



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1572 OF 2013**

**CATHERINE WAMBUI KARIUKI.....CLAIMANT**

**VERSUS**

**DR. NYAMBURA GICUHI.....RESPONDENT**

**JUDGEMENT**

1. Issues in dispute are the unlawful and unfair termination of the Claimant and the non-payment of terminal dues.
2. The Claimant Catherine Nyambura kariuki filed the claim herein on 30<sup>th</sup> September 2013. The reply to claim was filed on 7<sup>th</sup> November 2013. Both parties exchanged their statements and documents and hearing proceeded on 29<sup>th</sup> October 2015. Both parties have filed their written submissions.

**The claim**

3. The Claimant was employed by the Respondent in January 2012 as a Receptionist/Dental assistant where she served until 22<sup>nd</sup> July 2013 when she was summarily dismissed without notice or a hearing. The claim is that the Respondent called the Claimant and made false allegations against her and without due cause proceed to dismiss her and without making any payment in lieu of notice. The Claimant was also not issued with a Certificate of Service. At the time of her dismissal the Claimant was earning kshs.16, 450.00 per month. On 13<sup>th</sup> August 2013, the Respondent issued a letter to the Claimant noting that she had been terminated due to failure to perform her duties. Such a reason was not brought to the attention of the Claimant before the dismissal on 22<sup>nd</sup> July 2013 and to use the same was an unfair labour practice.
4. The Claimant is seeking notice pay of kshs.18, 000.00 and damages for loss of employment and a declaration that she was unfairly terminated.
5. In evidence the Claimant testified that upon her employment by the Respondent she worked diligently and was promoted to the reception due to her good work relations. On 22<sup>nd</sup> July 2013 the Respondent called her to the office and asked her to explain the circumstances under which *bonga* points were used and to write a statement. She was then issued with two cheques, one for kshs.18, 000.00 and another for Kshs.13, 000.00. There were salary vouchers attached to these cheques that she was made to sign. That one cheques was for July 2013 salary while the second cheques was for leave due. The Claimant was then summarily dismissed without being given any explanation.

6. The Claimant also testified that she was later served with a letter indicating that she was of poor performance but this was not correct as she had been employed as a dental assistant and later promoted to the reception and her salary increased.

7. The Claimant also testified that she was always put under threat by the respondent. She was constantly told she would be fired and made to feel unwelcome. This continued throughout her employment with the respondent. On 2nd August 2012 she was made to write a letter of commitment; the Respondent issued notice that she was going to lay her off and on 24<sup>th</sup> September 2012 the Claimant was issued with a notice with regard to her performance but on 20<sup>th</sup> October 2012 she was made to write a letter of commitment. Later the Claimant was dismissed for no apparent reason.

8. That this was unfair, the Claimant has been unable to secure a new job for over a year and thus seek compensation for loss of work and earning.

## **Defence**

9. In defence the Respondent admitted employing the Claimant but state that she was not diligent in her work as it was not satisfactory. The termination was not due to any *bonga* points and the same was not unfair. On 22<sup>nd</sup> July 2013 the Respondent terminated the Claimant due to underperformance and failure to carry out her duties with due diligence and attention. That since 2011 when the Claimant was employed, there were complaints of poor performance and a warning letter had been issued. Upon failure to improve performance, the Respondent had no option but to terminate the Claimant and all terminal dues were paid. This was not a case of unfair labour practice and no notice is due or compensation, damages, severance pay or any other benefit.

10. The defence is also that the claim should be dismissed. The Respondent is also seeking costs.

11. In evidence, the Respondent testified that she is a Dentist with a dental clinic where she employed the claimant. The Claimant had no previous training which the Respondent did on the job. She was not happy with the claimant's work performance and thus decided to terminate her employment. The Claimant asked to be given a second chance so as to improve and the Respondent opted to place her at the reception instead. This was not a promotion, rather it was due to poor work performance.

12. The Respondent also testified that she terminated the Claimant for the reason that there arose several issues where the Claimant had been conned by an artist and also breached confidentiality. The Claimant gave out information which was confidential. A PIN Number that held the Respondent client details and when asked about it, the Claimant did not seem to appreciate what she had done. The con artist had access to all patient data and the respondent's bank account and thus felt the Claimant had exposed her to so many issues and had to terminate her. The termination had nothing to do with *bonga* points.

13. The Respondent also testified that she had serious concerns with the claimant's work performance but the last straw was the breach of confidentiality and exposure of client information. This was causing the Respondent serious problems.

14. That in 2012 the Respondent had terminated the Claimant as the dental practice required the Claimant to lay out all the client details and records in one file and every time the Claimant had to do her work there would be missing records. So many issues were not working well as required. On second thought the Claimant was reinstated and she did a letter of commitment to work well but this did not work as well and hence the termination. The termination was due to the claimant's failure to understand the magnitude of the problem she had caused. When the Respondent called the Claimant for a hearing, it became apparent that she could not understand the problem and there was no good communication. All her dues were paid.

## **Submissions**

15. The Claimant submitted that the reason of termination was stated to be poor performance but this was

never a matter brought to the notice of the Claimant before her dismissal. It was therefore unfair to use the same to effect dismissal on 22<sup>nd</sup> July 2013. There was no notice pay despite the termination being effected summarily as what was paid on 22<sup>nd</sup> July 2013 was leave due and salary for July 2013. Under section 43 of the Employment Act, the Claimant was terminated unfairly as there were no reasons given to her for the same. Equally section 41 of the Act was not adhered to at all. This was an unfair termination and the Claimant should be paid compensation.

16. The Respondent also submitted that under the provision of section 44(4) of the Employment Act, an employer can summarily terminate an employee without notice or with less notice. For the reasons that the Claimant had been previously warned and failed to comply and continued to be of poor performance, the Respondent applied the law to effect summary dismissal which was lawful. The Claimant is thus not entitled to the prayers sought in this case.

17. The Respondent also submit that the Claimant was of poor performance a matter that was brought to her attention but failed to improve. Even though the Respondent heard the Claimant without recording the meeting or calling a witness, this should not be sued to taint an otherwise lawful process. Section 49 of the Employment Act have the remedies available to the Claimant but the circumstances within which the termination took place must be put into account. In this case the Claimant contributed to her own termination due to poor performance. Where the court finds that the Claimant is entitled to a compensation, one (1) month pay should be sufficient. The Claimant only deserves one month notice pay at kshs.16, 000.00

### **Determination**

18. A written contract of employment is not only a good labour practice but a legal requirement under section 9 and 10 of the Employment Act. Such a written contract sets out the terms and conditions of employment to help the parties to an employment relationship understand their duties and obligations, rights and responsibilities. Without a written contract, it becomes near impossible to the parties to appreciate what each is required to do and more so when there is a problem, challenge or conflict. In this case no party mentioned an employment contract but that duty is vested upon the employer and the Respondent in this case. Such a written contract should be issued on or before commencement of employment and where not practically possible not later than two (2) months upon employment. In the absence of such a written contract, the word of the employee becomes critical for the court as the employer has failed to undertake a mandatory duty. See **Kizito Lubano versus KEMRI Board of Management & others, Petition No.47 of 2015** on terms of employment which position is also reiterated in the case of **Henry Ochido versus the NGO Co-ordination Board, Petition No.41 of 2015** where the court in making reference to the provisions of section 10 of the Employment Act held thus;

*... At clause (1), an employer is required to put into writing all employment terms and conditions and where any specific terms is not so written, this should be done within two (2) months. Therefore any review or changes to the written terms and conditions of employment must be in consultation with the employee so as to reflect the changes and bring such changes to the attention of such an employee. ...*

19. It is therefore to the advantage of each party to have a written contract of employment. This is more helpful to an employer as under such a written contract, they are able to evaluate an employee whose performance is poor or in need of review.

20. In that regard, the Claimant testified that she was terminated for no apparent reason. She was called and made to write a statement with regard to the use of *bonga* points which she did but was then summarily dismissed. In defence, the Respondent sets out that the reason for terminating the Claimant was due to poor performance. In her evidence, the Respondent introduced another reason for terminating the Claimant – that of breach of confidentiality. That despite the Claimant being of poor performance, her work station was changed from dental assistant to receptionist but the last straw was breach of confidentiality and the failure by the Claimant to understand the magnitude of the problem she had caused. That due to such breach, the Respondent applied the provisions of section 44(4) of the

Employment Act and effected summary dismissal.

21. There are few instances where an employer is allowed to summarily dismiss an employee. Such instances are as set out under section 44(4) of the Employment Act. The employer is also allowed to set out a policy or in the employment contract, and noting the nature of business the employer is engaged in, set out more terms and conditions where breached may lead to summary dismissal. In this case there was no employment contract and that notwithstanding, the application of section 44(4) is not without conditions. The rights under section 44 of the Employment Act aside, an employer must adhere to the mandatory provisions of section 41 of the Employment Act even in the case where summary dismissal is justified. An employee enjoys an inherent right to be heard before such summary dismissal. The modalities for such hearing are set out under section 41 of the Employment Act. Section 41(2) thus sets out;

*(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. [Emphasis added].*

22. The Respondent has admitted to the error in not following the provisions of section 41 of the Employment Act as she failed to hear the Claimant in the presence of a witness. Such a failure though admitted was in breach of a mandatory provision of the law. Such amount to procedural unfairness under section 45 of the Employment Act.

23. The other reason used by the Respondent to terminate the Claimant was that she was of poor performance. Poor performance of an employee is a matter taken seriously by this court. This is so as in using such a reason, the employer must demonstrate the efforts put in place to address the poor performance, the modalities put in place to support a poor performing employee and the timelines agreed upon in this regard. The rationale is that when employing the employee, the employer was satisfied with certain skills, competences and had thus hired such an employee to undertake certain tasks. In most cases an employer places such an employee on probation to ensure that indeed the skills and competences that the employee said to possess are indeed commensurate to the task at hand. In this case there is no letter or contract of employment spelling out any employment terms or conditions. I take it then, when the Respondent hired the Claimant she was satisfied with the skills and competencies the Claimant possessed at the time. Where the need arose to have more skills, the duty was then on the employer/Respondent to train the Claimant so as to fit into her business needs as held in the case of **Jane Frances Ominde Munyakoh versus Imaging Solutions Limited, Cause No 1491 of 2011**. The duty to ensure an employee is impacted with the requisite skills and specialization in the field of the employer is sorely the duty of the employer, and this is more so for the unskilled employee. See **Steven Masaba versus Uganda Railways Corporation, HCCC No.87 of 2014 VI KALR**;

*... An employer has the duty to provide a safety system of work and proper supervision to his unskilled employees. ... He has to particularly take into account the nature of the work.*

24. The Respondent testified that she hired the Claimant and had to train her on the job as a dental assistant. I take it then the Claimant had no prior training in dental procedures hence the responsibility taken by the Respondent to train her on the job. The Respondent as a Dentist running a Dental clinic employed the Claimant knowing well she had no prior training in that field. It cannot therefore be an expectation that within the short time of employment in 2011 to 2013, the Claimant would be conversant with all the professional duties and requirements equivalent to that of a Dentist. As a Dental Assistant, the training on the job would require constant appraisal and review and timelines to ensure the Claimant was coping with the job requirements. The duty then vested upon the Respondent to meet these requirements. It cannot then be upon the Claimant to prove that she had enough training. To come to such an assessment would be an unreasonable expectation and to terminate the Claimant on such basis is an unfair labour practice.

25. Even where the Respondent required to terminate the Claimant on the grounds of poor performance, efforts towards supporting the Claimant to be good at her job must be demonstrated. Upon such a demonstration of efforts made, where termination is still found necessary, notice to this effect should have been issued to the Claimant and an opportunity to be heard given. At such a hearing, the Claimant would have had the chance to state what frustrations she had on the job and upon good assessment, then a decision made. Only then would it have been necessary to issue the termination letter if appropriate and in such notice the Respondent should have given the reason/s for such termination.

26. The law with regard to termination of contracts is that the same should only be terminated where there are reasons, which reasons, the employer at the time of terminating such a contract genuinely believed to exist hence the termination. In this case section 43 of the Employment Act is important to refer;

*43. (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.*

27. However, even where there are genuine reasons leading to the termination, an employee is entitled to challenge the same as even where there is a genuine reason that may lead to a termination, the same must be assessed as to its validity, fairness and reasonableness based on each case. The test of fairness must therefore be looked at with regard to the conduct of the employee, the policy procedures given by the employer and fundamentally the procedures adopted by the employer leading to the termination. These are important considerations that the Court must address as by assessing each case, a finding as to whether a termination was unfair or unfair must have the basis on the above issues being established to exist or not to exist.

28. What is of paramount importance and the Court gives very high regard to is that even where an employer finds gross misconduct and sufficient reasons to terminate an employee is the question as to whether that employee was given a fair chance to challenge the decision of termination through an appeal by an independent panel/committee/body or person other than the panel/committee/body or person who heard the case and made the decision to terminate. This is what would entail adherence to the fair rules of natural justice and what is outlined under section 45(5) of the Employment Act thus;

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider—*

*(a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

*(b) The conduct and capability of the employee up to the date of termination;*

*(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

*(d) The previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

*(f) The existence of any previous warning letters issued to the employee*

[Emphasis added].

29. In this case, I find the Respondent failed the procedural test of fairness as due process was not followed as well as the substantive fairness test as the reasons given to the Claimant do not constitute grounds for summary dismissal. The substantive reason for which the Claimant was dismissed for was never brought to her attention in writing or in any clear manner for her to be able to reply to or to be able to give her defence. The warnings issued to the Claimant do not relate to the substantive issue of breach of confidentiality as stated by the Respondent. To thus summarily dismiss the Claimant without following the law amounted to the violation of mandatory provisions of the law and this amounted to unfair labour practice. This is contrary to the principles set out under section 45 of the Employment Act and I therefore find the dismissal of the Claimant was unfair.

**Remedies**

30. The Claimant has since been paid her leave due as well as salary for July 2013. Though such payments were made, the Respondent did not give a statement as to what exactly this entailed. I therefore find that the Claimant is entitled to notice pay upon the finding that there was summary dismissal and no notice was thus issued. Such notice is due under section 35 of the Employment Act for one (1) month or payment in lieu of such notice. The salary claimed is at Kshs.18, 000.00 but the Claimant confirmed in her evidence that she was earning Kshs.16, 000.00 at the time of dismissal. Where there was an underpayment, such should have specifically been pleaded or the Wage Order applicable stated. Notice pay awarded at kshs.16, 000.00.

**On the finding that this was a case of procedural and substantive unfairness, the Claimant is awarded compensation at 12 months' salary. This is awarded at kshs.192, 000.00; notice pay at Kshs.16, 000.00; and costs of the suit.**

**Orders accordingly.**

Delivered in open Court at Nairobi this 30<sup>th</sup> day of November 2015.

**M. MBARU**

**JUDGE**

In the presence of

Lilian Njenga: Court Assistant

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