



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 812 of 2012

HELLEN NECHESA.....CLAIMANT

VS

KAMONGO WASTE PAPER LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 2nd May and filed in Court on 11th May 2012, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Reply on 16th August 2012 and the matter was heard on 22nd January 2013 with Mr. Kwengu instructed by Kwengu & Company Advocates appearing for the Claimant and Ms Leila Letif instructed by Rachier & Amollo Advocates appearing for the Respondent. The Claimant testified on her own behalf and Peter Ochieng' Jabuya testified for the Respondent. The Claimant filed written submissions.

The Claimant's Case

2. According to the Claimant, she was employed by the Respondent in November 1997 and worked as such until 25th July 2011 when her employment was terminated. At the time of her termination, the Claimant was earning a monthly salary of Kshs. 8,500. She was paid Kshs. 17,770 in terminal dues.

3. It was the Claimant's case that her termination was wrongful and malicious. Prior to her termination, she was not given an opportunity to be heard. The Claimant claimed to have had a clean employment record.

4. The Claimant claimed the following:

- a) Leave for 10 years.....Kshs. 85,000
- b) Outstanding salary.....8,500
- c) Notice pay.....8,500
- d) Compensation for unfair termination.....102,000

- e) Severance pay.....63,466
- f) Costs and interest
- g) Any other relief the Court may deem just to grant

The Respondent's Case

5. In its Memorandum of Reply, the Respondent denied that the Claimant was its employee from 1997 as stated in the Memorandum of Claim. Rather, the effective date of the Claimant's employment was 2008.

6. It was the Respondent's case that the Claimant was summarily dismissed on 25th July 2011 for theft of confidential documents belonging to the Respondent which had come into the possession of the Claimant by virtue of her employment. Jabuya testified that the offence committed by the Claimant was very serious.

7. Prior to her dismissal, the Claimant was given adequate opportunity to be heard and the Claimant in fact admitted having stolen the said documents. Jabuya told the Court that he personally told the Claimant that her employment would be terminated. The Claimant was issued with a letter of summary dismissal which she refused to sign. She however received her terminal benefits.

8. Having been summarily dismissed, the Claimant was not entitled to notice or pay in lieu thereof. Upon termination, the Claimant was paid all her terminal dues including service pay from June 2008 to July 2011 and full salary for July 2011. The Respondent denied owing the Claimant any payment in lieu of leave since the Claimant had taken or was compensated for all her leave.

Findings and Determination

9. The major issue for determination in this case is whether the termination of the Claimant's employment by way of summary dismissal was lawful.

10. Section 43(1) of the Employment Act, 2007 provides that:

(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.

11. According to the Respondent, the Claimant was summarily dismissed for stealing confidential documents belonging to the Respondent. Apart from the word of Peter Ochieng' Jabuya there was no further evidence to prove the allegation against the Claimant. There was also no evidence that the Claimant was given an opportunity to defend herself against the accusation. In the eyes of the Respondent the allegation against the Claimant was so serious that it warranted summary dismissal without notice. Yet, the Respondent did not find it necessary to give the Claimant adequate opportunity to defend herself. While the law allows an employer to summarily dismiss an employee for good cause, the employer seeking to do so must follow due process.

12. Section 41 of the Employment Act sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity 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.

13. This process covers cases of gross misconduct under Section 44 of the Act. There is no such a thing as summary disciplinary procedure even in cases of gross misconduct. In fact the only difference between cases of summary dismissal and other forms of termination is that in proper cases of summary dismissal the employer is not required to give notice. However in reaching the decision to summarily dismiss an employee, the employer must follow the procedure set out in Section 41 of the Act.

14. The right to be heard is unassailable in all cases of misconduct, including gross misconduct. In the case of **Patrick Mwangi Gatimu Vs Chandarana Supermarket Limited (Industrial Court Cause No 814 of 2011)** this Court stated that:

“The litmus test is whether an employee facing disciplinary action has been given adequate opportunity to respond to charges leveled against them before action is taken.”

15. The Respondent failed to show compliance with the law in this respect and I therefore find the termination of the Claimant's employment by way of summary dismissal unfair within the meaning of Section 45 of the Employment Act. I therefore award her the equivalent of 6 months' salary in compensation. I also award her one month's salary in lieu of notice.

16. With regard to the claim for leave, the Respondent produced a leave form dated 4th June 2011 indicating that the Claimant had taken her leave for the year 2011. In reaching its decision, the Court rejected the Claimant's evidence that she had not signed this document. The claim for leave therefore fails and is dismissed.

17. The Respondent produced a salary voucher for the month of July 2011 in favour of the Claimant. The claim for outstanding salary therefore also fails and is dismissed. Severance pay which is applicable in cases of redundancy under Section 40 of the Employment Act is inapplicable in this case.

18. The final effect of this Award is as follows:

- (a) 6 months' salary in compensation for unfair termination.....Kshs. 51,000
- (b) One month's salary in lieu of notice.....8,500

Total.....59,500

The Respondent will pay the costs of this case.

Orders accordingly.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF MAY
2013**

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....*Respondent*