



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1530 OF 2013

ELIZABETH MURUGI MWAURA WEYA.....CLAIMANT

VERSUS

MARIE STOPES KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant's memorandum of claim was filed on 24th September 2013. The Claimant sought the resolution of a dispute she framed as wrongful termination of employment. The Claimant averred that she was employed by the Respondent on 1st February 2007 in the capacity of an assistant human resources manager. She averred that she earned Kshs. 80,000/- gross salary and rose through the ranks to the position of director people management a senior management position and was earning Kshs. 360,000/- a month. She averred that the Respondent was bound by its Staff Employment Manual and Code of Regulations 2012 and the applicable laws relating to employment. She averred that the Respondent did not act in accordance with justice and equity in terminating her employment. The Claimant averred that the Respondent's action of purporting to summarily dismiss her from employment with the Respondent was purely capricious, malicious and discriminatory and that she was not afforded an opportunity to be heard in respect of the allegations made against her. She averred that she had diligently and faithfully carried out her duties and as a result, had been severally promoted as well as favourably evaluated and commended and never received a warning letter. The Claimant averred that as a result of the unlawful and unfair termination of her services she claimed Kshs. 360,000/- as one month's salary in lieu of notice, unpaid days worked in June 2012 Kshs. 72,000/-, annual leave 172,800/-, 12 months gross salary as compensation for unlawful and unfair termination as well as unpaid benefits, costs and interests. In the alternative and without prejudice to the foregoing she sought reinstatement or re-engagement in work comparable to that which she was doing prior to her termination.
2. The Respondent filed a reply to the Claimant's memorandum of claim on 29th January 2014. In the reply, the Respondent averred that the Claimant was its erstwhile employee from 1st February 2007 till 6th June 2012. The Respondent averred that the Claimant was similarly bound by the conditions contained in the contract of service as well as the Respondent's Staff Employment Manual Code of Regulations 2012 and the applicable laws relating to employment. The Respondent averred that the Claimant was dismissed for gross misconduct and that it was a stranger to the allegations of unlawful and unfair termination. The Respondent averred that if the Claimant was to seek equity she had to do so with clean hands. It averred that the Claimant carelessly performed her duties at the expense of the Respondent and that during the Claimant's

service a plethora of suits was filed against the Respondent and in most of them the Respondent was found culpable and that the suits arose directly as a result of the Claimant's action while she was in the Respondent's employ. The Respondent averred that the Claimant is not entitled to the amounts claimed and that the suit was an abuse of court process and an attempt at unjust enrichment. The Respondent averred that reinstatement or re-engagement was not feasible as the relationship between the Claimant and the Respondent had irretrievably broken down. The Respondent averred that the dismissal of the Claimant was proper and in accordance with the Employment Act as the Claimant had grossly misconducted herself in the course of duty. The Respondent thus sought the dismissal of the suit.

3. The Claimant testified on 5th May 2015. In her testimony in which she was led by her counsel Mr. Kibanya, she stated that she was employed by the Respondent and given an employment letter. She testified that she was first employed as a HR assistant and was during probation interviewed for the position of HR manager and appointed to it and left as HR director. She testified at the time of dismissal she was earning Kshs. 360,000/- a month. She stated that the Employment Act and the Human Resources Manual of the Respondent applied to her contract. She testified that on 6th June 2012 she was given a letter terminating her services in the presence of another director and that she declined to sign it as she did not agree. She stated that she had just come back from training and the two officials followed her to her office and asked her to hand over and was escorted to her car and asked to leave. She was not given any explanation and she did not get an opportunity to defend herself. She testified that she never received any warning either verbal or written. She stated that the reasons given for the termination were not justified because the Respondent had branches and these issues would have been brought before a committee. She testified that she was not given a hearing and was just bundled out. She stated that her letter of employment indicated that she was entitled to one month notice, pay for days worked, leave due but not taken and she also sought compensation.
4. In cross-examination by Mr. Nyiha for the Respondent, she testified that it would be unfair to insinuate that civil suits came up. She stated that there were restructuring issues and those were issues of the Respondent. She testified that regarding the issues concerning employees that she was not directly answerable to the staff concerned and by the time the cases came to Nairobi decisions had been made after deliberations of the committee. She testified that the CEO was in charge. She disagreed with counsel for the Respondent and stated that if details of the cases were provided we could go through them and that she should not be blamed for them. She testified that she was not given a hearing and that for dismissal there are hearings and that the reasons on her dismissal letter did not warrant summary dismissal.
5. In re-examination by her counsel Mr. Kibanya, she testified that the issue of civil suits was not stated in her dismissal letter and that the dismissal letters were signed by the CEO. She stated that she was never summoned as a witness and that she was only asked to testify in one case where an employee Kilonzo had sued. She testified that she was only given a letter and escorted to the gate.
6. The Respondent had indicated it would not call any witness and at the end of the Claimant's testimony wished to change its position. The application to adjourn for the Respondent to call a witness was opposed and the Court upheld the opposition to adjourn as the case had been set for hearing long ago and the Respondent had indicated it was not calling a witness. The parties were therefore directed to file submissions.
7. The Claimant filed submissions on 22nd May 2015 and in the submissions stated that she the issues that arose for determination were whether the Respondent's termination of the Claimant's employment was fair and whether the Claimant's employment was terminated in accordance with fair procedure. The Claimant submitted that she was not given a hearing and was just accosted by being given a letter of dismissal and being escorted to her office to clear out and leave the Respondent's premises. She submitted that failing to subject her to a disciplinary process was contrary to the law. She submitted that the Respondent failed to prove the reasons for her termination were fair and valid within the meaning of Section 45 of the Employment Act. The

Claimant submitted that the Respondent attempted through its counsel to suggest that there was a plethora of suits against the Respondent by its former employees yet this was not on the letter of dismissal. The Claimant submitted that there was no production of any letter of dismissal signed by the Claimant in respect of these employees and no evidence had been produced that the Claimant had power to terminate the employment of any of the Respondent's employees. The Claimant submitted that the termination of any employee followed a decision of a committee and the decision to terminate was a collective one and not the Claimant's alone. The Claimant submitted that under Section 41(1) of the Employment Act the employer was bound to explain before termination of employment the reasons for the intended termination and at the explanation the employee was entitled to have another employee present during this explanation. The Claimant also submitted that under Section 41(2) the Employment Act required that before terminating the employment of an employee summarily the employer was obligated to hear and consider any representations the employee or the employees representative made in relation to the alleged misconduct or poor performance. The Claimant submitted that the Employment Act applied to all employees employed by an employer under a contract of service as provided under Section 3(1). The Claimant submitted that she was entitled to pay for days worked in terms of Section 17(1) of the Employment Act and that it was the responsibility of the Respondent as employer to keep records in terms of Section 74 of the Employment Act. She submitted that she was entitled to 25 leave days and no proof was availed of her taking the annual leave. The Claimant submitted that on the strength of decided cases such as the case of **Stephen Ng'ang'a Ngigi v Marie Stopes Kenya Ltd Cause No. 1710 of 2010** where Onyango J. held that the dismissal was unfair in both substance and in procedure and awarded 12 months compensation and the case of **Kenya Plantation & Agricultural Workers Union v Kilifi Plantation Limited [2013] eKLR** where the Court found the reason for termination to be invalid and the procedure for the termination unfair and awarded 12 months compensation.

8. The Claimant's case was that she was dismissed without due process being followed. The Respondent's case was that there was reason for the dismissal and therefore the Respondent was justified in summarily dismissing the Claimant from its employ. The Claimant was the only party that availed a witness but that did not water down the case of the Respondent. The evidence before the Court is that there were a number of suits against the Respondent and a Mr. Paul Cornelissen, a director of the Respondent. In none of the 3 suits exhibited did the Court see any reference to the Claimant herein or any allegation that the Claimant was in any way responsible for the 3 cases in the Respondent's bundle. The Claimant on her part stated that the Respondent was bound to conduct a disciplinary hearing before dismissal. The cases availed by the Respondent except for the one of **Ng'ang'a v Marie Stopes** indicate a disciplinary process was undertaken. In the case of **Ng'ang'a v Marie Stopes** above the Court observed that the Respondent did not adhere to the regulations or even the law in dismissing the laboratory technician. He had gone on leave without completing his leave form properly. In that case there was no indication that the Claimant was the cause of the dismal failure of the Respondent to follow the law. In her own case no hearing was held in terms of Section 41 of the Employment Act. The dismissal was not denied by the Respondent who only asserted that the dismissal was in accordance with the law. Section 41 was abridged and the failure to follow procedure by the Respondent renders the dismissal unlawful and unfair. It would be improper to order a re-engagement or reinstatement in the circumstances obtaining and the only recourse to the Claimant would be relief under Section 49 and 50 of the Employment Act. The Claimant ought to have been accorded a modicum of due process as held in the case of **Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where my learned sister Ndolo J. held that non compliance with section 41 of the Employment Act renders any disciplinary action outrightly unfair.

9. The pertinent and relevant parts of Section 49 provide as follows:-

49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following -

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(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) 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. ?

10.I find that the Claimant was entitled to receive pay for days worked, leave earned and not taken as well as notice pay as her termination was not proper. In the final analysis I will enter judgment for the Claimant against the Respondent as follows:-

- a. Notice pay Kshs. 360,000/-;
- b. 6 days worked in June 2012 Kshs. 72,000/-;
- c. Leave earned 12 days Kshs. 144,000/-;
- d. 12 months compensation for unlawful and unfair dismissal Kshs. 4,320,000/-;
- e. Sums in a), b), c) and d) to be subject to statutory deductions as provided for in Section 49 of the Employment Act;
- f. Costs of the suit.
- g. Certificate of Service in terms of Section 51 of the Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this **14th** day of **October 2015**

Nzioki wa Makau

Judge