



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 27 OF 2013

AGNES WAKIO MWACHOFI .....CLAIMANT

VERSUS

TRANSOCEANIC PROJECT

DEVELOPMENT [K] LTD .....RESPONDENT

### **J U D G M E N T**

The claimant was employed by the respondent on 5/1/2009 and worked continuously until 16/11/2011 when her services were terminated by the respondent without notice. Her job title was Receptionist and her salary as at the time of termination was ksh.42,000/- per month. She prays for terminal dues plus damages for unfair termination.

The respondent admits the employment relations in her response but denies that the termination was unfair. In addition the respondent avers that she has at all material times been willing to pay to the claimant ksh.121,353. The case was heard on 6/6/2013 and 11/6/2013 when the claimant testified as CW1 and Marshan Ouma Wandera testified for the respondent as RW1. The claimant confirmed by a letter dated 5/1/2009 that she was employed on the same day by the respondent.

That she served well until October 2011 when she went on leave. That when she resumed duty on 16/11/2011 the respondent's Operations Manager Mr. Hector Martinez gave her a letter without letterhead dismissing her from employment. That she rejected the same and left.

According to her, the said Manager had been harassing her as woman demanding that she visits him in his home and when she declined he started to threaten her with difficult working conditions. That one way of such threats was an intended transfer to Nairobi within a short notice and which was revoked by the Managing Director of the respondent.

She declined any accusation of poor performance or misconduct as alluded to by the respondent and in particular she denied ever being served with any verbal warning by the respondent. She also denied ever declining to go on transfer as alluded to by the respondent. She prayed for the relief sought in her claim and maintained that her termination was unlawful and in breach of the contract.

On cross examination the claimant maintained that she was qualified for the job of Receptionist when she applied for it. She also admitted that her service was subject to transfer to other stations. That her duties included receiving letters. That her transfer letter had an error of the reporting date and she sought correction which was never done before it was revoked by the Managing Director.

She denied going to Shimanzi station without transfer instructions. She denied receiving warning letter dated 13/9/2011. That she saw it after her lawyer was served with defence. She however admitted to have had issue relating with the RW1 and the Operations Manager but not the other colleagues.

RW1 was the respondent HR Manager. He admitted that the claimant was employed by the respondent as a receptionist. That her relationship with other staff members was not good and in particular himself. That a former General Manager had wanted the claimant to be the HR manager and she had infact taken over much of his duties before the MD intervened.

That as the HR Manager he gave her verbal warning followed by a written one dated 13/9/2011 after she refused to go on transfer to Nairobi. That she had wanted to to to Juba instead but was not granted because she was newly trained in clearing and forwarding.

That the Operations Manager transferred her to Nairobi but instead she moved to Shimanzi Warehouse to work from there. She said that only the Managing Director could transfer but the Managing Director never revoked the transfer. The MD only wrote an e-mail directing staff not to deal with him on personal matters.

RW1 admitted that the email request for extension of time for commencing transfer was never respondent to. He also admitted that the MD was the final authority on transfer if he revoked it. He concluded by saying that the operations manager was the authority to terminate employment.

On cross examination he admitted that there was delay in serving the transfer letters to the claimant because they were waiting for permission from the MD. He also confirmed that by her email produced as Exhibit 4(a), the claimant did not refuse the transfer but only requested for more time to relocate. He further admitted that the request was reasonable but not responded to. He also admitted that the said email requested for the transfer allowance but the same was never paid to the claimant. He further confirmed that the lady who was to swerve position with the claimant from Nairobi resigned before the transfer was completed.

He also confirmed that the claimant went for leave on 19/10/2011 with the approval of the Operations Manager even after the alleged refusal to go on transfer and the warning letter.

I have carefully perused through the pleadings and considered the evidence adduced by the parties. I have also considered the closing submissions filed. The jurisdiction of the court to determine the dispute herein has not been contested. It is also agreed by the parties that the claimant was employed as a receptionist on 5/1/2009 and worked continuously until she was terminated on 16/11/2011 without prior notice. It is also agreed that her salary was Ksh.42000 as at the date of termination.

The issues for determination are:

- a. **whether the termination of the claimant's service by the respondent was wrongful and/or unfair.**
- b. **Whether the relief sought ought to issue.**

In answer to the first issue, the court has to consider two questions. Firstly whether the termination was in breach of a term of the contract in order to be deemed wrongful and secondly whether the termination was in breach of the statutory provisions in order to be deemed unfair.

On the first question of wrongful termination, I have considered the contract letter and I am satisfied that it provided for termination without notice for gross misconduct. In all the other cases the termination was to be by a notice of one month or one months salary in lieu of such notice.

In this case the letter of termination dated 16/11/2011 produced as defence exhibit 2 cited the reason for the termination as “quality of performance not meeting expectations”. To me that sounded like poor performance of duty which does not amount to gross misconduct. To that extent the termination on the

said ground without notice and without any offer to pay salary in lieu of notice amounted to breach of contract. Consequently it was wrongful termination.

As regards the second question, a termination is deemed unfair if in a claim like this the employer fails to prove a valid reason(s) for the termination and/or if the procedure followed in dismissing the employee was not fair as provided for in the employment Act.

Section 43(1) of the Act provides that in any claim arising out of termination of employment, the employer shall be required to prove the reason for the termination in default of which the termination shall be deemed to be unfair within the meaning of Section 45 of the said Act.

In this case the reason for termination was poor performance of work. However I am satisfied that the respondent did nothing to prove the said reason for dismissal. There was no evidence adduced to prove that indeed the claimant was performing her duties below expectations based on known targets agreed between the employer and the employee. There was also no evidence to show that the claimant was put to some agreed scheme to monitor improvement and failed to improve. In that regard I find and hold that the reason for termination was not proved by the respondent and as such poor performance of work was not a valid reason for termination within the meaning of Section 45 of the Employment Act. The termination was therefore unfair on that ground alone.

Indeed the respondent did not contest the claimants exhibit 9 which was an email by the Chief Executive Officer, Daniel Arval to Hector Martinez and the claimant commenting on the outstanding loyalty and dedication to work by the claimant to which Mr. Martinez responded agreeing at 100%!. How, when and why did she then become a poor performer to deserve summary dismissal? In my view it is not a difficult thing to suspect personal issues attributable to Mr. Martinez and the RW1 as testified by both CW1 and RW1.

The second issue to consider in unfair termination is the procedural unfairness according to Section 45 of the Employment Act. This connotes the obligation on the employer to afford the employee an opportunity to be heard before termination on certain grounds. Section 41(1) of the Act requires that before terminating the employment of an employee on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands, the reason for which termination is contemplated and shall allow the employee to be accompanied by another employee or a Shop floor union representative of his choice during the explanation. Subsection (2) then demands that before the termination or summary dismissal of the employee, the employer shall hear and consider any representation which the employee and his companion under Subsection (1) shall make.

In the present case the respondent again did nothing to prove that the claimant was accorded a hearing before the termination. Her uncontested evidence is that she resumed work on 16/11/2011 from leave and worked until 5p.m when she was served with a termination letter which she rejected. The termination letter which was produced as exhibit 2 for the defence indicated that the management had discussed the claimant's performance and found it to be below expectation. There was however no evidence that the claimant was ever warned about her poor performance or whether she was subject of any hearing on her performance. No proceedings of any meeting was produced to show that the claimant was given an opportunity of being heard on the alleged poor performance in which she was accorded all the rights provided for under Section 41 of the Employment Act.

To that extent and in view of my finding on the validity of the reason cited for termination, it is my finding that the claimant was dismissed through an unfair procedure in violation of express statutory provisions and therefore unjustified.

Lastly, I will consider the issue of the reliefs sought by the claimant. All the reliefs sought are provided for under Section 49 of the Employment Act and I proceed to grant them as prayed and particularized under paragraph 12 of the memorandum of Claim, and submitted to by the learned counsel for the claimant.

Consequently I enter judgment for the claimant and against the respondent as follows:

- a. **The termination of the claimant's employment is declared wrongful and unfair.**
- b. **The respondent to pay the claimant:**

(I) salary in lieu of notice .....42,000

(II) salary arrears for 16 days

worked in November .....22,400

(iii) 7 days leave not taken ..... 9,800

(IV) 12 months salary for unfairness

termination .....504,000

TOTAL                               578,200

C. **The respondent will also pay costs and interest**

Orders accordingly

Signed dated and delivered this 31st July 2013

ONESMUS MAKAU

JUDGE