



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 807 OF 2012

(Before D.K.N. Marete)

LILIAN NYABOE NYARIBOCLAIMANT

Versus

WIRELESS INNOVATIONS NAIROBI LIMITEDRESPONDENT

JUDGEMENT

This matter comes to court vide a statement of claim dated 14th May, 2012 and filed on the same date. The issue in dispute is;

- 1. Wrongful, unfair and unlawful termination of the claimant's services, and**
- 2. Failure to pay terminal benefits to the claimant**

The Respondent denies the claim and prays that the same be dismissed with costs, in her Memorandum of Response dated the 12th June, 2012 and filed on the following date.

The claimant's case is that at all material times she was an employee of the respondent in the capacity of Administrative Secretary w.e.f. 1st May, 2002 on the following terms;

- a. *The claimant's employment was effective from 1st May 2002 until retirement at the age of fifty five (55) years;*
- b. *The Respondent would contract the Claimant in the capacity of an Administrative Secretary and or in such other capacity as the employer may determine from time to time;*
- c. *The Claimant would serve a three (3) months probation after which a confirmation letter would be effected and a review of the salary would be done depending upon the claimant's job performance';*
- d. *The hours of work were to be between 8 am and 5 p.m. on Monday to Friday and between 9 a.m. and 12.30 p.m. on Saturday's; A daily lunch break between 1 p.m. and 2 p.m. was to be provided;*
- e. *The Claimant was required to report to her immediate supervisor/manager on her activities of the day or any reports that may be required from time to time;*
- f. *There was no job description but it was indicated that the job description may change and there was therefore need for the Claimant to remain flexible;*

- g. *The claimant would be remunerated at a monthly salary of Kshs.19,000/= (later increased to a Gross salary of **Kshs.36,750/=**)*
- h. *The Claimant was entitled to twenty one (21) days annual leave;*
- i. *The contract of service was terminable by any party giving one month's written notice or salary in lieu thereof;*

The claimant accepted the offer of employment and executed the contract of employment as exhibited at Appendix 1 of the claim. The claimant diligently continued to execute her duties until July, 2009 when she was issued with a suspension letter on grounds of misconduct. This was for one month. On resumption of duty on 17th August, 2009 she was advised by the director of the respondent, a Mr. Mutua that her services were no longer required and that she had been summarily dismissed. No letter of dismissal has been issued despite demand.

She prays for;

- a. *Salary due for period until retirement at the age of 55 years*
- b. *12 months gross salary on account of damages for unlawful and unfair termination of employment amounting to Kshs.441,000/=*
- c. *Severance Pay for each completed year of service amounting to Kshs.128,625.*
- d. *Salary for the month of suspension amounting to Ksh.36,750/= plus interest thereon at court rates from August 2009 until payment in full*
- e. *One month's salary in lieu of notice amounting to Kshs.36,750.00*
- f. *Certificate of Service*
- g. *Unpaid leave days for the period worked*
- h. *Deducted but unremitted PAYE, NSSF and NHIF payments*
- i. *Costs of the suit*
- j. *Interest at court rates on items a, b, c, e, g and h from the date of filing suit until payment in full; and*
- k. *Any other relief that this Court may deem fit and just to grant.*

The respondent's case is that the termination of employment was lawful in That the claimant was culpable of several instances of misconduct as enumerated in the letter of suspension dated 16th July, 2007. The respondent in toto denies any neglect of the claimant's rights to a hearing or even non payment of terminal dues or at all and prays that this matter be dismissed with costs.

The matter came to court variously until the 22nd March, 2013 when it was Heard *inter parties*. At the hearing CW1, the claimant testified and in so doing reiterated and reinforced her submission in the claim. This is summarized as follows;

- That she is a sales and marketing executive and formerly employed by the respondent from March, 2002 to August, 2009
- Her starting salary was Ksh.19,000.00
- She was entitled to twenty-one days leave
- She was answerable to one, Charles Mutua, the Business Manager of the respondent

- On 16th July, 2009, she reported to work as usual but was put to one month's suspension on grounds of a delay in the purchase of a billboard for a GSU tender
- She was informed of this ground of suspension and did a write an apology on the same
- On reporting from suspension on 17th August, 2009, she was dismissed
- A letter of suspension was only issued on 17th August, 2009 and no letter of dismissal has been issued to date
- She was not informed of the reasons for dismissal
- She had not had any previous warnings on her conduct or service
- She was not paid her terminal dues despite demand

On cross-examination, she emphasized her position and on re-examination put it that her responsibility in the tender document was to compile the same and also submit a quotation for the price of the tender.

At a further hearing on 22nd May, 2013 DW1, Mr. Charles Mutua testified in defence. He submitted that the claimant's services were terminated for doing some mistakes. He further testified that he was instructed to do a suspension letter for thirty days. He further testified that his relationship with the claimant and other staff was not good. She refused to pick the letter of termination.

On cross examination, he testified that the tender was part of the reasons for termination. Other reasons were attitude, being argumentative and refusal to respect the company organization code. She was on termination paid her terminal dues

like;

- Salary for August, 2009
- One month's salary in lieu of notice
- Last pay

The parties on completion of the hearing agreed to dispose off the balance of

the matter by way of written submissions of which both parties submitted and the matter was set for judgement.

The claimant's written submissions reiterated the claimant's position as per the claim.

The issues for determination in this case therefore are;

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

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful.

Section 45, Employment Act, 2007 is the gateway to all issues relating to unlawful termination. It brings out cases of unfair, unlawful and wrongful termination to the limelight. It provides as follows;

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 circumstances leading to the termination of the claimant's employment fall within the ambit of S.45 (2) (a) and (c), S.45 (4) (b) and S.45 (5). There was no compliance with the law and therefore the termination in the circumstances can rightly be deemed to have been unfair.

Further, the Constitution of Kenya, 2010 at Article 47 provides for the basic right of fair administrative action for all persons. This is enunciated in the authority of Ongaya, J. in **Kenneth Njiru Njorani Versus Dodhia**

Packaging Limited Cause No.431 of 2010, as follows;

Article 47;

1. *Every person has the right to administrative action that is expeditious,*

efficient, lawful, reasonable and procedurally fair.

2. *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

3. *Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-*

- a. *Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
- b. *Promote efficient administration.*

This ties down all sectors of public administration including employment. In employment relationships, parties are so directed to exercise fair administrative action in their administrative actions and other dealings. It enjoins employers and employees in both the private and public sectors and requires of them to partake to certain action that is fair and accommodative to parties to an employment contract.

*Under Article 47 of the Constitution grants every person the right to fair administrative action applicable to employees and employers in the public sector and the private sector as was stated in the case of **Kenneth Njiru Njorani Versus Dodhia Packaging Limited** Cause No.431 of 2010, correctly quoted in the case of **Shankar Saklani versus DHL Global Forwarding (K) Limited** [2012] eKLR Justice Byram Ongaya, stated:*

*“In making this finding the Court recognizes termination has constitutional basis as provided in Article 47(1) of the Constitution which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Managerial decisions by employers are properly administrative actions within the province of Article 47 of the Constitution on the right to fair administrative action. **The Constitution breaks the curtains and it does not matter whether the employer is in public sector or private sector.** The Constitution in Article 10 clearly states **that the national values and principles of governance apply to all persons and the principles and values include human rights.** Thus, **in the instant case, the Respondent was bound to accord the Claimant the right to a fair administrative action through observation of the Rules of Natural Justice** and as expressly envisaged in Section 45(5) of the Employment Act.*

Article 47 of the Constitution clearly proves that:

1. *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
2. ***If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action,** the person has the right to be given written reasons for the action. It is the Claimant’s submissions that her rights as guaranteed under the Article 47 were violated from the conduct of the Respondent who never observed the above explicit fundamental right guaranteed by the Constitution.*

*This Article of the Constitution will be applied retrospectively because of the wording of Article 47(2) allows for respective application of this provision of this Article as was stated in the case **Samuel Kamau Macharia & Another versus Kenya Commercial Bank and Others** (Nairobi Supreme Court Application No. 2 of 2011) (Unreported) correctly quoted in the Case of **Esther Achieng Juma versus Co-operative Bank of Kenya Ltd**, Petition No.220 of 2012 (unreported) wherein Majanja J stated:*

“If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.”

The Employment Act

Before the Respondent summarily dismissed the claimant on the grounds alleged, the Respondent never explained to the Claimant, the reason for which the Respondent was considering terminating her employment.

Without prejudice to the above, if at all there was any such explanation, the Claimant was never accorded the chance to have another employee and/or person present as provided under Section 41 of the Employment Act. This was buttressed in the case of **Shankar Saklani versus DHL Global Forwarding (K) Limited** [2012] eKLR, Justice Byram Ongaya, states:

“The Court finds that the Respondent acted unreasonably by failing to take into account matters that were relevant, namely *complying with the statutory requirement to hear the Claimant. Thus the dismissal was unfair as it was in contravention of the express statutory provisions.*”

The Claimant further submits that provisions of Section 45 of the Employment Act were flawed by the Respondent. The Respondent failed to prove that the Claimant was dismissed in accordance with fair procedure. This was also stated in the case of **Samson Buluma versus DPL Festive Limited**, (2012)eKLR, Radido Stephen J, Stated:

“Section 45 of the Employment Act, 2007 places a duty on an employer to prove validity and fairness of a reason for termination. The Respondent has failed to discharge this onus. Section 10 of the Employment Act similarly expects an employer to produce in legal proceedings certain written particulars regarding the contract while section 74 also sets out records to be kept by an employer.”

The claimant’s case is a display of a failed observation of the procedure for fair termination of employment. The respondent was casual and not observant of the claimant’s legal and constitutional rights to fair process and fair administrative action. I therefore find that the termination of the employment of the claimant was wrongful, unfair and unlawful and hold as such.

The issue for determination therefore is whether the action of the respondent in terminating the services of the claimant was fair, lawful and in accordance with the terms of her employment contract. The Employment letter at Appendix 1 of the claim is explicit on the terms and conditions of employment. It elaborately expresses the terms of the contract of employment *inter parties*.

The claimant was suspended from employment on 16th July, 2009 through a verbal communication by the respondents Director, one, Charles Mutua. No reason(s) was communicated to the claimant and no other issues were discussed by the parties at the meeting of suspension on the same date.

When she resumed duty after one month’s suspension on 17th September, 2009, she was informed of her summary dismissal as per a letter of suspension backdated to 16th August, 2009 which was delivered on 17th September, 2009. The claimant was never afforded an opportunity to be heard during the entire process of suspension and dismissal and neither was she paid her terminal dues. This to me was unlawful, wrongful and unfair and I find as such. This settles issue number 1 herein.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. This would simply ensue from the finding on issue number 1 above. If she was unlawfully, unfairly and wrongfully terminated from employment, it would follow that this must be redressed and compensated as this is the hallmark of civil law and the dictates of fair play.

The respondent took its time at breaching the law and must now pay the price for so doing. I find that the claimant is entitled to the relief sought and award the same on the following terms;

(a) 12 months gross salary on account of damages for unlawful and unfair termination of employment amounting to Kshs.441,000/=

(b) Severance Pay for each completed year of service amounting to
Kshs.128,625.

c. Salary for the month of suspension amounting to Ksh.36,750/= plus interest thereon at court rates from August 2009 until payment in full

d. *One month's salary in lieu of notice amounting to Kshs.36,750.00*

e. *Certificate of Service*

f. *Unpaid leave for the period worked*

Lastly, and on issue number 3, who indeed bears the costs of this cause? Costs follow the event, it is rightly said. The circumstances of this case dictate a situation where the respondent bears and pays the costs of the suit to the claimant.

I am therefore inclined to uphold the claimant under relief to the claimant on the following terms;

1. (a) *12 months gross salary on account of damages for unlawful and unfair termination of employment amounting to Kshs.441,000/=*

(b) *Severance Pay for each completed year of service amounting to Kshs.128,625.*

(c) *Salary for the month of suspension amounting to Ksh.36,750/= plus interest thereon at court rates from August 2009 until payment in full*

(d) *One month's salary in lieu of notice amounting to Kshs.36,750.00*

(e) *Certificate of Service*

(f) *Unpaid leave for the period worked*

$- 21/30 \times 36,750.00 \times 7$ - *Ksh.180,075.00*

Total **Ksh.823,200.00**

2. The respondent is ordered to issue a certificate service to the claimant.

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

Dated, delivered and signed the 2nd day of October, 2013.

D.K.Njagi Marete

JUDGE

Appearances:

1. Mr. Ayisi instructed by Maneo & Company Advocates for the claimant.

2. Mr. Kayo instructed by Ochieng', Onyango, Kibet & Ohaga Advocates for the respondent.