



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 28 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 25th November, 2014)

MILICENT ADEDE CLAIMANT

-VERSUS-

INTERNATIONAL CHILD SUPPORT AFRICA RESPONDENTS

JUDGMENT

The claimant herein filed her memo of claim on 28.4.2011 through the firm of E. K. Owinyi & Co. Advocates. Her claim is that she was employed by the respondents at its Busia (K) office as a Project Officer on a fixed term contract of 36 months with effect from 1st January 2009 to 31st December 2011. Letter of appointment is marked **MAA-1** dated 5.12.2008. The claimant was entitled to monthly salary of Kshs 39,023/= which was subject to annual increments depending on her performance and this was subject to statutory deductions in respect of PAYE, NHIF & NSSF. It is the claimant's averment that she served the respondents faithfully and diligently and this earned her a salary rise to Kshs 42,925/= as per her Annex **MAA-2(a) & (b)**.

She avers that on 18.11.2009, she came to work as usual and was summoned to the programme officer's office and handed a termination letter dated the same day. The letter indicated that she had received a 2nd warning letter within 12 months from the time of receiving a 1st warning letter. This was termed as a gross misconduct. The claimant avers that she had not received any warning letter as alleged. She was not given copies of these alleged warning letters and she stated that she is not even aware of the alleged warning letters. On 11.1.2010 she wrote to the director asking for the alleged warning letters. She didn't receive any reply. The termination letter is marked **MAA-3a**. She later received another letter **MAA-5** which she received on 20.12.2009 and it was a letter delivered to her house and left with a girl Jane Awino. The letter had been delivered to her house on 18.12.2009 in her absence and there was no indication it was urgent. The letter however informed the claimant that her termination letter had been revoked as per her letter dated 17.11.2009. She was therefore expected to report back to work as usual before close of office for Christmas break. The letter didn't indicate when she was to report back nor why the termination had been revoked so she didn't report.

In 2010, she got another email from the Regional Director informing her that the office co-ordinator would communicate to her. He did communicate informing her that she had absconded duty as from January 2010. She had handed over duty on 15.12.2009 and new accusations were levelled against her.

She told court that she never breached terms of her contract and her contract was prematurely terminated. She wants court to order her paid the outstanding contract period plus costs of this suit. In cross examination she told court that she didn't report back to work as she didn't believe the revocation was done in good faith. She says **Exh ICS-2** was her 1st warning according to the email. She denies the

memo of 9.11.2009 (pg 15) was a 2nd warning.

The respondents filed their memo of defence on 26.5.2011 through the firm of Kowinoh & Co. Advocates. It is their contention that the claimant's contract could be terminated after giving 1 month's notice or 1 month's salary in lieu of notice. They deny that the salary of claimant was subject to annual increments depending on her performance.

It is their position that the claimant's termination was lawful, procedural and without any ill motive. On the renewal of termination, it is their position that it was a prerogative of respondents and the annex *MAA-5* was clear that the claimant report back on duty after her annual leave and as per the original contract. They also aver that the claimant never filled the required forms as shown in annexure *ICS-1*. It is their position that the claimant was given a termination letter on 20.1.2010 after she failed to turn up to work *App ICS-3*. They contend that the termination was lawful as per the contract of employment and staff rules. They also deny that the claimant was entitled to any terminal benefits but only to her pension.

It is their position that the claimant was guilty of unaccounted money and engaging services of other people without authority and this was communicated to her through a memo dated 30th October 2009. The respondents aver that the termination was lawful, warning letters were given and the procedure laid down in the Employment Act, contract of service as well as terms and regulations of staff. It is the respondent's position that after revocation of termination, the claimant should have gone back to work. They want this case dismissed.

Having considered all evidence from both parties and upon consideration of the submissions filed, the issues for consideration are as follows:-

1. **Whether there were valid reasons to dismiss the claimant on 18.11.2009.**
2. **Whether the termination was reversed.**
3. **Whether due process was followed in terminating the claimant.**
4. **If the claimant is entitled to any remedy.**

On 1st issue, the claimant was dismissed on 18.11.2009 apparently after giving her 1 month's notice. The notice stated that her services were to stand terminated on 17.12.2009 because she had 2 warning letters. The respondents have submitted that the 2 warning letters are *App ICS-2*. The 1st of the letters on *App-1* is email dated Friday September 25th 2009 at 9.06 am and it clearly states:-

“The above constitute breach of organizations policies on your part and therefore take this as a first warning.”

The 2nd letter on *App ICS-2* is a memo from the programmes office co-ordinator *POWK* dated 9th November 2009 and subject is breach of ICS policies. It is addressed to the claimant. The letter lists areas in which the claimant has been in breach of some work policies and advises that she is found culpable on the said issues which are serious and the memo was therefore forwarded to the Regional Director for appropriate disciplinary action. Nowhere in this memo it is indicated that the memo was a 2nd warning because after the memo, a notice of termination followed.

According to ICS Africa Staff Rules and Regulations Manual Article 5:-

- 1) **“When an offence is more serious, but would not constitute sufficient reason for normal termination or summary dismissal, the line manager may issue a written warning. The purpose of a written warning is to remind staff that certain behaviour cannot be tolerated – also not a little bit and once warned in writing, no more transgression can be tolerated.**
- 2) **A copy of the written warning will be kept in the confidential file of the employee for a**

period of one year.

3) A similar second offence on a related or unrelated subject within a period of twelve months will warrant a second written warning.

4) A second written warning within a period of 12 months constitutes sufficient reason for normal contract termination, unless there are overriding reason to retain the employee.”

In the case of claimant there is proof a 1st written warning and not a second one which points to the fact that there was no sufficient reason to warrant instant dismissal. S. 43 of Employment Act is clear that:-

“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.”

This termination was apparently reversed but the claimant indicated that she received the letter recalling her back to work late and so didn't report at all as she thought the decision was not genuine.

Under S.10 of Employment Act details of what constitutes an employment contract are stipulated. S. 10(5) however states that:-

“Where any matter stipulated in subsection (1) changes the employer shall, revise the contract to reflect the change and notify the employee of the change in writing.”

In the case of the claimant, it appears there was change in the contract. It was terminated and then the termination revised. This substantially altered the terms of the contract and this could only be done in consultation with the employee. Once the claimant received the termination letter, the 1st contract terminated. Recalling her was not going to cure the mistake unless a fresh contract was agreed upon even on the remainder of the contract period. This was not done and therefore the reversal of termination was non consequential and any action taken after without consultation with the claimant remains null and void.

On the 3rd issue, it is apparent that due process was not followed. The due process envisaged is that provided for under S.41 of Employment Act which states that:-

“(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 respondents cannot aver that they had a right to terminate the contract after giving 1 month's notice and without giving reasons. This offends also fair labour practices as enunciated under Article 41 of the Constitution and S. 50(1) of the Constitution on natural justice.

It is therefore this court's finding that claimant was not accorded due process and there were no

sufficient reasons to terminate her contract. The termination was therefore unfair and unlawful and I declare it so.

What remedies is the claimant entitled to? She has enumerated her claim in para 20 of the memo. I find for her as follows:-

1. 12 months salary as compensation for unlawful termination = 12 X 39,023 = Kshs 468,276/=

2. Unpaid leave allowance for 2 months = 39.023 X 2 = Kshs 78,046/=

3. 14 days leave accrued and not taken at time of termination = 14/30 X 39,023 = Kshs 18,210/=

TOTAL = KSHS 564,532/=

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4. Service pay is not payable as the claimant contributed to NSSF and pension scheme from where she should draw her dues.

5. Claimant should be issued with a certificate of service.

The respondents will meet costs of this suit.

HELLEN S. WASILWA

JUDGE

25/11/2014

Appearances:-

N/A for both parties

CC. Wamache