



**REPUBLIC OF KENYA**

**Industrial Court at Nairobi**

**Cause 134 of 2012**

**MARY KEMUNTO.....CLAIMANT**

**v**

**4 KENIA TRUST REGISTERED TRUSTEES.....RESPONDENT**

**JUDGMENT**

1. Mary Kemunto (Claimant) filed a Statement of Claim on 8 June 2012 against 4 Kenia Registered Trustees (Respondent) seeking a declaration that her *dismissal was wrongful and unlawful; payment in lieu of Notice (2 months); service pay for period worked; compensation for leave for 5 year; overtime uncompensated between 2007 and 2012; 12 months compensation for wrongful and unlawful termination; certificate of service and costs.*

2. The Respondent filed a Statement of Defence on 12 July 2012 and after several Court appearances, I heard the parties on 7 February 2013 and 2 May 2013.

**The evidence**

3. The Claimant was employed by the Respondent initially in 2007 as a homeopathic tutor on a one year commission contract. The contract was governed in accordance with the law of the Netherlands. The Respondent renewed the Claimant's contract on expiry and a new commission contract was entered into for another one year to terminate on 16 April 2009. At the end of the second contract, the Claimant entered into a new commission contract in which the Claimant was designated as Principal. This third contract was to terminate on 15 April 2010.

4. Sometime in 2010, the parties entered into a further contract. According to the Claimant the Respondent offered her an indefinite contract as a Principal through letter dated 1 February 2010 but effective 16 April 2009 (Claimant's *Appendix MKN-4*). According to this letter the Claimant was to get a salary of Kshs 37,000/- per month.

5. According to the Respondent, it offered the Claimant the position as a Principal through letter dated 1 February 2009 effective 16 April 2009 (Respondent's *Appendix MM 1*). The Claimant's salary was set at Kshs 37,000/- per month. The Respondent strenuously denied knowledge and authenticity of the letter dated 1 February 2010 (Claimant's *Appendix MKN-4*)

6. Through a letter dated 24 November 2011, the Claimant's salary was increased to Kshs 50,000/- per month.

7. On or around 12 March 2012, the Respondent terminated the employment of the Claimant through a letter of even date with immediate effect. The letter had a tabulation of the terminal dues of the Claimant which included *one month salary in lieu of Notice, wages for days worked in March 2012 and pending*

*holidays between 2009 to 2012*, all totaling Kshs 143,820/-. It is this termination with immediate effect which the Claimant challenges.

8. The Claimant challenges the termination with immediate effect on three main grounds. One that the Respondent did not give her notice, second, that she was not given a hearing and third, that no reasons at all were given for the termination. The termination, the Claimant stated was against the provisions of the Employment Act. Section 41 thereto was mentioned in the Statement of Claim.

9. For the Respondent, a warning letter dated 31 October 2008 and a response dated 1 November 2008 were produced (Respondent's *Appendices MM-2 and MM-3* respectively) and reference was made to several verbal warnings, a meeting held on 14 February 2012 and a board meeting of 7 March 2012 to justify the dismissal of the Claimant (minutes were produced as Respondent's *Appendices MM-4 and MM-5*).

10.Regarding appropriate relief, the Respondent produced a copy of its certificate of registration from the National Social Security Fund notifying it that it was registered with effect from 1 February 2010. Official receipts acknowledging contributions to the NSSF were also produced.

11.The Claimant filed her submissions on 21 May 2013 (after the lapse of the period I had directed) while the Respondent's submissions were filed on 30 May 2013(one day before this judgment).I have never the less considered the submissions.

## **The Law**

12.The relevant provisions of law when there is a challenge to termination of employment are mainly sections 41, 43, 44 and 45 of the Employment Act. I have on previous occasions had the opportunity to discuss the significance and implication of these sections. Section 41 of the Act makes provision for a statutory right to a hearing before dismissal or what is called in employment law parlance as procedural fairness. Sections 43 and 45 of the Act on the other hand deal with substantive fairness, in that an employer is under an obligation to prove the reasons for dismissal and that the reasons are valid and fair. Section 44 deals with summary dismissal.

## **Analysis**

### ***Procedural fairness-section 41 of the Employment Act***

13.It is not in dispute that the Respondent terminated the services of the Claimant with immediate effect. This is what is called summary dismissal which is provided for in section 44 of the Employment Act. The Respondent therefore had to show that it complied with section 41 of the Act when it was considering terminating the Claimant.

14.In the recent past I have addressed the implication or significance of section 41 of the Employment Act in Mombasa Industrial Court, Cause No. 146 of 2012, *Alphonse M Mwachanya v Operation 680 Ltd* thus

In my considered view in order for an employer to meet the legal requirements of procedural fairness section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following:

- (i) Explained to the employee in a language the employee understood the reasons why it was considering the termination.
- (ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.
- (iii) Heard and considered any explanations by employee or his representative.

(iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and complied with its own internal disciplinary rules.

15.The first question I have to grapple with is whether in terminating the services of the Claimant, the Respondent has demonstrated that it was in compliance with the provisions of sections 41 of the Employment Act.

16.It is also not disputed that the Respondent issued a warning/show cause letter to the Claimant on 31 October 2008. The letter set out several reasons why the Respondent was contemplating taking disciplinary action against the Claimant. The Claimant responded in writing on 1 November 2008. There was no further communication from the Respondent as to whether it was satisfied with the response/explanations tendered by the Claimant.

17.To my mind, the matter rested there and the Respondent cannot reopen the same in 2012 as the basis for terminating the services of the Claimant. I do not see or find any causal connection between the warning letter of 31 October 2008 and the dismissal of the Claimant in 2012.

18.The Respondent also relied on the minutes of a meeting with the Claimant on 14 February 2012 (Respondent's *Appendix MM-4*) to show its compliance with the statute. These minutes cannot by the stretch of any imagination be taken to have been part of the process contemplated under section 41 of the Employment Act. The minutes only show the Claimant's responsibilities as were discussed between the Claimant and the Respondent.

19.As far as the minutes of the Respondent's Board held on 7 March 2012 are material, it is clear that the Claimant was not in attendance at the Board meeting, though the issue of her dismissal was on the agenda. The minutes simply made reference to meeting held in March 2011, refusal by Claimant to sign her contract in November 2011 and her demands for increase in salary.

20.It was incumbent upon the Respondent to confront the Claimant with the reasons/grounds upon which it was contemplating dismissing her, hear her explanations and in the presence of another employee of her choice if she so desired. This was not done.

21.In my view the Respondent did not demonstrate that it had complied with the procedural requirements of section 41 of the Employment Act and therefore the only conclusion I can reach is that the immediate termination of the Claimant was procedurally unfair.

22.Because of the conclusion I have reached, I believe it is not necessary for me to discuss whether the reasons which were proffered by the Respondent to summarily dismiss the Claimant fit in within the grounds for summary dismissal as set out in section 44 of the Employment Act; whether the Respondent has proved the reasons as required by section 43 of the Act or that the reasons were valid and fair as required by section 45 of the Employment Act.

23.It is also not necessary for me to discuss as to which of the two letters of appointment as Principal was genuine. Such an exercise would not affect the essential elements of the relationship which existed between the parties and the issue of dismissal.

### **Appropriate relief** ***Payment in lieu of Notice***

24.The appointment letter dated 1 February 2009, which is relied on by the Respondent provided for termination forthwith with notice at clause 11.The version relied on by the Claimant and dated 1 February 2010 did not have page 3 attached and I cannot speculate on what provision for termination it had.

25.It is not disputed that the Claimant was paid a monthly salary. The said salary was increased to Kshs 50,000/- with effect from November 2011. Section 35(1)(c) of the Employment Act is clear that a contract wherein wages are paid periodically at intervals of or exceeding one month is terminable by



TOTAL

**Kshs 174,000/-**

35.The Claim for service pay is dismissed.

36.The Claim for overtime is declined.

37.Each party to bear its own costs.

**Delivered, dated and signed in open Court in Mombasa on this 31<sup>st</sup> day of May 2013.**

**Justice Radido Stephen**

**Judge**

**Appearances**

Ms. Kingi instructed by Kithi & Co.

Advocates for Claimant

Ms. Mbatia instructed by L.N. Mbatia &

Co. Advocates for Respondent