



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU

CAUSE NO.107 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BILHA FWENDE MASINDE.....CLAIMANT

VRS

SUBUMBA FARMERS CO-OP. SOCIETY.....RESPONDENT

J U D G E M E N T

The claim herein was filed by Bilha Fwende Masinde against the Respondent her former employer alleging that she was unfairly dismissed from the Respondent's employment. She seeks the following remedies:-

- (a) A declaration that the termination of the Claimant by the Respondent was unfair and unlawful.
- (b) Re-instatement of the Claimant to her previous employment position and this should be unconditional.
- (c) Payment of the Claimants accrued dues from her suspension and termination to the date of re-instatement.
- (d) Cost of this suit
- (e) Any other relief the Honourable Court will deem fit to grant.

The Respondent filed a response to the claim denying the Claimants allegation. The Respondent avers that the Claimant was lawfully dismissed for negligence, laxity and/or ineptitude and prayed that the claim be dismissed with costs.

The case was heard on 20th June, 2015. The Claimant testified on her behalf while the Respondent called two witnesses, Isaac Khisa Nasiyuma (RW 1) and Jotham Wotia Wekhanya

(RW 2). The Claimant was represented by M.M. Omondi instructed by M.M. Omondi & Co. Advocates. The Respondent was represented by Mr. Murunga instructed by J.O. Makali & Co. Advocates. The parties thereafter filed and exchanged written submissions.

Claimant's case

In the Memorandum of Claim, her testimony and written submissions, the Claimant avers that she was

employed by the Respondent, a farmers Co-operative Society registered under the Co-operative Societies Act as a book keeper on 28th October, 1996. On 19th October 2000 she was offered the position of Secretary Manager which she held until 18th December, 2012 when she was dismissed from employment.

The Claimant testified that the reason for her dismissal was because she opposed the purchase of land by Board members of the Society as members had expressed reservations about the transaction and also because the price at Shs.268,725 was inflated and had not been approved by the members. She therefore declined to sign the cheque for purchase of the land as a result of which she was suspended by letter dated 21st September, 2012 and thereafter dismissed by letter dated 18th December, 2012. She reported the matter to her Union, the Kenya Union of Commercial, Food & Allied Workers who wrote to the Respondent but no response was received to the same.

The Claimant alleges the grounds for her suspension on allegations of negligence, publication of confidential matters of the Society, spending Respondent's funds without the knowledge of the Management Committee, ignoring instruction of the Management Committee and inciting members against the Management Committee are malicious and the dismissal was unfair as she was not accorded an opportunity to be heard.

Respondent's case

The Respondent in its defence and in the testimony of its witnesses avers that the reason for the Claimant's dismissal was because she refused to sign the cheque for purchase of land which was provided for in the Respondent's 2011/2012 budget at Shs.500,000/= and for locking the management and tender committee members out of the office on 21st September, 2012. RW1 testified that their efforts to get the Claimant to open the office through an elder and the assistant chief were unsuccessful. The Claimant only agreed to go to open the office and hand over the cheque book when they involved the District Co-operative Officer who requested her to hand over the keys and the cheque book. As a consequence she was suspended for 90 days and because she did not apologise, the management committee reached a decision to dismiss her on 18th December, 2012. It was the Respondent's evidence that the dismissal was in accordance with the terms and conditions of employment manual that was issued to all staff of the Respondent. It was further the Respondent's position that the Claimant had been warned previously for resisting the recruitment of an Assistant Secretary Manager and Factory Manager.

Issues and determination

The issues for determination are whether there was valid reason for dismissal of the Claimant, whether the dismissal was according to fair procedure and whether she is entitled to the reliefs sought.

The Employment Act Section 43 provides that an employer is required to prove valid reason for termination. Section 45(2) states that the reason must be valid and fair, relating to an employee's conduct, capacity or compatibility based on operational requirements of the employer.

In the present case the letter of suspension gave reasons for the suspension as -

1. *Negligence*
2. *Publication of confidential matters of the Society*
3. *Spending of the Societies funds without the knowledge of the Management committees*
4. *You ignore to implement what the management has passed.*
5. *Inciting farmers against the management*

The of letter summary dismissal on the other hand gave reasons for dismissal as :-

1. *You committed an offence of insubordination by disobeying to carry out your duties as a Secretary Manager and instead you locked out the management committee and went to your home without any excuse on 21st September, 2012.*

2. *This is a serious offence which leads to an employee's summary dismissal from employment.*

The Claimant was never asked to respond to any of the charges in either the letter of suspension or the letter of summary dismissal. There is no report from the Respondent or evidence that any investigation was carried out to prove either the grounds of suspension or the grounds of dismissal. Those grounds therefore remain only as allegations and that have not been proved. The bottom line is that there were no valid reasons for the summary dismissal of the Claimant.

On the procedure for termination Section 41 of the Employment Act provides 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.*

The Claimant was never taken through any disciplinary process. She was suspended from duty on 21st September, 2012 and without any further intervention, dismissed on 18th December 2012. RW1 stated that the Management Committee met on 18th December, 2012 and decided to dismiss the Claimant. She was not invited to the said meeting. The terms and conditions of service referred to by the Respondent does not provide for any disciplinary process. It only provides for grounds of summary dismissal. The Respondent is bound by the provisions of Section 41 of the Employment Act, which it did not comply with.

Having failed to prove the grounds of summary dismissal and to subject the Claimant to fair

procedure before dismissal, the dismissal was both substantively and procedurally unfair in terms of Section 45 of the Act. The Claimant is therefore entitled to the remedies set out under Section 49 of the Employment Act.

The Claimant prayed only for reinstatement. Section 49(4)(c) and (d) require the court to consider both the practicability of reinstatement and the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

The Respondent is a small organisation owned by its members. The members of the Management Committee which dismissed the Claimant are still members of the SACCO. The Claimant's position as Secretary Manager and Chief Executive Officer could not have been left vacant after her dismissal as it is a position that is essential to the operations of the Respondent. The Claimant has not proved any exceptional circumstances to entitle her to the remedy of reinstatement.

For these reasons I do not find it prudent to order reinstatement of the Claimant. I have considered the statutory remedies in Section 49(1) that would be awarded as an alternative for reinstatement. In this respect I award the Claimant 3 months salary in lieu of notice as provided in the Respondent's terms and conditions of service. Her salary having been Shs.2,500 per month, I award her Shs.11,500 in lieu of notice.

The Claimant worked for the Respondent for about 16 years. Taking into account her length of service, I award her maximum compensation of 12 months salary in the sum of Shs.42,000/=. I further order that the Claimant be paid salary withheld during suspension for 3 months being Shs.11,500.

The Respondent shall also pay the Claimant's Costs.

The decretal sum shall accrue interest at court rates from date of judgement.

Dated signed and delivered this 9th day of October, 2015

MAUREEN ONYANGO

JUDGE