



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA T NAKURU
CAUSE NO. 326 OF 2013

STELLA MUKWANYAGA RECHE.....CLAIMANT

v

MASTERMIND TOBACCO KENYA LTD.....RESPONDENT

JUDGMENT

1. The issues for determination in this judgment are rather straightforward. They are, whether the summary dismissal of Stella Mukwanyaga Reche (Claimant) by the Respondent on 26 June 2006 was justified /unlawful and whether the Claimant is entitled to pay in lieu of notice, pay in lieu of 21 days outstanding leave, compensation, damages, gratuity and certificate of service.
2. The Claimant filed her written submissions on 18 November 2014, but no case law was cited therein while the Respondent filed its submissions on 26 November 2014.
3. But first is the question of applicable law.

Applicable law

4. It is not disputed that the Claimant was dismissed in 2006 during the tenure of the Employment Act, cap. 226 (repealed). The Employment Act, 2007 was not in place and therefore despite the Claimant anchoring her cause of action on it, it is not applicable.
5. The Court will consequently determine the dispute on the basis of the repealed statute and the contract of employment.

Whether dismissal was unlawful

6. The concept of unfair termination was unknown in the statutory employment framework in Kenya before the advent of the Employment Act, 2007. An employee could challenge a dismissal/termination on the ground of unlawfulness or justifiability of the reasons.
7. But, generally, an employer could dismiss an employee for a good reason, a bad reason or no reason provided damages measurable by the contractual or such reasonable period was paid. For the esoteric of language, an employer could dismiss without cause.
8. The contract of employment between the parties provided for termination by the giving of one month notice or pay in lieu of notice.
9. The Claimant was not given notice of one month or paid one month salary in lieu of notice.

10. Section 17 of the Employment Act (repealed) provided 7 grounds upon which an employer could summarily dismiss an employee. Briefly the grounds were, *absence from work without permission or lawful cause; intoxication in the workplace; improper/careless/wilful neglect to perform work; use of abusive or insulting language; failure to obey lawful/proper commands; arrest for cognizable offence and suspicion of commission of criminal offence to substantial detriment of employer.*

11. The Claimant was dismissed on ground of misappropriation of Kshs 675,777/40. The Respondent contended this was both a misconduct and criminal offence in the dismissal letter.

12. The Respondent had caused an audit to be carried out. The audit implicated the Claimant who was the Nakuru Depot Clerk. The Claimant acknowledged in writing that the money got lost while in her possession from 27 May 2006 to 31 May 2006 and committed to repay the same. The acknowledgment was witnessed.

13. The Claimant was also charged in Nakuru Criminal Case No. 1551 of 2006 with offence of stealing by servant but was acquitted under section 210 of the Criminal Procedure Code on 6 September 2012.

14. The Respondent did not call any witnesses before this Court. The testimony of the Claimant that she was forced to sign the acknowledgment was not controverted. Considering this failure and the acquittal of the Claimant in the criminal case, I find that her dismissal was unjustified and therefore unlawful.

The limitation question

15. The Respondent through its submissions urged that the cause of action herein was time barred by virtue of section 4 of the Limitation of Actions Act.

16. A perusal of the Response indicates a pleading at paragraph 6 that

The respondent states that the claim herein is bad in law and shall raise a preliminary objection at the start of the hearing or at an opportune time notice of which is hereby given.

17. Limitation should be specifically pleaded. The Respondent did not specifically plead any statute of limitation. Further the issue was not raised during or in the course of hearing.

18. Placing reliance on the Court of Appeal decision of *Achola & another v Hongo & another* (2004) 1 KLR 462, it is my considered view that the Respondent has raised the limitation question too late in the day for due consideration.

Appropriate relief

One month pay in lieu of notice

19. Pursuant to clause 2 of the confirmation letter, the Court finds the Claimant entitled to Kshs 19,890/- being one month pay in lieu of notice on basis of pay slip for May 2006 annexed to the Memorandum of Claim.

Salary upto 26 June 2006

20. The Claimant was entitled to earned wages for the days worked in June 2006. Despite her not reporting to work after 1 June 2006, she was still an employee of the Respondent until she was dismissed through letter dated 26 June 2006. She is entitled to wages up to date of dismissal.

21. Payment of wages is both a statutory and contractual entitlement not related to dismissal. The Court awards her Kshs 13,260/- as pleaded.

Pay in lieu of outstanding leave days

22. Again this was a statutory and contractual entitlement. The Respondent did not controvert this head of claim either in the pleadings or evidence. In the submissions, an admission was made for pro rata leave of Kshs 6,962/-.

23. Submissions should flow from the evidence. The Court would award the Kshs 13,923/- as pleaded.

Compensation

24. The statutory framework in place did not provide for compensation. This head of claim is declined.

Gratuity

25. Clause 4 of the contract provided for a Staff Retirement Benefits Scheme. The scheme was not a party to the Cause herein nor was an evidential or contractual basis laid for gratuity. It is declined.

Damages for unfair loss of employment

26. The Claimant did not lay a contractual or statutory basis for this relief. No authority or precedent was cited. It is declined.

Conclusion and Orders

27. The Court finds the summary dismissal of the Claimant was unjustified and unlawful and awards her and orders the Respondent to pay her

a. One month salary in lieu of Notice	Kshs 19,890/-
b. Salary upto 20 June 2006	Kshs 13,260/-
c. Outstanding leave	Kshs 13,923/-

TOTAL **Kshs 47,073/-**

28. Claimant to have costs assessed at Kshs 15,000/-

29. The heads of claim for compensation, gratuity and damages for unfair loss of employment are dismissed.

Delivered, dated and signed in Nakuru on this 11th day of December 2014.

Radido Stephen

Judge

Appearances

For Claimant Orina & Co. Advocates

For Respondent Chuma Mburu & Co. Advocates