



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1861 OF 2011**

*(Before D.K.N. Marete)*

**GLADYS KAKAI.....CLAIMANT**

Versus

**PAN AFRICA CHEMICALS LIMITED .....RESPONDENT**

**JUDGEMENT**

The matter was brought to court via a statement of claim dated the 25th October, 2011. The issue in dispute is therein cited as;

**‘Wrongful and unfair termination of the claimant’s employment’**

The respondent vide a memorandum of reply dated 5th March, 2012 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that between 17th December, 1987 and 30th September, 1999 she was employed as a copy typist by East Africa Heavy Chemicals Ltd. On or about September, 1999, the business of East Africa Heavy Chemicals Ltd was sold to East Africa Heavy Chemicals (1999) Ltd and the former employment terminated on 24th September, 1999 - See Annexure 2(a) and (b) of the claim. This business was sold to the current respondent with effect from 1st October, 1999 to 15th October, 2004 – See Annexure 3(a) and (b), also of the claim. All her employment and terminal dues were paid by East Africa Heavy Chemicals Ltd and East Africa Heavy Chemicals (1999) Ltd.

Upon purchase of the business by East Africa Heavy Chemicals (1999) Ltd, she was employed by the respondent as a secretary at a monthly salary of Ksh.9,180.00 and a house allowance of Ksh.1,377.00 all totaling to Ksh.10,557.00. She was also issued a letter of employment and was paid the monthly salary in arrears. Her duties as secretary entailed;

- Handling all the respondent’s keys
- Opening the respondent’s premises
- Opening the administration block for cleaning
- Opening the stores for the store keeper to issue equipment
- Closing the respondent’s premises, administration block and stores at the end of each working day.

The claimant submits that she worked for nine (9) hours from 730 hours to 1730 hours while other workers put in eight (8) hours a day.

The claimant worked diligently and dutifully exhibiting commitment, enthusiasm and enterprise thereby earning an increment of her monthly salary and house allowance to Ksh.10,580.00 in February, 2007, Ksh.11,500.00 – September, 2007 and Ksh.12,400.00 w.e.f. May, 2008 – See Annexure 4.

The claimant's services were terminated by a letter dated 23rd March, 2009. This, she submits was unfair, wrongful and unlawful in that;

- a. *No reasons were given in the letter dated 23<sup>rd</sup> March 2009 for termination of the Claimant's employment.*
- b. *The Claimant's employment was not terminated in accordance with fair procedure.*
- c. *The Respondent did not act in accordance with justice and equity in terminating the employment of the Claimant.*
- d. *The Respondent did not explain to the Claimant the reason for which the Respondent was terminating the Claimant's employment.*

On protest against termination of her employment, the respondent did an internal memo dated 25th March, 2009 giving reasons for termination of employment as;

- a. *Packaging company files and an invoice intended for Park Villa Hotel Webuye to the Respondent's Nairobi office without authority or consent of management.*
- b. *Failing to ensure delivery of a special parcel to Mombasa on 22<sup>nd</sup> March 2009.*

She prays for;

- a. *Payment for 1324 hours being extra hours/overtime*

*worked from 15<sup>th</sup> October 2004 to 25<sup>th</sup> March 2009,*

*calculated at the rate of 11/2 times the normal*

*hourly rate (Kshs.7.50 x 132 hours) - Ksh.89,370/=*

- b. *Compensation equivalent to 12 months salary based*

*On the gross monthly salary at the time of termination*

*(Kshs.12,420/= x 12 months) - Ksh.149,040/=*

*Total - Ksh.238,410/=*

*(See computation of overtime hours marked Annexure 10).*

Also recited and embossed as reasons whereof, the claimant prays for judgement and an award in her favour against the Respondent as follows:-

1. *A sum of Kshs.89,370/= being payment for the extra hours/overtime worked from 15<sup>th</sup> October 2004 to 25<sup>th</sup> March 2009.*
2. *A sum of Kshs.149,040 being compensation for unfair and wrongful termination.*
3. *Costs of and incidental to this cause.*

4. *Interest on (1), (2) and (3) above at such rate as this Honourable Court may deem fit.*

5. *Any other or further relief that this Honourable Court may deem necessary to grant.*

The respondent denies the claim and states that the claimant's duties were limited to and or restricted to secretarial duties as per inherited terms and conditions of the letter of appointment dated the 29th September, 1999. She denies the claim on overtime and submits that the claimant was expected to fill appropriate overtime computation forms if she ever did any. She also denies the nine hour working day.

The respondent denies that the claimant was a performer and that this dismissal was deserved as the claimant had been verbally and in writing warned over her work culminating in the final warning letter of 26th November, 2008. Her particulars of negligence and carelessness are cited as follows;

- *In the recent past, you packaged company files and an invoice intended for Park Villa Hotel, Webuye to our Nairobi office without authority or consent of Management.*
- *On the 26<sup>th</sup> November, 2008, you received your last and final written warning advising you to improve your work performance.*
- *On the 31<sup>st</sup> January, 2009, you wrote an apology letter to Management for mistakes made while updating company books and records.*
- *On the 20<sup>th</sup> March 2009, you were strictly instructed by Management that a special parcel must be delivered to Mombasa on the 22<sup>nd</sup> March 2009, but you failed to ensure delivery of the same.*

The Claimant states that the purported reasons for the termination of her employment were an afterthought following her protestations and were not valid for the following reasons;

- a. *The Claimant never packaged company files and an invoice intended to (sic) Park Villa Hotel, Webuye to the Respondent's Nairobi office. It was the Respondent's accountant's work and duty to cross-check the files and invoices, put them in envelopes and address the envelopes. The Claimant's work was only to seal the envelopes and dispatch the same. It was the Respondent's accountant who placed and addressed the company files and an invoice intended for Park Villa Hotel Webuye to the Nairobi office.*
- b. *The claimant admits that she was given a warning letter of 26<sup>th</sup> November, 2008 but the same was unjustified. This was the only warning letter the Claimant received from the Respondent and she protested against the same.*
- c. *On 31<sup>st</sup> January, 2009, the Claimant was coerced and intimidated by the Respondent's General Manager to write an apology letter failure to which she would be dismissed from her employment.*
- d. *On 20<sup>th</sup> March, 2009, the Claimant recorded 3 parcels destined for Nairobi, Mombasa and Kisumu in the dispatch books. The Respondent's General Manager instructed the Client to dispatch the parcels destined for Kisumu and Nairobi because they were urgent and hold onto the parcel destined for Mombasa to await the Respondent's lorry going to Mombasa. The Claimant duly complied with the General Manager's instructions by dispatching the parcels destined for Kisumu and Nairobi and she requested the Respondent's Transport Manager to give the parcel destined for Mombasa to any of Respondent's driver who would be going to Mombasa in the Respondent's lorries. The Claimant with the permission of the Respondent was away from work on 21<sup>st</sup> March 2009 attending a funeral and when she reported to work on 22<sup>nd</sup> March 2009, she found the parcel destined for Mombasa in the office. The Claimant states that she was not to blame for the non-delivery of the parcel destined for Mombasa.*

The respondent therefore submits that the termination of employment of the claimant was lawful as due process had been done in accordance with Sections 44 and 45 of the Employment Act, 2007.

The matter opened for hearing on 16th October, 2010 when CW1 Gladys Naliaka Kaikai (the claimant) testified. She denied signing Appendix 13 as all her dues were not paid and the reasons for her termination were not valid. She in evidence reiterated her claim for payment of overtime for 1324 hours during the entire working life at a rate of Kshs.67.50 per hours all totaling to Kshs.89,370.00

DW1 - David Simiyu testified in support of the defense. He said that he was the Administrative Manager of the respondent and the claimant. He knew her when he was employed in 1991 and she was a copy typist cum receptionist. He testified that the termination of the claimant was lawful and on grounds that on 20th March, 2009 she had been given a tender document for delivery to Mombasa before 23rd March, 2009 but failed to do the same and the tender aborted.

She had been careless in handling her duties and documents were not well accounted for. She wrote a letter of apology dated 21st January, 2009 – paragraph 7 of Memorandum of Reply where she indicated that this was her last apology.

The witness testified that she did not report to work on 4th December, 2008 and that she was in charge of the reporting register.

DW1 for the respondent testified that he had done a letter of commendation for hard work and honesty on 25th March, 2009 but this was not a fetter to termination as there was information unknown to him as he did so. She was dishonest and even her curriculum vitae was not truthful and accurate.

The witness testified that the respondent complied with the termination clause of the letter of employment and the terms and conditions of service. She (Claimant) was paid and signed for her terminal benefits. He denied any dues on overtime and in any event, would only have been entitled to off-duty in lieu of overtime. This was not due or authorized.

The issues for determination therefore are;

1. Was the termination of the claimant's employment unfair, wrongful and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether the termination of the employment of the claimant was unfair, wrongful and unlawful. In her evidence, the claimant narrates the process of her termination very very succinctly. That her services were terminated on 23rd March, 2009 and signed in acknowledgement and acceptance of certificate of service which was good and recommending. She was paid Ksh.29,592.00 as terminal dues.

The respondents in their various submissions aforesaid bring in a case for justification of this termination. It is in evidence that the claimant in the course of employment earned salary increments in February, 2007 (Kshs.10,580/=), September 2007 (Kshs.11,500/=) and May 2008 (Kshs.12,420/=) and also earned a recommendation from the respondent.

The termination of the claimant is not justifiable from the plethora of evidence and support documents adduced in support of her case. Again, this also offends S.45 of the Employment Act, 2007 which provides for situations of unfair termination of employment contracts.

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(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*
- c. *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

- a. *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

- a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

- b. *the conduct and capability of the employee up to the date of termination;*

(c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

- d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

- e. *the existence of any previous warning letters issued to the employee.*

The claimant in her written submission posits that the termination was unfair for the following reasons;

1. *No reasons were given in the letter dated 23<sup>rd</sup> March 2009 for the termination of the Claimant's employment.*
2. *The Claimant was not informed of the reasons of the termination of her employment leave alone being given an opportunity to be heard on her defence.*
3. *Fair procedure was not followed in the termination for the Claimant's employment.*
4. *The Respondent did not act in accordance with justice and equity in terminating the Claimant's employment.*

The citation of the reasons for termination by the respondent vide an office memo dated 25<sup>th</sup> March, 2009 was a mere after thought and a consequence

of her protestations and were ultimately not valid reasons for such termination.

The termination also offended S. 41 of the Employment in that the provision for hearing of the claimant was absent in toto.

41. (1).Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

43.(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 there employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reasons 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.

I therefore agree with the claimant and find a case of unfair, wrongful and unlawful termination in the circumstances.

The 2nd issue is for determination is whether the claimant is entitled to the relief sought. She is and the issue would be the extent of that relief. All elements of her prayers have been proven in evidence and law. The respondent has not brought out a clear case to rebut the claimant's working hours bearing in mind that she combined the duties of typist/secretary, receptionist and clocking officer. It was implied that she reports and leaves earlier and later than all other employees. She must be compensated for this.

I am therefore inclined to allow this claim and order compensation to the claimant as follows;

a. Payment for 1324 hours being extra hours/overtime

Worked from 15<sup>th</sup> October 2004 to 25<sup>th</sup> March 2009,

Calculated at the rate of 11/2 times the normal hourly

Rate (Ksh.67.50 x 1324 hours) - Kshs.89,370/=

b. Compensation equivalent to 12 months salary based

On the gross monthly salary at the time of termination

(KShs.12,20/= x 12 months) - Kshs.149,040/=

**Total** - **Kshs.238,410/=**

As to the costs, these follow the event. The costs of this cause shall be borne by the respondent.

The penultimate orders of court therefore are that the claimant is entitled to;

1. a) Payment for 1324 hours being extra hours/overtime

Worked from 15<sup>th</sup> October 2004 to 25<sup>th</sup> March 2009,

Calculated at the rate of 11/2 times the normal hourly

Rate (Ksh.67.50 x 1324 hours) - Kshs.89,370/=

b. Compensation equivalent to 12 months salary based

On the gross monthly salary at the time of termination

(KShs.12,20/= x 12 months) - Kshs.149,040/=

**Total** - **Kshs.238,410/=**

2. The costs of this cause shall be borne by the respondent.

Dated, delivered and signed this 3rd day of October, 2013.

**D.K. Njagi Marete**

**JUDGE**

**Appearances:**

1. Mr. Kefa Ombati instructed by Kefa Ombati & Company Advocates for the claimant.
2. Mr. Wasuna instructed by Wasuna & Company Advocates for the respondent.