



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1287 OF 2012

ESTHER WAMBUI KARANGO.....CLAIMANT

VERSUS

PALBINA TRAVEL & TOURS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit by way of a Memorandum of Claim dated 19th June 2012 seeking the following relief;

- i. a declaration that the summary dismissal of the Claimant was wrongful and unfair and pay compensation in respect thereof;
- ii. payment of terminal benefits owing to the Claimant as follows;
 - a. one month salary in lieu of notice in the sum of Kshs.48,572/=;
 - b. Arrear salary for the month of June in the sum of Kshs.48,572/=;
 - c. Service gratuity at the rate of one month salary for every completed year of service between 2007 to 2012 in the sum of Kshs.388,576/=.

2. The claim is supported by a Verifying Affidavit of the Claimant and vivavoce evidence of the Claimant under oath.

The Claimant produced various documentation annexed to the Memorandum of Claim to elaborate the particulars of claim.

3. The Respondent filed a Memorandum of Response dated 3rd October 2012 and produced various documentary evidence marked appendix I to 8 to the Memorandum of Response.

4. The Respondent filed a Supplementary list of documets marked 1 – 10 on 7th October 2013 in support of the defence. The Respondent also called one Alex Mulwa Musembi the Human Resource manager of the Respondent to testify in support of its case.

Claimant's case

5. The Claimant Esther Wambui Karongo was employed on 22nd January 2007 by the Respondent as a Secretary earning a monthly salary of Kshs.10,000/=. She was initially placed under Probation and was confirmed on 24th April 2007. Her salary was increased to Kshs.12,000/= per month.

6. The Claimant worked continuously until the 9th March 2012 when the managing Director Mr. Nganga called her to a meeting at 5p.m. in the evening and Mr. Nganga informed her that he had dismissed her from work.

7. The Claimant asked for reasons why she was abruptly dismissed from employment and for a letter of dismissal but the Managing Director declined to give her dismissal letter stating that he would give her the letter in a hotel.

8. The Claimant explained to him that she could not go to a hotel to receive a letter from him because she was married where upon the Managing Director asked the Claimant to leave his office.

She left the employment and did not come back.

9. On 26th March 2012, the Claimant received a letter of summary dismissal from M/S Apedi Advocates. A cheque of Kshs. 107,609 was enclosed in the letter.

10. The payment included one month Basic pay of Kshs.48,572/= and Terminal / Ex-gratia pay of Kshs.97,144/=. Total gross sum pay of Kshs.145,716/=.

11. In terms of the letter of summary dismissal, the Respondent states that the Claimant was requested to report to work on 15th March 2012 but failed and or neglected to do so.

For this reason and other acts of omission and commission (not specified) committed by the Claimant in the course of her employment, the Claimant was dismissed with effect from 15th March 2012.

12. The Claimant denies that she was given any reason for the dismissal on 9th March 2012 and confirms that she declined to go to a restaurant to meet Mr. Nganga apparently to receive a letter of dismissal. She states that the allegations against her are false and malicious.

13. That she was not paid the sum of Kshs.107,609/=:, but only got a copy of the cheque dated 30th March 2012. The Advocate took back the cheque from her when she disclosed to him that she had recorded the conversation between herself and Mr. Nganga on 9th March 2012 when he asked her to meet him at a hotel.

14. She said she was wrongfully and unfairly dismissed.

That she is owed terminal benefits as particularized in the particulars of claim and compensation for the unlawful and unfair dismissal.

15. She said she was registered with NSSF and NHIF. She also said that the warning letters produced by the Respondent were mere fabrications and had not received any warning letters during her tenure as Secretary as alleged by the Respondent or at all. She also denied that the Respondent had asked her to report to work on 15th March 2012 stating that she had already been dismissed from work on 9th March 2012.

16. She told the Court that the few times she went to work late would be with a good reason and would explain to the employer in advance such as when her child was sick. She has denied even failing to honour instructions from her employer but had written to the Managing Director regarding the matter of having to prepare tender documents which was not part of her job description as a secretary. She had merely asked that they discuss the matter.

17. The purported letter of interdiction produced by the Respondent was according to the Claimant never given to her but was a mere fabrication. If these documents were genuine she would have acknowledged receipt by signing a copy thereof.

18. She withstood very close cross-examination and was candid in her responses to the questions posed. Her testimony was consistent in material respects and largely appeared credible.

19. She accepted the schedule of reporting produced by the Respondent as a true record stating that whenever it shows she was abit late, she had offered good explanation for it mostly in advance.

20. The Respondent conceded that it owed the Claimant salary of March 2012 and one month salary in lieu of notice and that the issue as to whether gratuity was payable or not was still pending.

21. This claim was dropped by the Claimant in view of the fact that she was duly registered with NSSF and full contribution had been made by the respondent.

Respondent's case

22. Mr. Alex Mulwa Musembi testified under oath in support of the Claimant's case. He adopted a witness statement dated 30th September 2013 as his testimony. He also produced the list of documents filed on 7th October 2013 and the annexure to the memorandum of Response filed on 4th October 2012 as evidence before Court.

23. The only issue for determination is

- i. whether the Claimant was dismissed for a valid reason and
- ii. whether the dismissal was in terms of a valid procedure.

24. The witness told the Court that he was a Human Resource Officer employed by the respondent on January 2012. This was about two months to the date of dismissal of the Claimant.

He stated that the Claimant used to report to work late and this caused the Respondent problems as she manned the front office.

25. He told the Court that he learnt that the Claimant had been given two (2) warning letters in this regard. These were given before he was employed so he had no personal knowledge about the matter.

26. There was one letter dated 13th February 2012, which was given to the Claimant during the tenure of the witness.

The letter is titled final warning regarding the Claimant's failure to assist the Marketing Department in binding tenders and putting up together Marketing materials.

She was alleged to be insubordinate and rude.

28. The witness said that the Claimant was supposed to attend a disciplinary hearing on 10th March 2012, but she declined.

No Notice was produced by the witness charging the Claimant with any offence and asking her to report to a disciplinary hearing on 10th September 2014.

This was a day after the dismissal of the Claimant by Mr. Nyaga, the Managing Director.

29. The witness denied that the warning letters and the one for interdiction were specifically prepared for

the purpose of this case but could not give good explanation why there was no acknowledgment of receipt of the said letters.

30. The witness said that the Claimant fell-out with the managing Director after the Claimant refused to discuss the letter of interdiction where the main issue was her reluctance to take additional work.

31. The witness said that he attended the meeting on the 9th March 2012 in which the Claimant's lateness to work and her general conduct was discussed.

32. The witness contradicted himself under cross examination when he said that the Claimant was to come for a disciplinary hearing on 15th March 2012 yet earlier he had said that the Claimant was supposed to attend a disciplinary meeting the following day, after the meeting with Mr. Nganga on 9th march 2012.

33. He was at pains to explain why the letter of dismissal was done by an Advocate instead of himself or Mr. Nganga.

He denied that the Respondent acted unlawfully and maliciously by dismissing the claimant without notice and without payment of terminal benefits.

Determination

34. The Court has come to the conclusion of fact that the Claimant was summarily dismissed on 9th March 2012 in the evening.

That she was not given a show cause letter before the dismissal and had not been charged with any offence prior to the dismissal.

35. There could not have been a disciplinary hearing because no notice to attend one was produced nor were any minutes of such a meeting produced.

36. RWI'S testimony that a disciplinary hearing was to take place on 15th March 2014 several days after the summary dismissal of the Claimant was patently improbable and is deemed by the Court to be false.

37. The Court has also noted that the warning letters and the letter of interdiction could not have been received by the Claimant because she had not acknowledged receipt of the same.

38. The Court agrees with the proposition by the Claimant that the same were tailored specifically to provide a defence in this case.

39. The Court notes that the Respondent gave a cheque of Kshs.107,609/= to the Claimant and immediately withdrew the same when she asserted her right to full payment of her dues and questioned the impropriety of the conduct by the Managing Director Mr. Nganga by asking her to meet him in a hotel to discuss the matter. She viewed this as sexual harassment yet she was a married woman.

40. The Managing Director Mr. Nganga, did not choose to testify in this matter to rebut the allegation made against him by the Claimant. No reason was given for this failure. Instead he chose to get an officer who had just joined the Respondent company, slightly more than a month before the summary dismissal of the Claimant.

41. The witness did not know the Claimant well and was not well versant with the matters in dispute in this case.

42. The Court is satisfied that the Claimant has discharged her onus in terms of **Section 47(5)** of the **Employment Act, 2007**, by showing that the summary dismissal was not for a valid reason and the same

was not effected in terms of a fair procedure.

43. In the converse the Respondent has failed to discharge the evidential burden of rebuttal in terms of the same provision.

44. Accordingly, the summary dismissal of the Claimant by the Respondent was in violation of **Section 45(1)** as read with **Section 45(2)(a)** and **(c)** in that the same was not for a valid reason and was not done in terms of a fair procedure.

45. Accordingly, the Claimant is entitled to compensation in terms of **Section 49(1)(c)** as read with **Section 49(4)** and **50** of the **Employment Act**.

46. The Claimant had served the Respondent for a period of five (5) years.

47. The Court is satisfied that she did not contribute to the decision to dismiss her.

48. That she suffered loss of job, without notice and was treated in a demeaning manner in that, it was suggested by the Managing Director Mr. Nganga that a meeting at a hotel may have saved her employment. This sort of behavior by an employer is in violation of the dignity of the Claimant.

49. Taking all the circumstances of the case into account, the Court awards the Claimant 10 months salary being compensation for the unlawful and unfair dismissal in the sum of Kshs.485,720/=. In addition the Respondent is to pay the terminal benefits duly computed in the sum of Kshs.107,609/= which the Respondent admits to owe the Claimant.

50. The terminal benefits are to be paid with interest at Court rates from the date of dismissal being 9th March 2012 whereas the compensation in the sum of Kshs.585,720/= is payable with interest at Court rates from the date of this judgment.

51. The Claimant is to be given a certificate of service within 14 days from the date of this judgment.

The Respondent is also to pay the costs of this suit.

52. In summary the Claimant is awarded as follows;

(i) Kshs.485,720/= being compensation with interest at Court rates from 9th March 2012 till payment in full;

(ii) Kshs.107,609/= being the net terminal benefits payable by the Respondent with interest at Court rates from date of the judgment till payment in full;

(iii) costs of the suit;

(iv) Respondent to provide certificate of service within 14 days from date of this judgment.

Dated and Delivered at Nairobi this 17th day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE