



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 103 OF 2013

MAUREEN ANYANGO OOTE.....APPLICANT

VERSUS

KITTONY MAINA KARANJARESPONDENT

J U D G M E N T

The claimant has sued the respondent claiming terminal dues and compensation for wrongful and unfair termination of her employment. The respondent has denied liability and contended that the termination was justified both substantially and procedurally and as such the claimant is not entitled to any remedy.

The suit was heard on 22/7/2013 when the claimant testified as CW1 while the respondent and his witnesses Anne Wanja Wamithi and Joyce Sau testified as RW1, RW2 and RW3 respectively. The summary of the claimant is that she was employed by the respondent on 9/1/2012 as a secretary at a monthly salary of ksh.13500. That she worked without any problems until October 2012 when one morning her computer failed to start when she reported to work but it was repaired after raising the issue with the employer. That she continued to use it until 16/12/2012 when she was moved to manage the Reception while the Receptionist (RW3) went on leave. That the claimants computer was in the meantime assigned to another lady called Milicent Auma until 21/12/2012 when they went for Christmas holiday.

That when the firm opened on 7/1/2013, RW3 continued with her leave and Milicent Auma never returned but went to work elsewhere. That she never opened her computer until Jane Kimori an advocate working for the respondent demanded a document saved in the computer. That when the claimant tried to open the computer, it failed to start. That she reported the matter to the RW2 who refused to assist prompting Jane Kimori Advocate to pay for the cost of repairing the computer because the document was urgent to her.

That on 15/2/2013 the claimant fell ill and was given bed rest for 3 days but on her return to work she found that she had been replaced as a secretary by Milicent Auma who had returned to work and allocated the claimant new duties of cleaning and dispatching of mails. That in March 2013 the computer failed to function again and she was accused of damaging it by the RW2. That she was told by RW2 that a joint report by herself, RW3 and Milicent was demanded by RW2 about the damaged computer.

That they complied with the instructions and sent it to the respondent together with a photograph of the computer. That all these matters were happening during the time when the claimants annual leave was approaching and after she had reminded RW2 about the same but who had instead referred her to the

RW1.

That on 5/4/2013 she called RW1 to enquire about her leave but he referred her back to the RW2. That on 6/4/2013 she went to talk to RW2 about her leave and she said that it was okay and instructed RW3 to print out leave forms for her to fill. That just before filling the leave forms, RW3 told her that RW2 was calling her and when she went to see her she was served with a termination letter. That the RW2 told her that she had been instructed to do so by the RW1 because of the damaged computer. That she was only paid salary for six days worked in April 2013. That according to her the summary dismissal was not fair because she did nothing wrong except to ask for her annual leave.

She insisted that her period of service was 15 months and denied ever going for 10 days leave in December 2012.

On cross examination she admitted that initially she did relieve duties while RW3 was on maternity leave but she continued after RW3 returned from her leave. That on 4/6/2012 she was offered permanent employment backdated to 2/5/2012 at the same salary of Ksh.13500 per month. That the contract required her to be on probation for 3 months. That it also provided for leave to be taken in the month of December.

That the contract did not provide for termination notice of 3 months, leave allowance, house allowance and severance pay. She insisted that the computer malfunctioning even before March 2003 when it broke down while being used by Milicent Auma. She denied interfering with the computer or doing anything wrong to it. She denied ever being rude to her seniors and no warning letter was ever given to her for any misconduct. That during the time when RW3 was away on leave the claimant used her (RW3) computer. She agreed that from the time of signing a formal contract of employment to the time of dismissal was 12 months.

RW1 is the proprietor of the respondent firm and he is also an advocate of this court. He told the court that in January 2012 RW3 went for 4 months maternity and annual leave and introduced the claimant as her reliever and he employed her on temporary basis. That he did not pay NSSF for her during the 4 months although he paid her salary at the end of each month.

That when RW3 returned in April 2012 the claimant requested him to employ her and after consulting her Mombasa office, he employed her effective from 2/5/2012 with a 3 month probation. That henceforth he deducted and paid for her NSSF and NHIF. That in March 2013 RW2 reported to him a damage on the claimants computer CPU and he demanded a statement from the claimant. That she did not give any report. That when he called her she rudely told him that she did not know what happened to the computer.

That thereafter she kept on calling him but he told her to talk to RW2 directly. That she had become rude and was summarily dismissed by RW2 for misconduct. That severance pay and house allowance did not arise. That the claimant was granted 10 days leave in December 2012 at her request and the firm did not close down in December 2012. That he demand letter was also rude and in bad tone.

On cross examination, he said that he had nothing to prove that the claimant was employed as a reliever. He denied that the contract letter was sent to her as a mail to the office. She also denied that he deducted NSSF and NHIF and failed to remit until she reported the matter. He further denied even employing the claimant as a cleaner and insisted that she was the only one dealing with the computer in issue. He denied further that she was dismissed for asking for leave. He however confirmed that what he told the court was mainly told to him by RW2. He also had nothing to prove that she requested for 10 days leave on December 2012.

RW2 is the advocate in charge of the respondent's Mombasa office since 9/9/2009. She told the court that the claimant was introduced to her in January 2009 by RW3 to relieve her while she proceeded for leave. That after interviewing her she employed her as a temporary assistant until RW3 returned from leave. That the agreement was reduced into writing.

That RW3 returned in 10/5/2012 and the claimant was employed permanently in the same May 2012 because she had already proved competent. She signed a written contract. In March 2013 the claimant reported to her that her computer was not working and the same was confirmed by RW3. When she checked it she saw a dent on it of which the claimant could not give any explanation after enquiry.

That she reported to the RW1 when demanded a report from the claimant because she was the one assigned the computer. That when the claimant failed to write a report on computer RW3 did upon request by her (RW2). That when claimant refused to write the report she told her to talk to RW1 over the phone but the claimant refused. She admitted writing summary dismissal letter to the claimant on instructions from RW1 in Nairobi. She maintained that the claimant was not entitled to the prayer for 3 months notice and house allowance.

On cross examination she admitted that there was written contract for the relieve duties. She denied the allegation that the claimant was to work at Nyali. She confirmed that she did not see the claimant damage the computer and she did not have proof to show that the claimant damaged the computer. She could not remember whether the claimant was sick on 15/3/2013 but she denied ever demoting her to the position of a cleaner. On the issue of salary she maintained that the employment contract did not talk of house allowance.

RW3 was the superior to the claimant and incharge of the reception. She introduced the claimant to work as temporary office assistant in her place while she was away on maternity leave. That the claimant started working in January 2012. That when she returned from leave on 18/5/2012 the claimant did not leave the job as she was employed as a secretary on 2/5/2012 according to the letter of contract.

That in March 2013 the claimant reported to her that her computer was not working and upon examination she noted that the CPU had a breakage. That she then reported to the RW2 who in turn reported to the RW1. That as the superior she wrote a report and the claimant was dismissed from work. That she gave the claimant a cheque for the days worked but she refused to sign on a copy of the cheque and a voucher. That the claimant tore the dismissal letter and threw the pieces on RW2's floor, banged the door and left.

On cross examination she denied telling the claimant that she was demoted. That she saw the claimant using the computer in March 2013. That she told the claimant to write a report on the damaged computer but afterwards she wrote and showed the claimant to confirm after which she signed and sent it.

She did not know whether a technician repaired the computer. She maintained that it was the claimant who was using the computer. She concluded by saying that she did nothing when the claimant behaved rudely after dismissal.

After the close of the hearing the parties filed written submissions. I have carefully read through the pleadings and the documents filed. I have also considered the witness testimonies and the written submissions filed. The court is satisfied that it has the jurisdiction to determine the matter before it because it is a dispute related to employment and labour relations.

The issues for determination are:

- a. **whether the claimant was in a continuous service from January 2012 to April 2013.**
- b. **whether the summary dismissal of the claimant amounted to wrongful and unfair termination**
- c. **whether the claimant is entitled to the reliefs sought in the suit.**

In answer to the first issue, the court notes that the parties are in agreement that the claimant served the respondent from 9/1/2012 without any formal letter of appointment until 4/6/2012 when she was given a letter of appointment backdating the effective date to 2/5/2012. It is also not in dispute that she was dismissed summary on 6/4/2013.

According to the defence case, the claimant started working as a reliever and later she was given permanent employment in writing from 2/5/2012 and continued until the dismissal on 6/4/2013. On the other hand, the claimant maintains that she was interviewed for full employment with prospects of being taken to an office at Nyali in due course but later she was given contract to work at the main Mombasa office. Whichever way one looks at the evidence adduced, the obvious conclusion would be that the claimant served for continuous period between 9/1/2012 to 6/4/2013. The court therefore finds that the answer to the first issue is in the affirmative. In my view it is immaterial whether the first contract was in writing or not. It doesn't matter whether or not the claimant's duties changed from that of office assistant to secretary and later to cleaner/messenger. The bottom line is that she served one employer for all that period of time without a break.

As regards the second issue, the court had considered the procedural as well as substantive fairness as contemplated by the law and the contract of employment. There is no doubt whatsoever that the Contract of employment just as Section 44 of the Employment Act permitted the employer to summarily and unilaterally dismiss the claimant. However Section 43 and 45 of the Employment Act bars an employer from unfairly terminating the employment of an employee.

Section 43 provides that in a dispute like this an employer must prove the reason for terminating the employee's employment. The reasons for the summary dismissal stated in the termination letter included poor performance of work and failure to report damage on a computer by the claimant. As regards the first reason of poor performance, no evidence was adduced by the defence witnesses to prove the same. There was no evidence to show that the claimant had been warned about any poor performance and placed on an agreed scheme to monitor her improvement. It is therefore a baseless and an invalid accusation that the claimant had ignored and failed to improve on her work performance. The correct position is what RW2 stated in her testimony when she said that they employed her because she "had proved to be competent".

On the other reason of failure to report and give explanation regarding damage on a computer to either the managing partner or the head of the branch office, the courts also find that the respondent has failed to prove such failure on a balance of probability. There is no doubt that 2 defence witnesses RW2 and RW3 agreed that it is the claimant who reported the damage on the computer. There is nothing in writing which can prove that any of the defence witnesses instructed the claimant to write a statement explaining the damage to the computer.

The RW2 said in her evidence that she told the claimant to talk to RW1 over the phone. The RW1 confirmed in his evidence that the claimant called him several times and he refused to talk to her and instead directed her to talk to RW2 directly. The claimant's evidence that they did a joint statement through RW3 and while she emailed a photograph of the computer was not contested. Instead it was corroborated by RW3 when she confirmed that she did the statement, gave it to the claimant to verify before signing and thereafter send. In my view the reason of failure to report and also refusal to explain the damage to either Managing Partner or Head of the Branch was not proved and it was therefore not valid to warrant summary dismissal of the claimant. In the same note although only raised during the hearing, I do not find that the claimant was rude and disrespectful before the dismissal.

The court will not consider the conduct after the dismissal including the tone in the demand letter for purposes of determining whether or not the dismissal was justified. In my view this is a case of victimization because the computer was at the disposal of many people in the office and not the claimant alone. The defence also did not deny that Milicent was back as secretary.

As regards the procedural fairness, the court is no doubt that the defence failed to prove that Section 41 of the Employment Act was complied with. The claimant was never accorded a disciplinary hearing. She was referred to the RW1 by RW2 but he denied her audience and referred her back to the RW2. RW2 denied her hearing and instead kept the matter in abeyance until the following month of April 2013 when she sought for her leave and then dismissed her without a hearing. She was not heard by RW1 before instructing RW2 to dismiss her. According to his own evidence on oath the RW2 could not hire or fire without his approval. He therefore approved the dismissal unfairly and in breach of Section 41 of the

Employment Act which bars an employer from terminating employment on ground of misconduct or poor performance under Section 44 without first explaining the reason for the intended dismissal to the employee in the company of a fellow employee or shop floor union representative of his choice, and before hearing their representations which must be considered before the decision to dismiss is reached.

As correctly put by the claimant and not contested by the defence, the dismissal happened around 11.00m on a Saturday moments after the RW2 reported to work late and the claimant went to see her over her annual leave. That the discussion went on well and instructions given to RW3 to put out leave forms to the claimant to fill. There was no issue of rudeness, disrespect or damaged computer during the leave discussion. It would appear that the RW2 did not want to approve the claimants leave and only tricked the claimant to leave her office to get leave forms from RW3. The RW3 did not dispute that she was instructed to print out the leave forms for the claimants.

This court will not go to further details because the point is clear that the termination was not in compliance with the law. Consequently the answer to the second issue for determination is in the affirmative also.

The last issue to consider is the one for the reliefs sought. I grant prayer 1,2,and 3 of the claim in view of my earlier findings and observations herein above. I grant also the prayer for notice pay but only for a period of one month as provided for under clause 10.1 of the contract letter. I will also grant the prayer for leave but only for 21 days as provided under clause 4 of the contract letter less 10 days taken from 21/12/2012 to 7/1/2013.

I have dismissed prayer 4 because the court is being called upon to investigate into a matter where no clear basis has been laid. I have also dismissed prayer 5(b) for severance pay because, the dismissal was not in the nature of redundancy. Even if the claimant intended to claim for service pay, the court could still have dismissed it in view of Section 35 of the Employment Act which bars an employee who is a contributor to the NSSF from claiming service pay.

Lastly, I have dismissed the claim for house allowance because it is common sense that if the claimant did not claim the same before termination, the present claim is only a malafide afterthought calculated to achieve unfair enrichment at the respondents prejudice or just to put the court to test about its knowledge on obvious matters like consolidated compensation payable to employees.

In summary therefore I enter judgment in favour of the claimant against the respondent for payment of the following.

- a. **One month salary in lieu of notice13,500**
 - b. **cash in lieu of 11 days leave4,950**
 - c. **12 months salary for unfair termination.....162,000**
- 180,450**

The Claimant will have costs and interest.

Orders accordingly.

Signed, dated and delivered this 30th August 2013

ONESMUS MAKAU

JUDGE