



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 16 OF 2013
(Originally Nairobi Cause No. 1559 of 2010)

MIRIAM KYALO

CLAIMANT

v

MFI OFFICE SOLUTIONS LIMITED

RESPONDENT

JUDGMENT

1. Miriam Kyalo (the Claimant) acting in person filed a Claim against MFI Office Solutions Limited (the Respondent) on 21 December 2010 and the issue in dispute was stated as *employment dispute between Claimant and Respondent regarding summary termination of employment*.
2. On 15 March 2011, the Respondent through the firm of Kilonzo & Co. Advocates filed a Statement of Response on behalf of the Respondent. On 30 March 2011 the firm of Nyabena Nyakundi & Co. Advocates filed a Notice of Appointment of Advocate to come on record for the Claimant.
3. On 10 May 2012 the Respondent filed a Supplementary List of Documents while on 31 May 2012 the firm of Andrew Ombwayo & Co. Advocates filed a Notice of Change of Advocates to come on record in place of the firm of Nyabena Nyakundi & Co. Advocates.
4. On 25 January 2013 the Principal Judge directed that this Cause be transferred to Mombasa for hearing and disposal.
5. On 19 February 2013 the Claimant wrote to the Court indicating that Kituo cha Sheria were going to take over the conduct of her case from the previous Advocates who had been on record.
6. On 28 May 2013 the Cause was listed before me for hearing and both parties called witnesses.
7. This being a case primarily challenging the dismissal of an employee it would be useful for me to outline the statutory burden placed upon both employees and employers under the framework of the Employment Act. Different considerations may apply to proceedings brought pursuant to the Labour Relations Act.

Statutory burden in cases pleading unfair termination/wrongful dismissal

8. The first and foremost provision dealing with the incident of the statutory burden placed upon the parties in a complaint relating to a claim of unfair termination or wrongful dismissal is section 47(5) of the Employment Act which provides that

For any complaint of unfair termination of employment or wrongful dismissal the

burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

9. To my mind, arising from the said section, it is incumbent upon an employee to first prove that a termination or dismissal occurred and secondly the employee must prove the reasons which makes a termination unfair or dismissal wrong. To demonstrate that a termination occurred the employee may produce a termination letter or give such evidence as may lead to an inescapable conclusion that a termination occurred.
10. To show why the termination is unfair an employee may rely on the grounds set out in section 46 of the Act, such as that the termination was based on a female employee's pregnancy, employee's membership of a trade union or race, colour, tribe, sex, religion, political opinion or even participation in a lawful strike. Section 46 of the Act has enumerated nearly nine instances which if proved will make a termination of employment automatically unfair.
11. But section 46 of the Act is not a closed shop. An employee may establish or rely on other reasons why a termination is unfair. It could be that there was a breach of a contractual term of employment. It could be that no notification or hearing/opportunity to be heard as contemplated by section 41 of the Act was given. It could be because of an unfair labour practice, which has not been defined. The list is endless.
12. Once a Claimant has discharge the burden of proving why the termination was unfair, the obligation is placed upon the Respondent/employer to justify the grounds for the termination.
13. The grounds could be those mentioned in section 44(4) of the Employment Act. These include absence without leave, intoxication in the workplace, use of abusive language, refusal to obey lawful orders. Again the list is not exhaustive.
14. But the obligation on the employer does not end with justifying the grounds for the termination.
15. Section 41 of the Employment Act requires an employer to notify and hear the employee before termination. The employer is under an obligation to inform and explain to the employee the grounds upon which it is contemplating termination. An employee is entitled during this process to have a fellow employee or shop steward present.
16. The duty placed upon employers does not end with compliance with the procedural requirements outlined in sections 35 and 41 of the Act. Under section 43 of the Act, an employer must prove the reasons for the termination.
17. Indeed, the statute has placed an onerous statutory obligation upon employers. The employer must not only justify the grounds for termination, comply with the procedural requirements of section 41, prove the reasons for the termination but go further to prove that the reasons were valid and fair as required by section 45 of the Act.
18. But that is not the end of the story. The reasons for termination must be the reasons which the employer believed to exist at the time of termination and which caused the employer to terminate the services of the employee.
19. In my view, if an employer sets out the reasons in a letter/writing, the employer will not be permitted during a court hearing to rely on other reasons other than those given in the letter/writing.
20. It is not only in respect of the unfairness of termination that the statute has placed obligations upon employers.
21. Under section 10(7) of the Act, there is an evidential burden upon an employer to produce in legal proceedings a written contract of employment specifying the terms and conditions prescribed to prove or disprove an alleged term of employment. Section 74 of the Act on its part requires an employer to keep certain records and in principle, it is the duty of the employer to produce the records in cases of legal challenges.
22. The incidence of the statutory burden placed upon the parties invariably means that the structure, form and content of the Memorandum of Claim and Memorandum of Response should not be similar to those generally applicable under the Civil Procedure Act and Rules. It should also not be lost to practitioners that it is permissible to plead evidence in the primary pleadings.

Structure, form and content of pleadings in the Industrial Court

23. The statutory framework of litigation in the Industrial Court, in my view must, in structure, form and content differ markedly with the structure, form and content of the Plaintiff and Defence under the Civil Procedure Act and Rules. A general traverse, denial or putting the Claimant to strict proof will not do.
24. A Claimant in the Memorandum of Claim should plead and outline why the termination or dismissal is unfair or wrong. The Claimant may wish to rely on any of the grounds set out in section 46 of the Employment Act. This should be set out.
25. In instances where a Claimant intends to rely on section 45(4)(b) and (5) of the Act to prove that the termination was unfair or dismissal wrongful because the Respondent/employer did not act in accordance with justice and equity in terminating the employment, this should be clearly set out and particulars given.
26. For the Respondent, in structuring the Memorandum of Response, regard should be had first to the obligation to justify the grounds for the termination of employment or dismissal as set out in section 47(5) of the Act.
27. The Respondent should also outline the grounds or reasons why it asserts that the termination of employment was justified.
28. A Memorandum of Response should also set out whether and how the procedural requirements of section 41 of the Act were complied with. These include whether the notification of reasons for termination and hearing were conducted orally or documented and if documented evidence of the same should be produced. Practitioners should not forget that summary dismissal on grounds of misconduct or poor performance is also subject to procedural fairness.
29. And a Respondent must always keep in mind that the Employment Act requires employers to draw up contracts of employment with the particulars prescribed in sections 9,10, 11,12,13 and 20 of the Act. Section 10(7) of the Act specifically places the burden upon employers to produce the written contract/particulars in legal proceedings otherwise any alleged term of employment by an employee would be considered as proved.
30. In a nutshell, the parties must endeavour in their pleadings to structure their pleadings to be in tandem with the legal obligations placed upon them by the Employment Act. And the Industrial Court (Procedure) Rules, 2010 must also be borne in mind. The rules require the parties to set out in the primary pleadings any principles or policies, conventions, law or industrial relations issues relied on. The rules also allow the pleadings to contain evidence.
31. However, the Court must remain alive to the reality that quite a number of litigants presenting claims before it have no legal education, training, knowledge or skills. But where parties are represented there should be no excuse for failing to comply with the statutory requirements.
32. Having set out what the statute expects out of the parties, I will now turn to each parties' pleadings, case and evidence, narrating only what I believe is material to my determination of the issues arising.

Claimant's pleadings and case

33. The Claimant pleaded that she was employed by the Respondent on 12 August 2002 as a Sales Executive and that she later rose through the ranks to the post of Sales Manager at a basic salary of Kshs 63,875/-
34. On 24 July 2010, the Respondent's Branch Manager in Mombasa wrote to the Claimant a summary dismissal letter asking her to hand over to the Administration Manager.
35. According to the Claimant, the summary dismissal was unfair because she was not given an opportunity to make any representations or defend herself, there were no warning letters or notification. She was just called to the Branch Manager's office and handed over the summary dismissal letter. The Claimant in cross examination testified that she did not agree with the summary dismissal and that she did not breach any confidentiality clause of the employment letter nor use her office for personal gain.
36. The Claimant also denied that she revealed any confidential information to a colleague, a Mr. Raphael Beja but admitted that there were several email exchanges with the said Raphael and that just before her dismissal the said Raphael nearly beat her up.
37. The Claimant therefore sought a declaration that her dismissal was unfair, and terminal dues (damages/compensation) or in the alternative the salary lost and which she would have earned up

to her retirement at the age of 58 years.

Respondent's pleadings and case

38. The Respondent summarily dismissed the Claimant vide letter dated 24 July 2010 (Claimant's Exhibit 2) and the reasons are set out in the letter. For the sake of clarity, I will cite the relevant portions of the letter which went thus

This is to inform you that the Management has terminated your services with immediate effect due to hurling insults and using remarks to your seniors and staff that is hurting to the company and also instigating staff against the management on and other past occasions whereby you have always been forewarned.

Also on many occasions you have refused to obey instructions issued to you by your seniors and made gestures/remarks indicating purposeful refusal. (emphasis mine)

39. From the dismissal letter, three main grounds were given for the dismissal of the Claimant. These were hurling insults (using abusive language to persons placed in authority over her); refusal to obey instructions and instigating staff against the management.

40. The Respondent called its Mombasa Branch Manager, Mr. Riaz in its attempt to meet the legal obligations placed upon it by the statute. The witness testified that the Claimant was served with warning letters before dismissal and that these were on 6 January 2010 and 20 July 2010. On the reasons for the warnings, the witness informed the Court that the Claimant had not sent in reports to the Head office as required and that the Claimant had been involved in a commotion with her junior a Mr. Raphael Beja. As to the immediate cause of the dismissal, the witness testified that the Claimant had breached confidentiality by informing the said Raphael about his personal file being taken to Nairobi. When the witness called the Claimant to a meeting to discuss her behavior, the Claimant came, made a gesture and walked out demanding to be dismissed. As a result the witness prepared the Claimant's dismissal letter. The Claimant was thereafter paid for days worked in July 2010 and 9 outstanding leave days as final dues.

41. The witness made reference to several emails exchanged between the Claimant and other staff to justify the dismissal of the Claimant.

42. I have given due consideration to the pleadings, evidence and parties respective written submissions filed in Court on 13 June 2013 and 25 June 2013.

Evaluation

Procedural fairness

43. I have already set out the statutory stipulations regarding procedural fairness. The Claimant was summarily dismissed. Section 41(2) of the Employment Act is clear that summary dismissal is subject to the procedural fairness safeguards where the dismissal is on the grounds of misconduct or poor performance. The reasons outlined in the dismissal letter would amount, if proved to misconduct.

44. According to the Claimant, she was not called to any disciplinary hearing, all that happened is that the Respondent's Administration Manager called her into the Branch Manager's office and handed her the dismissal letter at about 11 am.

45. But for the Respondent, it was asserted that the Claimant had been issued with two previous warning letters in 2010, and that after the incident with Raphael, she was informed the situation would be sorted out the next day. It is during the next day that the witness testified the Claimant made a gesture and walked out.

46. There are two conflicting versions as to the process leading to the dismissal of the Claimant. Section 41 of the Employment Act does not explicitly require the notification and disciplinary process to be recorded/documented. It could be oral. But a prudent employer, with a human resource and or administration department may well be advised to have and keep records of events preceding a dismissal/termination of employment.

47. The Human Resources Manager who was allegedly present on the day of dismissal was not named or called as a witness to inform the Court how the process was conducted. The Respondent has not satisfied me that it complied with the procedural requirements of section 41 of the Employment Act. The dismissal was therefore devoid of procedural fairness.

Substantive fairness

48. It is not only procedural fairness that a Court is concerned with in an unfair termination complaint. There is also the element of substantive fairness. Summary dismissal should be the culmination of a fundamental breach of an employee's obligations arising under the contract of service or gross misconduct.

49. And it is in this regard that employers have an onerous task, to justify the dismissal and prove the reasons and that the reasons were fair and valid. The Claimant was summarily dismissed. As I have already alluded to, summary dismissal is available in two types of scenarios, fundamental breach of terms of contract or gross misconduct.

50. To my mind, after keenly going through the emails exchanged with the junior staff Raphael Beja, I cannot agree that the Claimant was in breach of a fundamental obligation of her contract so as to warrant summary dismissal. If any confidential information had been exchanged with outsiders, I would have looked at the case differently. In the case under consideration the emails referred to an apparent disciplinary case facing the said Raphael and the Claimant. It had nothing to do with the business dealings of the Respondent as set out in Clause 4(b) of the Letter of Appointment.

51. Secondly, the Respondent had sought to rely on gross misconduct to justify the dismissal. Its case was that the Claimant had used abusive or insulting language. The dismissal letter made reference to senior managers and other staff. In my view, for the Respondent to meet the statutory threshold, it should have brought or at least named the senior managers that the Claimant insulted or abused.

52. Under the circumstances, I do hold that the Respondent failed to discharge the statutory burden placed upon it to prove the reasons and that the reasons were valid and fair reasons so as to justify summary dismissal. The summary dismissal was not in accord with substantive fairness.

Appropriate relief

Compensation

53. The Memorandum of Claim was filed by the Claimant while acting in person. And this is why it is inelegantly drafted. The reliefs sought by the Claimant apart from the Certificate of Service are not clearly stated.

54. However, one of the primary remedies where a Court finds unfair termination or wrongful dismissal is an award of compensation up to a maximum of twelve months' gross pay.

55. I have found the dismissal of the Claimant both procedurally and substantively to have been unfair. Putting into consideration the thirteen factors set out in section 49(4) of the Employment Act, I would award her the equivalent of two months' gross pay. At the time of dismissal the Claimant was earning gross pay of Kshs 63,875/- and I award her Kshs 126,750/-.

Payment in lieu of Notice

56. Section 35(1)(c) of the Act has made it mandatory that a contract where salary is paid periodically at intervals of or exceeding one month is terminable by written notice and if no notice is given, section 36 of the Act expects payment in lieu of notice. I would substitute the dismissal of the Claimant into termination with pay in lieu of notice.

57. The Claimant did not lay out any contractual or statutory basis for the Claim for all salary lost until contractual retirement age.

Conclusion and Orders

58.I do find and hold that the summary dismissal of the Claimant was both procedurally and substantively unfair, substitute the summary dismissal into termination on notice and award her

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| a. One Month compensation | Kshs 126,750/- |
| b. One month pay in lieu of Notice | Kshs 63,875/- |
| c. TOTAL | Kshs 190,625/- |

59.The Respondent to issue the Claimant with a Certificate of Service.

60.There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 12th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Nyange instructed by Kituo cha Sheria

for Claimant

Mr. Shijenje instructed by Kilonzo & Co

Advocates

for Respondent