the client services department. The Claimant's final dues calculation was referred to and the breakdown showed the dues the Claimant was entitled to and the sums she owed. She discussed with her colleagues Joyce and Caro and decided to dismiss the Claimant. She stated that this was an obvious case of theft. She said that guards wrote Axion and she wrote Morning Fresh.
18. In re-examination she testified that the Claimant was only blamed for the loss of the items in the security officer's report.
19. The Claimant filed submissions on 10th March 2015 and in the submissions reiterated the Claimant's case. The Claimant submitted that there was no basis for the dismissal and relied on the case of **Nicholas Otinyu Murukla v Equity Bank Limited [2013] eKLR**. The Respondent filed submissions on 4th May 2015 and in the submissions reiterated the defence. The Respondent submitted that the Claimant was not entitled to any of the prayers sought. The Respondent relied on Sections 42(1) and 45(2)(c) of the Employment Act. The Respondent relied on the case of

Polkey v A.E Dayton Services Limited (Formerly Edmunds Walker Holdings Limited) [1987] UKHL and submitted that on the basis of the evidence the Claimant was liable on the counterclaim and her suit was for dismissal with costs.

20. The Claimant was an employee of the Respondent and earned Kshs. 37,360/- as salary per month. The dismissal was as a result of an incident that took place on 26th March 2011. The Claimant asserts that she had bought some items and was routinely inspected as she left the premises. She was let to go by the security officer. The Respondent on the other hand asserts that there had been a reported loss of items from the Claimant's department and when the Claimant was asked for receipts by the guard she did not produce any. It was asserted that the Claimant drove off when an ambulance came through necessitating her giving way. The Claimant was asked a few questions on the items by the Respondent's management and her supervisor and no receipts were availed. A decision to terminate was made.
21. Thought there was possibly a reason for termination, Section 41 provides that there has to be some degree of fairness. It has now become vogue to refer to it as procedural fairness. She was entitled to be advised of the fact that the Respondent was contemplating dismissal. It would seem therefore that though the Claimant may have precipitated the dismissal by the casual approach to the policy by the Respondent they should have accorded her some hearing as contemplated by law. In the premises I would hold her dismissal was unfair and award her three months compensation amounting to 112,080/-. No award is made for the other claims made. She was indebted to the Respondent for the medical cover and she had no defence to the counterclaim. I would enter judgement against her for the counterclaimed sum Kshs. 35,367/-. Netting this off from her compensation she would receive a sum of Kshs 76,713/-. Each party will bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of June 2015

Nzioki wa Makau

Judge