



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1019 OF 2012

SOPHIE K. MURIITHI.....CLAIMANT

VS

FELIX KIRUI T/A SUPREME HEALTH CARE CLINIC.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 11th June 2012, the Claimant sued the Respondent for wrongful dismissal, The Respondent filed a Reply on 26th July 2012 and the matter was heard on 12th April and 16th May 2013 with Mr. Nyabena instructed by Nyabena Nyakundi & Co Advocates appearing for the Claimant and Mr. Bosek instructed by J.K Bosek & Co Advocates appearing for the Respondent. The Claimant and the Respondent testified on their own behalf. The Claimant filed written submissions on 12th June 2013 while the Respondent did not file any submissions.

The Claimant's Case

2. On 1st August 2003, the Respondent employed the Claimant by oral agreement in the position of Medical Laboratory Technologist. The Claimant also served as a Receptionist. Her initial salary was Kshs.6,000 which was progressively increased to Kshs. 15,000. The Claimant claimed that she was not paid house allowance and did not go on leave for the years 2004-2007

3. On 21st April 2012 the Respondent summarily dismissed the Claimant on allegations of gross misconduct. It was the Claimant's case that prior to her termination she was not given any opportunity to be heard. The Claimant claimed to have had a clean employment record. The Claimant was not paid her terminal dues and was not issued with a certificate of service.

4. The Claimant's claim is as follows:

- a. A declaration that the Claimant's dismissal was unfair and wrongful
- b. Salary for April 2012.....Kshs.15,000.00
- c. One month's salary in lieu of notice.....15,000.00
- d. 4 years' annual leave (21 days x15,000x4 years.....48,461.00

- e. Service gratuity @ 15 days' pay for each year.....69,230.70
- f. 12 months' in compensation for wrongful dismissal.....180,000.00
- g. House allowance @ 15% of basic salary (2,250x104 months).234,000.00
- h. Certificate of service
- i. Costs and interest
- j. Any other relief the Court may deem just to grant

The Respondent's Case

5. In his Reply, the Respondent averred that the Claimant's employment was conditional upon her producing valid evidence of registration under the Medical Laboratory Technicians and Technologists Act. Having failed to produce any evidence of registration, her employment was untenable and unlawful.

6. The Respondent also cast doubt on the Claimant's professional certificate issued by Kabete Technical Training Institute on 4th October 2010, arising from the appearance of the name 'Sofy' instead of 'Sophie' on the said certificate and the fact that none of the names appeared on the website of Kabete Technical Training Institute as having graduated from the said Institution. The Respondent testified that he wrote to the Claimant on 15th August 2003 asking for her Certificates and National Identity Card but the Claimant did not comply with this request. The Respondent was therefore unable to confirm the Claimant's qualifications.

7. It was the Respondent's case that the Claimant's termination was as a result of misconduct on her part to wit; diverting clients, siphoning money, lateness and failure to adhere to official dress code. The Respondent testified that he had raised these issues with the Claimant and warned her verbally.

Findings and Determination

8. The main issue for determination in this case is whether the termination of the Claimant's employment was justified and lawful

9. Section 43 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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

10. The Claimant's letter of summary dismissal gave the reasons for dismissal as unauthorized absenteeism and lateness, pocketing proceeds made from laboratory tests and diverting clients. The letter made reference to previous letters and verbal warnings from the Respondent to the Claimant. The Respondent also took issue with the authenticity of the Claimant's official documents and her qualification for the job which the Court however found to be unfounded and in bad faith.

11. In support of his case, the Respondent produced a letter dated 24th October 2009 written by the Claimant as an apology for reporting to work late. The Respondent also produced a warning letter dated 24th May 2010 issued to the Claimant by the Respondent in which the issues of lateness, absenteeism and failure to wear uniform were raised. The Claimant admitted having written the apology letter dated 24th October 2009.

Section 45 (2) of the Employment Act provides that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure.

12. Fair procedure in cases of misconduct, poor performance and physical incapacity is defined in Section 41 of the Employment Act In the case of **Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013]eKLR**, Radido J held that for an employer to meet the legal requirements of legal fairness set out in Section 41 of the Employment Act the employer must demonstrate the following:

- a. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c. That the employer has heard and considered any explanations by the employee or their representative;

13. In the case before me, although the Respondent may have had a reason for terminating the Claimant's employment, at least on the ground of lateness which the Claimant admitted in her letter of apology dated 24th October 2009, there was no evidence that the Respondent followed fair procedure as required by law.

14. 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 and award her three months' salary in compensation. I also award her one month's salary in lieu of notice as well as salary for the month of April 2012.

15. The Respondent did not produce leave records to confirm the Claimant's leave status as required by Section 74 of the Employment Act. The claim for 4 years' leave is therefore allowed. The Respondent stated that he paid National Social Security Fund (NSSF) dues on behalf of the Claimant but did not render any documentary proof. In the absence of such proof, the claim for gratuity succeeds.

16. The Claimant also claimed house allowance. Section 31(1) of the Employment Act provides that:

An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

17. There was no evidence that the Respondent either housed the Claimant or paid her house allowance. The claim for house allowance for the entire period of service is therefore allowed. The Court will adopt the resultant gross figure of Kshs. 15,000 basic salary and 2,250 house allowance

as the Claimant's salary for the purpose of this claim.

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

a) 3 months' salary in compensation for unfair termination.....Kshs.51,750

b) One month's salary in lieu of notice.....17,250

c) 4 years' annual leave (21 days x 17,250x4 years).....48,300

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d) Service gratuity @ 15 days' pay for each year.....69,000

e) House allowance @ 15% of basic salary (2,250x103 months).....231,750

Total.....Kshs.418,050

The Claimant is also entitled to a certificate of service.

The Respondent will pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF JULY 2013

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JUDGE

In the presence of;

.....**Claimant**

.....**Respondent**