



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1627 of 2011

MERCY W. KINYUA.....CLAIMANT

VS

WESTLIFE CONSTRUCTION COMPANY LTD.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 20th September and filed in Court on 27th September 2011, the Claimant sued the Respondent for unfair termination of employment and failure to pay terminal dues.
1. The Respondent filed its Defence on 27th October 2011 and the matter was heard on 23rd October and 10th December 2012. The Claimant and the Respondent's witness, Peterson O. Gichana gave sworn evidence. Counsel for the parties then filed written submissions.
1. At the hearing, Mr. Sang instructed by Kipsang & Mutai Advocates appeared for the Claimant while Mr. Maberera instructed by Kosgei & Masese Advocates appeared for the Respondent.

The Claimant's Case

1. The Claimant was employed by the Respondent on 7th February 2011 in the position of Finance Officer at a monthly salary of Kshs. 25,000 (employment contract is marked Appendix A) in the Claimant's documents).
1. The Claimant worked for the Respondent until 20th April 2011 when her employment was terminated (letter of termination is marked Appendix C in the Claimant's documents). At the time of her termination, the Claimant was on probation.
1. According to the Claimant, no sufficient reason was given for her termination. She further stated that prior to her termination, she was not given an opportunity to defend herself. She claimed to have had a clean employment record.
1. In her her sworn evidence, the Claimant related events leading to the Respondent's

failure to meet deadlines for submission of tender documents for which she was blamed by the Respondent.

7. Specifically, the Claimant was accused of failing to secure a Bid Bond and a Manufacturers Authorisation, both of which were essential to the Respondent's bid. The Claimant told the Court that she had played her role in this process with competence and diligence and that the delay was occasioned by other officers including the Respondent's Chief Executive Officer.

1. The Claimant prayed for an award against the Respondent for:

- a) A declaration that the Claimant's termination was unlawful
- b) One month's pay in lieu of notice.....Kshs. 25,000
- c) Prorata pay for period between 1st April and 20th April 2011.....20,000
- d) Prorata leave.....2,000
- e) 12 months' pay in compensation for unfair termination.....300,000
- f) Costs of the suit plus interest

The Respondent's Case

9. The Respondent admitted having employed the Claimant on 7th February 2011 as a Finance Officer but averred that the Claimant was summarily dismissed on 20th April 2011 for gross misconduct and incompetence. At the time of her dismissal, the Claimant was on probation.

10. The Respondent maintained that the Claimant, by failing to secure the Bid Bond and Manufacturer's Authorisation aforementioned, was in breach of Section 44(4)(c) of the Employment Act, 2007 which provides that an employee may be summarily dismissed if he/she:

“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”

11. Moreover, the Claimant breached Clause 11 of her contract of service which required her to perform her duties with integrity, diligence and efficiency. The Respondent therefore invoked Clause 12 which provided for summary dismissal for disciplinary reasons.

12. In his sworn evidence the Respondent's witness, Peterson O. Gichana, the Chief Executive Officer (RW1) told the Court that the Claimant's overall performance was poor. With specific reference to the Manufacturer's Authorisation, the witness testified that all the Claimant was required to do was to print a pre-signed letter, which she failed to do. The Bid Bond was a standard form which the Claimant was expected to pick from the Bank for presentation to RW 1 for signature, which she also failed to do.

Findings and Determination

19. The first issue for determination in this case is whether the termination of the Claimant's employment by way of summary dismissal was undertaken within the law.

20. Section 44 of the Employment Act provides for summary dismissal under certain circumstances. The procedure to be followed in handling such cases, which incorporates the employee's right to be heard is set out in Section 41 of the Act 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 reason 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 the 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 subsection (1) make

21.However, Section 42(1) provides that:

(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

22. It is not in dispute that the Claimant was on probation when she was dismissed. The termination of her contract was therefore expressly excluded from the requirements of Section 41 of the Act. Consequently, the Claimant's claim for unfair termination on the ground that she was not heard fails.

23.Nevertheless and in spite of the provisions of Section 42(1) of the Act, I find that the Claimant did not have the opportunity to mitigate her case before the Respondent prior to her dismissal. I therefore convert her dismissal to a normal termination and award her one month's pay in lieu of notice in accordance with Clause 5 of her contract of service.

24.Since the Claimant had worked for at least two months by the time of her termination, she is entitled to prorata leave at the rate of 1.75 days leave in respect of each completed month of service as provided under Section 28(b) of the Employment Act.

25.I also award the Claimant prorata pay for period between 1st April and 20th April 2011.

26.The net effect of this award is as follows:

- a) 1 month's salary in lieu of notice
- b) 3.5 days' pay in lieu of leave
- c) Prorata pay for period between 1st April and 20th April 2011

25. I award the costs of this case to the Claimant.

DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF FEBRUARY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**