



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 2367 OF 2012

IVETTA MKALA CLAIMANT

VERSUS

NATION MEDIA GROUP RESPONDENT

JUDGEMENT

The claim herein was filed on 22nd November 2012 by the claimant Ivetta Mkala for wrongful dismissal and unpaid dues by the respondent, Nation Media Group. The respondent filed their reply on 18th July 2013 admitting that the claimant was their employee but was terminated due to poor performance. During the hearing, the claimant gave her sworn statement and the respondent opted not to call any witness. On 21st August 2013, both parties agreed to file their written submissions and the mention the matter on 5th September 2013 to confirm, but on this date only the claimant had filed their written submissions, the respondent was given 14 days but by 23rd September 2013, the respondent had not filed any written submissions.

In the claim, the claimant stated that she was employed by the respondent on 13th September 1996 in the NTV Division until 10th July 2012 when she was verbally dismissed and despite her request to have the termination in writing; this was never given to her. That this dismissal was without any justifiable cause and has caused her loss of employment. She was not given any notice or paid compensation and this violated her terms of contract with regard to her employment with the respondent. She has thus suffered loss and damage and currently going through serious financial strain due to the loss of employment. Before dismissal, the claimant was earning Kshs.77, 111.00 per month and now seek compensation for unfair termination, 3 months notice pay, pay for leave days not taken all amounting to Kshs.1, 233,776.00.

In evidence, the claimant testified that she was secretary to the Managing Director at the respondent from 1996 where she performed well and was given letters of commendation. Her salary was Kshs.77, 111.00 per month. She had no case of misconduct or indiscipline. However On 7th July 2012 she was terminated. She testified that on this day, at around 1 pm before she left for lunch, the Human Resource Manager called her to the Managing Director's office and gave her a termination letter which she refused to sign as she did not agree to the termination as the grounds given for the termination were that of poor performance and this was not true. That since she refused to sign for this termination letter, she was told to leave the office at 5pm. She was advised to appeal.

On 10th July 2012 the claimant went to ask the respondent for her dues, she submitted her letter requesting for the dues but the respondent reused to pay or respond to her. She instructed her advocate who made another demand on 25th September 2012 but the respondent refused to reply or pay. She now

seek compensation for loss of employment, notice pay and leave due in 2012.

In cross-examination by the respondent advocate, the claimant confirmed that the respondent practice was to undertake annual appraisal and after every appraisal there was a formal note and a salary review. This appraisal could give a negative or positive note or response and where there was good performance, one got a positive response. That in the claimant's case, she would receive her performance review by the human resource and the general manager. She was reviewed in July 2012 and then dismissed.

On the date of termination, there was a meeting with the human resource manager, the claimant was given her termination letter but refused to sign in acknowledgement since the reasons for termination was poor performance and she did not agree to this assessment. She refused to admit that she was of poor performance, and that by accepting to sign the termination letter would be to agree to this reasons.

She also confirmed that, every year at work she was entitled to one month leave, in 2012 she had not taken her leave and thus claim one month pay.

In response, the respondent stated that the claimant was working with them in the broadcasting Division and was terminated due to poor performance and was made aware of the same during her appraisal meeting held on 10th July 2012. That the respondent practice is that in the event of termination on account of poor performance is to have a review meeting between the employee and its officers to deliberate on the performance and after this review, a termination letter is issued and in this case, the claimant left the meeting before the letter could be issued hence hijacking a lawful cause. That the claimants performance at work two years preceding her termination had drastically declined in her rating as an individual and at the review meeting, these reasons were explained to her.

That the claimant suffered no loss of employment since her termination was in consonance with the letter of appointment and the law and that the respondent is not responsible for her financial misfortunes. The claim for compensation is therefore unfounded and that the claim for leave days should be proportional to the number of months worked for the year the leave was due.

That the claimant refused to compromise and deliberate on subsequent settlement of her dues and thus not entitled to costs or interests on her claim.

The claim for notice pay at 3 months is admitted.

The Employment Act, 2007 is clear on the procedure governing termination on the ground of poor performance. Subsection 41 (1) of the Act provides that before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity and the employer shall explain to the employee, in a language the employee understands, the reason for which the employer is considering the termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation. Subsection 41(2) requires the employer, before terminating the employment of an employee or summarily dismissing an employee under the section to hear and consider the employee's representations which the employee may have to make in view of the alleged misconduct or poor performance. In this case the respondent acted in contravention of these clear provisions of the Act. The termination note given to the claimant was a decision to terminate and not an intention by way of a request by the supervisor for the management to consider the termination. The claimant was not allowed to call a fellow employee or a representative of her choice to be present before her termination on the ground of poor performance and in view of the termination. In any event, the respondent has not produced any subsequent letter of termination on the alleged ground of poor performance or the appraisal note o response indicating that the claimant was of poor performance. The respondent has not produced any administrative communication to the claimant that she failed in her duties or left her employment without the termination letter. Equally there is No evidence that the claimant absconded duty or was insubordinate. The court finds that the submissions by the respondent that the claimant invited the loss of employment on herself is unfounded and cannot cure the breach of the express standards expected of the respondent's handling of the claimant's case. This was an unfair labour practice by the respondent against the claimant.

Where the court finds that the employer committed an unfair practice against an employee, compensation is awarded as under section 49(4) (m) of the Employment Act. I note the claimant had worked for the respondent for a period of over 16 year without any record of indiscipline. I will award the maximum allowed compensation at 12 months.

Leave days where due for any particular year can be taken by an employee so entitled at any point and time within the year this is due. This does not have to be at the end of the year when this accrues. The claimant had worked from January to July 2012; she could have taken her leave any time within this year and hence her entitlement for one month leave does not abet with her termination before the year ended. I will award leave pay for one month.

The respondent has admitted owing notice pay for 3 months. I will confirm this in the award.

The court enters judgment for the claimant against the respondent for orders:

1. **a declaration that the claimant's termination of employment by the respondent was unlawful;**
2. **Payment by the respondent to the claimant a sum of Kshs.925, 332.00 being gross salary for twelve months for unlawful termination plus interest thereon at court rates from the date of judgment till the date of full payment.**
3. **Notice pay amounting to Kshs.231,333.00;**
4. **Leave pay at Kshs.77,111.00; and**
5. **The respondent to pay costs of the case.**

These are the orders of the court.

Delivered in open court this day of 30th September 2013.

M. Mbaru

Judge

In the presence of

.....

.....

.....