



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 178 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 15<sup>th</sup> October, 2014)**

**EVERLYNE MAMAI ..... CLAIMANT**

**-VERSUS-**

**ONE ACRE FUND ..... RESPONDENTS**

**JUDGMENT**

The claimant Everlyne Mamai filed her Statement of Claim on 25.6.2013 in person. Her contention is that she was wrongfully dismissed from service by the respondents. Claimant's case is that the respondents is a NGO based in Western and Nyanza Region of Kenya. She stated that she was employed by respondents on 4.5.2009 as a field officer at a salary of Kshs 4,000/= per month amongst other benefits. He appointment letter was attached as **App 1(a)**. She was also given a document detailing expectations of respondents to her staffs contained in document **App 1(b)**.

The claimant served respondents diligently and on 20.9.2010 she was promoted to position of Field Manager and later to Field Director and her salary adjusted accordingly to Kshs 25,000/= per month plus Kshs 2,500/= monthly housing stipend **App 3(a)**. She earned a further increment in salary on 22.4.2013 **App 3(b)**. By 31.5.2013, her salary was now Kshs 53,164/= gross as per **App 4(a)**.

The claimant contends that she dutifully served the respondents until 10.6.2013 when the respondents wrongfully and unlawfully dismissed her from employment on grounds that she had threatened other staff members with terminations and also that she had behaved in unprofessional manner. Her termination letter was exhibited as **App 5**. It is the claimant's case that her rights were infringed upon as she was not accorded any hearing before termination and that the respondents acted with disregard to the rule of law.

She wants the court to declare her dismissal wrongful and unlawful and order her to be fully compensated accordingly as set out in her memorandum of claim. It is further claimant's contention that she was a top performer and that is why she earned her promotions. In cross examination she stated that the was overall boss in respondent's Busia office and understood that a top performer can be dismissed for using abusive language. She also denied being high – handed and sacking other staff. She told court that she was fired on 10.6.2013 and filed her suit 17 days later despite the fact that the respondents manual had a provision for appeals. She also told court that she was entitled to 1 month's notice on dismissal. She denied receiving money she was not authorized to receive.

The respondents on the other hand filed their statement of defence on 17.7.2013 through the firm of Annet Mumalasi & Co. Advocates. It is the respondents defence that the claimant's termination was lawful and proper as the claimant had engaged in acts of gross misconduct that warranted summary dismissal. The acts complained of according to respondents are threatening, intimidation and harassment

of junior staff including using abusive language to them. That she also dismissed junior staff who demanded their transport costs payments in tandem with budgetary allocations.

The respondents contend that the claimant is not entitled to the orders sought in the memorandum of claim and ask court to dismiss her case with costs to respondents. The respondents called 5 witnesses who were staff of respondents and RW3 averred that they were harassed and intimidated by claimant who even dismissed him. RW1 who was an Anti-Fraud Officer of the respondents averred that he did his investigations as an internal Auditor of respondents and established that some money was irregularly paid or withheld by the claimant.

I have considered evidence of both parties plus submissions filed. The issues for determination are:-

- 1. Whether the claimant committed acts of gross misconduct warranting summary dismissal.**
- 2. Whether the claimant's dismissal was lawful and fair.**
- 3. Whether the claimant is entitled to prayers sought.**

On 1st issue, the claimant served respondents as Field Director before her termination as per letter of appointment (**App 3(a)**). Other than the appointment letter, other terms of engagement were contained in the Human Resource Manual of the respondents. It is also not in dispute that her salary at termination was Kshs 53,164/= gross as per **App 4(a)**. According to the staff manual (**App 3 – respondents documents**) Clause 7 – procedures for discipline are set out and these include written warning, probation, suspension and summary dismissal. Clause 9 of the manual deals with cases of termination and under summary dismissal conditions that may result in summary dismissal are laid out. They include fraud, absence from duty, intoxication, using abusive language etc. These conditions are as set under S. 44(4) of the Employment Act 2007 which states as follows:-

**“44. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—**

- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**
- (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;**
- (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;**
- (d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;**
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;**
- (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or**
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his**

**employer's property.**

The respondents contention is that the claimant often abused junior staff and harassed them and this behavior falls under S. 44 (4) (d) of Employment Act which states:-

**“using abusive or insulting language, or behaving in a manner insulting to his employer or to a person placed in authority over him by his employer.”**

The question then is whether the claimant did commit this offence. The respondent called 5 witnesses and none stated that the claimant abused them. All that the RW4 stated was that the claimant always threatened the workers and finally gave him a termination letter which was not signed. The other witnesses RW1 & RW2 talked of alleged fraud committed by the claimant. RW3 and 5 also touched on some alleged fraud apparently committed by the claimant.

There is no proof that the claimant abused any staff or used insulting language. The reasons for which the claimant was therefore dismissed in the termination letter do not fall under S. 44(4) of Employment Act and do not amount to acts of gross misconduct warranting summarily dismissal.

Given that the claimant didn't commit acts of gross misconduct, was her termination lawful? Termination would have been lawful if due process had been followed. The issue of due process involves the right to be heard as set out under S. 41 of Employment Act 2007 which states as follows:-

**“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(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 sub – section (1) make.”**

The claimant was not given a show cause letter and neither was she given proper reasons warranting her dismissal. I therefore find that the claimant's dismissal was not lawful and fair. What remedies is the claimant then entitled to? I find claimant is entitled to the following prayers which I grant:-

1. Salary upto and including June 10, 2013 – 10,190
2. 1 month salary in lieu of notice – 53,164
3. 12 months salary for wrongful dismissal = 53,164 X 12 = Kshs 637,968

**TOTAL = KSH 701,322/= Less statutory deductions**

4. Certificate of service.

**Respondents will pay costs of this suit.**

**HELLEN S. WASILWA**

**JUDGE**

**15/10/2014**

**Appearances:-**

Claimants present in person

N/A respondents

CC. Wamache