



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1020 of 2012

RUTH MIDEVACLAIMANT

VERSUS

RUPIA LIMITEDRESPONDENT

JUDGEMENT

1. This is a claim dated 14th June 2012 for unlawful and unfair termination of the Claimant and refusal to pay terminal dues. A response was filed dated 17th July 2012 admitting that the Claimant had been their employee but was terminated after due process was followed. Parties proceeded for hearing and witnesses called and written submissions filed.

2. It is the Claimant's case that in June 2006 she was employed by the Respondent as a Branch Clerk and was confirmed for the job on 1st February 2007 on a salary of Kshs.11, 950.00 per month and a house allowance of Kshs.1, 500.00. She was promoted through the ranks her last position being Credit Officer III at a gross salary of kshs.18, 000.00. However on 31st January 2012 her employment was terminated contrary to the principles of natural justice. That in 2010 she went for maternity leave of three months which was approved but one month into her maternity leave, she was recalled but was never paid. She has made demands for her dues but the respondent has remained adamant and not paid and now seeks:

1. *3 months notice pay at Kshs.54,000.00*
2. *Two months maternity leave pay at kshs.36,000.00*
3. *Prorate leave at kshs.9.000.00*
4. *Refund for salary for 5 months at kshs.15,000.00*
5. *Relocation allowance from Nandi to Kaka mega at kshs.11,950.00*
6. *Gratuity at 15 days pay for 5 years worked at Kshs.51,923.00*
7. *12 month gross salary compensation for loss of employment at Kshs216,000.00*

All amounting to kshs.393, 873.00

3. The claim is based not eh grounds that there were no basis for her termination and no valid reasons existed for the respondent action.

4. In evidence the Claimant submitted that the Respondent is a company carrying out business as a micro credit facility dealing with banking services and where she started as a casual and later as full staff but on 31st January 2012 she was terminated on the reasons that she was not attending to her duties and when she did she was irregular and also not responding to memos from her superiors. She was also accused of lying that she was sick but she had given her medical records having attended the group medical facility. On the ground of issuing irregular records she stated that she gave her explanations on how banking was done and there were records for the same. On the ground of her refusal to respond to memos she refused to respond as she termed her accusations false and nobody listened to her views. That while she was still employed, no complaint had been lodged from the groups she used to work with and was surprised to read the Defence and note that these complaints came after her termination.

5. That in 2011 she was not allowed to go on leave and she was not paid. She got part payment of Kshs.5000.00 but the balance was not paid. She had gone on maternity leave together with annual leave as she had a premature delivery but was recalled after three (3) weeks and now seek to be refunded for her leave not completed. That she used to earn kshs.18, 000.00 but this was later reduced to kshs.13, 000.00 for no reason at all yet she had been promoted and issued with a letter.

6. The Claimant further stated that she was moved from one station to the other but her relocation allowance that was due was never paid and seek her relocation allowance from Nandi to Kaka mega. She was not on any pension scheme and seeks gratuity pay for the 6 years with respondent and since her termination was without notice it was thus unfair, she was inconvenienced and thus seeks compensation.

7. In cross-examination the Claimant confirmed that she was terminated without notice but she had received three memos with the first one being based on false allegations about disclosing information and the 2nd being failure to attend to her duties and the third being failure to respond to memos. That all these memos related to her performance at work but she never held a meeting to discuss her performance as all communications was through writing. That on 17th December 2011 she wrote to the Director explaining why she had not responded to memos from the Operations Director since the Director was the most senior officer and thus she did not follow the chain of command. That the Branch Manager was her supervisor and Claimant confirmed that under the Respondent policy, failure to respond to memos from a supervisor was insubordination of that office.

8. That in all the memos received by the Claimant addressed her poor work performance especially irregular records but insisted that she had given her explanations over this issue and she could not admit false allegations.

9. That in 2010 she went on her annual leave but before reporting back she had a pre-mature delivery. That her Annual leave commenced on 1st March 2010 and was to end on 29th March 2010 but she delivered her child on 22nd March 2010 before her annual leave was over and was thus forced to seek her maternity leave this being her 7th month of pregnancy. That under company policy, maternity leave was to be applied two months in advance but her delivery was premature in the 7th month instead of the 9th month. Leave was granted but recalled back to duty after one month.

10. She further stated that she was earning Kshs.18, 000.00 per month all deposited to her account but upon checking she realised she had only been paid Kshs.13, 000.00. That in transfers, the company procedure was silent, she was verbally told to move from Nandi to Kakamega and did not claim relocation allowance until this case arose.

11. The Respondent on the other hand stated that they are a micro credit facility and a full member of Association of Micro Finance Institutions (AMFI) and not a banking facility. That since their employment of the Claimant which was confirmed on 1st February 2007, her performance was poor and by July 2007 she was given a 1st warning and still continued to be erratic in her work. That she falsified her records by making alterations to cover up her below par performance and used these falsified records for promotion only for the respondent to discover these falsifications later and a warning letter was issued and when she failed to respond or change, a decision was taken to terminate her employment in January 2010. That the Claimant wrote back to the respondent on 12th January 2012 admitting her mistakes which caused the

respondent to pardon her and give her a last chance.

12. The Respondent further submitted that according to company policy, when meeting member groups a staff member in making any alterations to any records was required to have a member of the group counter-sign confirming the changes. That these being records relating to finances and micro credits, any changes without confirmation was likely to cause great loss and damage to the business of the respondent. That one group under the management of the Claimant reported fraudulent activities by the Claimant leading to her dismissal. That one such fraudulent activity involved Kshs.23, 730.00 belonging to Unity Self Help Group that was on 18th November 2011 handed to Josia Okwomi from another group called Khwaumia Self help Group. That a memo relating to these fraudulent activities was written to the Claimant dated 19th November 2011.

13. That due to poor performance the Claimant was demoted to a lower grade, a decision she appealed against but was not successful. That at the time of termination, the Claimant was earning Kshs.15, 000.00 and not Kshs.18, 000.00 as claimed.

14. That the Claimant never applied for maternity leave and did not follow the company policy that of informing management that she was pregnant or apply for maternity leave two months in advance and hence her recall was proper in the circumstances as she had not reported back to work from her annual leave. That the Claimant was therefore summarily dismissed and not entitled to terminal dues or compensation for unlawful termination as due process was followed.

15. In evidence the Respondent called Mildred Shimula Wafula as their witness and confirmed that she was the Operations Manager of the Respondent having joined them in 2007 and had duties to supervise the branch operations, supervise junior staff and their duties and thus knew the Claimant very well. That having worked with the Claimant as the areas regional manager, as a clerk, her duties entailed to see the correctness of all records, groups management, office management and any other duties assigned to her and her immediate supervisor was the Branch Manager but all staff were answerable to her.

16. She further stated that the termination of the Claimant was with reasons as on several occasions reports of poor performance were communicated to her and warnings issued. In July 2007 a 1st warning was issued and several memos given and she was given time to address the issues raised which she admitted and apologized and was pardoned. That the main issue against the Claimant was her failure to attend to groups assigned to her and this was a loss to the respondent as being a credit institution with loan facilities to micro entrepreneurs, weekly meetings are important as their payments are based on them. Hence failure to meet the groups meant the loans and groups transactions were not monitored well. That when these issues were raised to the Claimant, she was rude as she did not want any issues raised against her. That there were complaints from the head office as from the group's records, several meetings were not held or the Claimant was at these meetings and was all behind schedule. That this was against respondent policy and the Claimant was aware but decided not to comply with the detriment of respondent business.

17. That further to failure to attend group meetings, the Claimant made alterations to the groups records consequently causing cancellations. That when such cancellations happened the group members were required to countersign which was not done and the Claimant admitted to this mistake. As the responsible person, the witness wrote to the Claimant but refused to respond on the basis that the group allegations were not true. Hence the Director wrote to her and she responded on 12th January 2012 admitting the allegations and sought to be pardoned.

18. The witness further stated that the Claimant was of the habit of not responding to memos and on 28th October 2011 a memo was written about concerns coming from groups reported on 2nd October but she did not give a response. Similarly the same groups raised concerns and another memo of 12th January and 13th January were issued. That the behavior of the claimant could cause the respondent to lose trust with the groups credits and hence loss of business. She did not respond or change her performance and hence a disciplinary action had to be taken.

19. That the respondent promoted the claimant on falsified documents and records and were not aware of the extent of the falsification since the Claimant was the one responsible for her groups and it took time to know since she was in charge and upon review by her supervisor the alterations, cancellations were discovered. She was then placed in a rank she was supposed to have been as her performance was erratic which had been noted into her letter of promotion.

20. The witness disputed the claim for 3 months notice pay as their policy was where notice was required before termination only one month pay was due but since the claimant termination was summary, then she was not eligible for notice or payment in lieu. Also no application was submitted for maternity leave and as the Operations Manager, the record was for annual leave and the respondent had not notice of the maternity need. That she was not aware of the pregnancy or the fact that the Claimant was due to deliver and in any event there was company procedure to be followed in such a case.

21. On the claim for relocation, the witness noted that the Claimant was at the station where she was needed and if there was any relocation the human resource policy indicated what was required as the staff member has to follow up with a written communication on a transfer and the expenses incurred for the work of the company for a refund. And noting the performance of the Claimant, failing to attend to her groups and absenteeism and her actions putting the respondent into disrepute, the summary dismissal was the sanction given.

22. That the Claimant was paid all her dues and contributions to HSSF and NHIF remitted.

23. In cross examination the witness confirmed that the claimant was terminated on 31st January 2012. That everything was done in writing and there was no physical meeting. The respondent had written to her requesting her to make a substantive response to the issues raised which she failed to do. She was therefore terminated. No notice was given due to the nature of work the respondent does as notice is not required. She confirmed that in the letter of appointment, one month notice was required before termination. That under the human resource policy, a warning letter serves for one year but may be put into consideration for future issues arising. That the Claimant admitted her mistakes and apologized and was pardoned. At the point of termination her salary was Kshs.15, 000.00. That when she went on annual leave she did not report back and after a week she was called and only then did she report about her delivery. There was no record of application for maternity leave. She had no balance of annual leave and she had 21 days per year which she had taken and exceeded. That the climate was very rude to the witness and was warned of this behavior.

24. It was not in dispute that the Claimant employment with the respondent ended on 31st January 2012. But the circumstances and reasons for this were in dispute as well as the terminal dues owing at this time.

Was the Claimant terminated from her employment or was this summary dismissal? If so terminated, was it unfair?

Was she paid her dues as owing at the time of dismissal?

25. Section 44 of the Employment Act summary dismissal is clear in that, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. Summary dismissal is lawful only where the criteria prescribed under the Section is followed. Under Subsection 44 (3), summary dismissal is justifiable only where,

The employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

26. Such conduct on the part of the employee is referred to as 'gross misconduct' under subsection 44(4) of the Act. Therefore, where there are grounds or a ground for summary dismissal and the same is justifiable or lawful, then the employer is not culpable for breach of any law and is free from liability; and in such instances Section 41 of the Act prescribing notification of alleged misconduct and hearing before

termination shall not apply. However, where the circumstances are such that the grounds for removal are of the nature that they did not amount to gross misconduct, then Section 41 come into play where the employee is entitled to dispute and challenge such dismissal and the same subjected to the test in Section 41.

27. The power to summary dismissal must be exercised an employer but only in the clearest of cases where there is an obvious breach due to gross misconduct. To avoid the strict interpretation of the law, an employer should seek to exploit Section 41 provisions before issuing that 'termination letter/notice' or that 'summary dismissal' letter to any employee. This is important as due process through notification and hearing as provided for in Section 41 of the Act is not a matter for negotiation. It is the right thing to do.

28. I note the Respondent wrote tot eh Claimant on 31 January 2012 in a letter referenced as '*Termination of employment*' where three (3) ground of the termination were extensively addressed. This covered to:

- a. Non-attendance of group meetings due to sick leave;
- b. Irregular records for the groups; and
- c. Non-response to memo dated 17/12/2011.

29. This letter of termination followed precious communication referenced therein dared 17th.12.2011 and the Claimants response dated 12.1.2012.

30. The letter ends with the following:

I take this opportunity to that you for the services you have rendered to our company and wish you luck in your endeavours.

31. I have scanned through the letter but the same does not seem to show details as to when the termination was to take effect. Whether on the same date of issue or on another date. What seems to have been inferred based on the evidence before me was that this was the dated [31st January 2012] taken to have been the last date of employment by both parties.

32. However in evidence the Claimant was emphatic on several occasions in her evidence that she was unlawfully an unfairly terminated from her employment. The respondent witness on the other hand insisted that this was a case for summary dismissal noting the accusations facing the Claimant and therefore no notice were needed or payment in lieu of notice.

33. I agree with the claimant's submissions guided by the letter issued to her by the Respondent that this was indeed '*termination of employment*' as any ambiguity on the part of the respondent on the letter they issued to her on 31st January 2012 and the evidence of their witness do not convince this Court that their intentions were to have summary dismissal.

34. As such, the finding that this was a termination and not summary dismissal, as outlined under Section 44 of the Act Section 41 of the Employment Act provides for notification and hearing before termination on grounds of misconduct, non-performance and other malpractice. The Section requires the employer to inform the employee the reason for which the employer is considering termination on account of misconduct, poor performance or physical incapacity. The employee is entitled to be so informed in a language that he or she understands and before the termination of the employment or summary dismissal the employer shall hear and consider any representations by the employee in view of the misconduct or poor performance.

35. In this case, several memos were issued to the Claimant she responded to some and totally ignored others particularly those coming from her supervisor. Some responses were for admitting the issues raised and seeking pardon where the was 'forgiven' and given the last chance to change. I find that these back

and forth communication only escalated the situation to event of 31st January 2012, that of termination. In this case, the Respondent officers having noted the poor performance of the respondent should have done more instead of just seating back to write one memo after the next yet there seemed to be no changes in the Claimant's situation. Modalities should have been put in place since the 'pardon' given in 2007 to ensure that there was a structure in place to facilitate the Claimant in changing. This yardstick would have helped into eh reviews of her work to ensure that she was Respondent in the circumstances was pitying the claimant for failure which she did and the only option was to terminate her employment, but the same was not done as outlined by the law.

36. Under Section 45 (4) (b) a termination of employment is unfair if it is found out that in all the circumstances of the case, the employee did not act in accordance with justice and equity in terminating the employment of the employee. In the termination herein, no notice was given and despite the response given by the Claimant in her letter dated 12th January 2012, she was owed this one simple process.

37. I must however note, Employees should not assume that since their employer is paying for their medical facilities they will know that they have been admitted to hospital and the condition or reason for their admission. By prying into these details it would be tantamount to invasion of their privacy which would be a fundamental breach of their constitutional rights outlawed in Kenya and other progressive nations.

38. Therefore, whatever the circumstance and the need for medical attention, the duty rests on an employee to let their employer know of their condition at their earliest opportunity and to ensure that the necessary approvals/permission or consent is granted once such an eventuality arises. The fact that the Claimant had a premature birth is a condition that should have been brought to the knowledge of the respondent immediately and I find the Claimant was not prudent in this respect at all. Her assumption that it was common knowledge for all to know about her delivery is wrong as this had no basis at all. She should have regularised her maternity leave application as soon as she was out of delivery or once she was summoned back to work and knew she could not due to her delivery and needed her maternity leave. By the fact that she immediately reported to work once she was called upon to be an indication that she was willing to work in her circumstances and her non-disclosure of this fact to the respondent should not be visited on her employer. The duty rested on her.

39. In evidence, the Claimant also failed to submit any document to the effect that she indeed had premature delivery to convince the Court that indeed she needed this leave or claim for pay in the event this was denied to her. She should have gone a step further to confirm this claim which she failed to do.

40. I also noted the attitude of the Claimant to her supervisor wanted, she preferred to report directly to her Director instead of her immediate supervisor and thus chose to ignore memos emanating from the Operations Manager. I must state here that any employee who ignores lawful instructions from her supervisor is doing so to her detriment as this officer is part of the management structures established by her employer to ease operations. That failure is also contrary to the law and this Court will not see any such employee making such failure in good light. This is a confirmation that by failure to take lawful instructions this same employee is not willing to abide by lawful court orders. That should be avoided at all costs.

41. The salary payable was contentious. The respondent letter of promotion to the Claimant dated 9th May 2011 is worth mention. This was a letter issued to the Claimant based on noted '*...improvements in your performance during the period under review.*' This is what the respondent told the Claimant. There is no letter submitted in evidence that this was changed. This is what due diligence entails for any employer who is in charge of their business. There is no counter-claim that the letter was issued through fraud or a forgery and that this Court should find in the respondents favour. This Court will take this letter as confirming the new salary applicable to the Claimant as at the time of termination.

42. In the circumstances of this case, the claim for 3 months pay in lieu of notice is reduced to one month pay in lieu of notice noting that the termination was based on provisions of Section 44 of the Employment Act. I will therefore grant a sum equivalent to one month pay in lieu of notice.

43. For the reasons above advanced, the claim for two months pay due for maternity leave is hereby declined. For an employee to enjoy such leave she must give not less than seven days notice in advance or a shorter period as may be reasonable in the circumstances of her intention to proceed on maternity leave on a specific date and to return to work thereafter. This notice must be in writing and if the employer so requests produce a certificate of her medical condition from a qualified medical practitioner or midwife. The claimant failed to give notice and even where notice was not reasonably possible to be given, she did not produce a certificate of her medical condition from a qualified medical practitioner or midwife.

44. The prora leave claimed was not proved in evidence or in submissions. I decline this claim. In any event, the claim for maternity leave was closely tied to the annual leave where the claimant indicated that she was already on her annual leave when she had pre-mature labour and therefore extended her annual leave but was recalled back on duty one week later. A party who claims must prove their case. This did not stand out as such a case here. With due regard to provisions of Section 74 as cited by the Claimant in submissions, the duty rested on her to outline how her annual leave was due and not paid or was not taken at all.

45. There was a claim for refund for 5 months. This aspect was not addressed at all in evidence or in the submissions of the parties. I was not sure why the Claimant put this claim forward at all. I will therefore not confirm this claim.

46. The claim for relocation allowance was a mere averment that was not proved. I will not grant this prayer.

47. The claim for gratuity is due where an employee's does not benefit from any a registered pension or provident fund scheme under the Retirement Benefits Act; and no payments to NSSF or NHIF have been remitted. Despite the Respondent stating that they issued payslips and deposited money to the Claimant's account, no payslip was attached or given in evidence to indicate how the sum of Kshs. 13,901.00 was broken down. This itemised statement must comply with Section 20 of the Employment Act. The duty to issue this statement rests with the Respondent and in the absence of this legal requirement, this Court must find for the Claimant and grant as prayed.

Based on the reasons above, this Court grants judgment for the Claimant in the following terms:

- a. Declaration that the Claimant's termination was unfair**
- b. This Court grants compensation of 3 months pay for unfair termination amounting to Kshs. 54,000.00**
- c. One month pay in lieu of notice amounting to Kshs.18,000.00**
- Total due all amounting to Kshs.72, 000.00**
- d. Costs of the suit.**

These are the orders of this Court.

Delivered in open court at Nairobi this 25th day of March, 2013.

Monica Mbaru
JUDGE

In the presence of
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Court clerk