



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

INDUSTRIAL CAUSE NO. 52 OF 2013

SARAH WANYAGA MUCHIRI.....CLAIMANT

VERSUS

RT. REV. BISHOP HENRY KATHII.....1ST RESPONDENT

ANGLICAN CHURCH OF KENYA (ACK) DIOCESE OF EMBU.....2ND RESPONDENT

JUDGMENT

1. The claimant in this suit avers that her services were unfairly terminated by the respondent after serving the latter for close to 22 years.
2. The respondent for his part contends that her termination was lawful and justified because the claimant had failed to upgrade her qualification in accounts from ACNC to CPA I as a minimum, to meet new challenges in her job.
3. Having reviewed the pleadings, supporting documents and having listened to oral evidence by both sides, it would seem that parties are not in dispute over the fact that the claimant's services were terminated because she was not able to upgrade her professional skills as demanded by the respondent.
4. According to the claimant, she was unable to enrol for professional training and take the examination because she had just taken a loan whose repayment deductions did not leave her with enough income to enroll for the training as well as fend for her family which she stated she was the sole bread winner.
5. The respondent however insisted that in order to improve service delivery, it was important for the claimant to undergo the training and attain as minimum CPA I. The respondent to this end, undertook to refund 50% of the course fee once the claimant passed her examination.
6. Upon termination of the claimant's services she referred the issue to the Ministry of labour who upon hearing the parties decided that the claimant's termination was unfair and recommended that she be paid an equivalent of one years wages as provided under section 49(1)(c) of the employment Act. The respondent did not agree and the matter was escalated as a criminal prosecution against the respondent but was dismissed as not constituting any criminal offence. The parties were advised to pursue their claim before this court hence the present suit.
7. Section 45(1) provides that no employer shall terminate the employment of an employee unfairly. Subsection (2) of the same section states that a termination of employment is unfair if the employer fails to prove (a) the reason for termination is valid (b) the reason for termination is a fair reason related the employees conduct, capacity or compatibility or based on operational requirements of the employer and (c) the employment was terminated in accordance with fair procedure.

8. In order to elaborate on the understanding of what unfair termination of employment as stated by statute means Lord Denning in the case of **British Leyland UK Ltd v. Swift** [1981] IRLR 91 stated as follows:

9. “The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him”

10. The South African Labour Appeals Court in the case of **Engen Petroleum Ltd. v Commissioner for Conciliation Mediation and Arbitration & Others [2007] ZALAC 5** has observed that...”At times there was some or other definition of an unfair labour practice which the Industrial Court had to apply in deciding whether a dismissal was unfair. A finding by Industrial Court that a dismissal constituted an unfair labour practice meant that the dismissal was unfair. A dismissal could be found to be unfair by reason of fact that, although the employee was guilty of misconduct, dismissal as a sanction was excessive in all the circumstances of the case and was therefore unfair.

11. The claimant in the matter before this court was dismissed for failure to upgrade her professional skills to the level desired by the respondent based on the operational requirements of the respondent. They needed a more qualified accountant than the skills possessed by the applicant and encouraged her to enrol for CPA I programme but the claimant could not for the reason that she did not have sufficient funds to meet the cost of the training.

12. I have perused the pleadings filed by both parties together with the supporting documents. I have also had the benefit of listening to oral evidence. It seems to me that nowhere did the claimant refuse to undergo the required training. She indicated her desire to do so but was incapacitated by financial commitments which on the face of it sounded quite compelling. The respondent was only prepared to refund 50% of the cost of training on condition that the claimant passes the examinations. In other words, a failure would have meant no refund.

13. The respondent needed the services of a more qualified accountant and were neither prepared to fully fund the claimant nor declare her redundant in order to create room for a more qualified person.

14. Section 17(11) of the Employment Act prohibits any employer from limiting or attempting to limit the right of an employee to dispose of his wages in a manner which the employee deems fit. The claimant as an adult and a parent had her priorities which by then was educating her child who had joined form one and repaying the bank loan which she had taken. To mount pressure on her to enrol for a course at her expense with the promise to refund 50% of the costs upon successful completion not only limited or attempted limit her right to dispose of her wages in manner she deemed fit, but amounted to unfair labour practice hence her dismissal was unfair one outside the justifications set out in section 45(2) of the Employment Act.

15. As stated earlier in this judgment, if the respondent wanted to retain the claimant in employment but at the same time wanted her professional skills enhanced, it was very much capable of sponsoring the claimant fully even if it meant recovering the costs gradually from her salary. The court concedes that improving the claimant's professional skills would not only have benefited the respondent but the claimant as well. To this extent the court reaches the conclusion that the claimant's termination was unfair.

16. Considering the circumstances and reasons for termination, the court will not award the claimant the 12 month's salary as claimed and also as recommended under section 49(1)(c) as that is the maximum amount awardable under statute. The court taking into account the circumstances of the case and reasons

for termination hereby awards the claimant 6 months salary as compensation for unfair termination of her employment. The ruling salary will be the amount earned monthly by the claimant at the time of her termination.

17. It is so ordered.

18. Dated at Nyeri this 7th day of March, 2014.

ABUODHA N. J

JUDGE

Delivered in open Court in the presence of the Claimant in person and in the presence of Mr. Njoroge Advocate for the Respondent.

ABUODHA N. J

JUDGE