



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 543 OF 2011
TERESIA N. PETER.....CLAIMANT
VS
KITUI TEACHERS SAVINGS
& CREDIT CO-OPERATIVE SOCIETY LTD.....RESPONDENT
AWARD

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 15th March 2011 and amended on 19th October 2012 is for unlawful dismissal. The Respondent responded by a Statement of Defence dated 12th May 2011 and amended on 8th April 2013. The case was heard on 17th July and 18th November 2013. The Claimant testified on her own behalf and the Respondent called its Chairman, Anthony Kyusya Mbiti. Both parties then filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent as an office messenger on 5th February 1986 and was progressively promoted to the position of Loans Clerk. Her monthly salary as at the time of her leaving employment was Kshs. 47,056.

3. On 17th November 2010, while on her annual leave, the Claimant was suspended on allegations that she was indebted to one Julius Mwinamo Ngunu and one Solomon K. Mulatya to the tune of Kshs. 507,650 and Kshs. 1,565,100 respectively. She was asked to sort out these issues and report to the Respondent's Board within 30 days from the date of the letter. On 17th December 2010, the Respondent wrote to the Claimant extending her suspension up to 22nd December 2010 while requiring her to appear before the Board on the last day of her suspension. On 22nd December 2010, she was summarily dismissed.

4. It was the Claimant's case that her dismissal was unlawful, unprocedural and unjustifiable. She pleaded that she was not given an opportunity to defend herself and was not paid her terminal benefits.

5. The Claimant therefore claims the following:

- a. A declaration that the termination of her employment was unlawful
- b. Reinstatement or in the alternative;

- (i) 12 months' salary in compensation.....Kshs. 564,672.00
- (ii) 3 month's salary in lieu of notice.....141,168.00
- (iii) Service pay per CBA (15/30x24x47,056).....564,672.00
- (iv) Leave pay for 20 days (20/30x47,056).....Kshs. 31,370.66
- (v) Unpaid salary for November and December 2010.....94,112.00
- (vi) Salary for remainder of period up to 60 years.....10,728,768.00
- (vii) Certificate of service
- (viii) Costs and interest
- (ix) Any other relief the Court may deem just to grant

The Respondent's Case

6. In its amended Statement of Defence, the Respondent denied that the Claimant was unlawfully dismissed. The Claimant was therefore not entitled to any of the reliefs sought.

7. It was the Respondent's case that the Claimant admitted having borrowed money from third parties, thus exposing herself to financial embarrassment contrary to the terms and conditions of her employment. She was therefore summarily dismissed in line with the terms and conditions of her contract of employment, the Code of Conduct and Ethics and the Human Resource Manual as well as the Sacco Societies regulations and the Memorandum of Agreement between the Kenya Union of Commercial Food and Allied Workers and the Respondent.

8. The Respondent further stated that the Claimant was given adequate opportunity to defend herself orally and in writing prior to the termination of her employment. According to the Respondent, the Claimant having been summarily dismissed for gross misconduct was not entitled to any terminal benefits.

Findings and Determination

9. The main issue for determination in this case is whether the termination of the Claimant's employment by way of summary dismissal was substantively justifiable and procedurally fair.

10. Section 43 of the Employment Act, 2007 provides that:

(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.

11. According to the Claimant, her dismissal was motivated by malice and bad faith on the part of the Respondent. The Respondent on the other hand stated that the Claimant had borrowed money from third parties which she failed to pay thus exposing herself to financial embarrassment in contravention of the terms and conditions of her employment. The Respondent's witness, Anthony Kyusya Mbiti testified that the Claimant was engaged in shylock activities with the Respondent's members.

12. By letter dated 15th November 2010 from the Respondent's General Manager, Florence M. Kang'asua the Claimant's attention was drawn to a debt owed to Julius Mwinamo Ngunu amounting to Kshs. 507,650. The Claimant was required to disclose any other debts owed by her and show cause why disciplinary action should not be taken against her.

13. The Claimant was subsequently suspended for 30 days effective 18th November 2010. The suspension letter dated 17th November 2010 from the Respondent's Chairman, Anthony K. Mbithi made reference to the debt owed by the Claimant to Julius Mwinamo Ngunu and an additional debt amounting to Kshs. 1,565,100 owed to Solomon K. Mulatya. The letter of suspension required the Claimant to sort out these issues and present evidence thereof to the Board within 30 days from the date of the letter.

14. The Claimant responded by letter dated 23rd November 2010 under reference **"SUSPENSION FROM DUTY"** as follows:

"I acknowledge the receipt of your letter on 17th/11/2010 in reference to the above subject and I understood every contest there in (sic). A day earlier I had received another one from the General Manager informing me of the same circumstances pertaining to debts (sic). I am very sorry and humbly request for forgiveness.

I have taken the initiative to settle every problem with the concerned as alleged and I have now made proper arrangements to settle so that I may maintain the good image of the Society (sic). Find the attached letter.

I apologise for any embarrassment that I might have caused in the office and I believe everything will be well.

Thank you.

Yours faithfully

TERESIA PETER

APPRAISAL CLERK"

15. On 17th December 2010, Anthony K. Mbithi wrote to the Claimant again. The letter which was referenced **"RENEWAL OF SUSPENSION"** stated as follows:

"This is to inform you that your suspension for 30 days expired on 17/12/2010 and there is no evidence that you have cleared the debts. In addition Veronica Nzasu Makau brought her letter claiming Ksh. 288,000/=.

Your suspension is renewed up to 22nd December, 2010 to enable you to clear all the debts. You are also required to come and meet the Board on the same day 22/12/2010 with evidence of payment of all the debts."

16. My reading of the above cited correspondence is that there was a common understanding as between the Claimant and the Respondent that the Claimant was involved in some indebtedness that was affecting the employment relationship between the parties. The letter of dismissal dated 22nd December 2010 made reference to the Claimant's suspension and to my mind, the reason for the termination was clear to both parties.

17. The Claimant testified that she was coerced to write her letter dated 23rd November 2010. The Court however found it unbelievable that a long serving employee who had risen through the ranks to a fairly senior and influential position in the Respondent's establishment would be coerced into writing such a lengthy letter by her own hand. The Court therefore rejected the

Claimant's account in this regard.

18. Article 7.1.8(ii) of the Respondent's Code of Conduct and Ethics Document which was produced by the Claimant provides as follows:

ii) An officer shall not neglect his financial and other obligations to his family and other people and/or organisations.

19. The evidence before the Court demonstrates that the Claimant had difficulties meeting her financial obligations prompting her employer to intervene. I therefore find that the Claimant was in breach of the Code of Conduct and Ethics and the Respondent had a valid reason to terminate her employment.

20. I will now examine the procedure adopted by the Respondent in effecting the termination of the Claimant's employment. Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct as follows:

(a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the employee or their representative;

21. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

22. The issue of the Claimant's indebtedness appears to have been a major concern to the Respondent and from the evidence on record, some discussions took place and some correspondence was exchanged. However, all these interventions put together fall below the threshold for procedural fairness set under Section 41.

23. In the case of *Nazareno Kariuki Vs Feed the Children Kenya [2013] eKLR*, this Court held that in disciplinary cases an employer is required to make a clear definition as to when the disciplinary process commences. An employee should not be left guessing whether they are facing disciplinary proceedings or are merely being counseled or reconciled. The reason for this is straightforward; that disciplinary proceedings have severe consequences including loss of employment.

24. In the case before me, the Respondent made attempts to get the Claimant to rectify her situation including suspending her from work to allow her time to settle her debts and when she failed to do so she was dismissed. In my view unlike interdiction, suspension is neither a disciplinary action nor a stage within the disciplinary procedure.

25. Suspension does not imply that any misconduct has taken place but is a neutral act where an employee is asked to stay away from work to enable the employer to conduct investigations into allegations made against the employee.

26. An employee on suspension remains innocent until proved otherwise. In addition, such an employee has a legitimate expectation that they will be given an opportunity to respond to any adverse findings arising out of investigations conducted by the employer. Suspension by its nature creates a fair amount of suspense for both the employee and the employer and should not therefore be unduly prolonged.

27. It seems to me that the Respondent in this case effected suspension as a disciplinary action and when it did not work, the ultimate disciplinary action of summary dismissal was employed.

28. For the foregoing reasons, I find the termination of the Claimant's employment by way of summary dismissal unfair for want of due procedure and award her the equivalent of 8 months' salary in compensation.

29. No evidence was laid before the Court to support the claims for 3 months' salary in lieu of notice and service pay. These claims were therefore not proved and are dismissed. I however award the Claimant one month's salary in lieu of notice. I further award her salary for the month of November 2010 and 22 days in December 2010. The Respondent did not produce any leave records to controvert the Claimant's claim for 20 days' leave pay and this claim therefore succeeds.

30. The Claimant's claims for reinstatement and payment of salary for period up to retirement are within the province of claims for specific performance and orders in this regard are granted in very exceptional circumstances which have not been established in this case.

31. The actual salary applicable to the Claimant as at the time of her leaving employment was in contention. According to her payslip for February 2010, her total earnings were Kshs. 47,056. For purposes of this claim however, the Court has discounted the sum of Kshs. 5,028 being over time compensation, resulting to a monthly salary of Kshs. 42,028 which the Court has adopted as the Claimant's salary for purposes of this claim.

32. Ultimately, I make an award in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation for unfair termination.....Kshs. 336,224
- b) One month's salary in lieu of notice.....42,028
- c) Salary for November 2010 and 22 days in December 2010.....72,849
- d) Leave pay (42,028/30x20).....28,019

Total.....Ksh.479,120

I direct the Respondent to issue a certificate of service to the Claimant and pay the costs of this case.

This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*