



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 2170 OF 2012

CAROLYNE CHEGERO VERESO CLAIMANT

VERSUS

PAN AFRICA LIFE ASSURANCE LIMITEDRESPONDENT

JUDGEMENT

1. On 26th October 2012, the claimant Caroline Chegero Vereso filed a claim for unlawful termination against the respondent Pan Africa Life Assurance Limited. On 8th February 2013, the respondent filed their defence and admitted the claimant was their former employee who was terminated after absconding duty, poor work performance, and late report to work and for breaching her employment contract and thus deny the claims as outlined by the claimant. At the hearing, the claimant gave her sworn evidence while the respondent called Miriam Gathura the Human Resource Manager. Both parties agreed to file written submissions.

Claimant's case

2. In the statement of claim, the claimant states that she was employed by the respondent as an Administrator where she progressed after several reviews and her last salary was Kshs.71, 303.00. On 13th September 2012 the claimant fell sick and informed her line manager, Nancy through the phone³ and proceeded to see Dr. Ruga who gave her a day off. She went to Agha Khan Hospital which was in the respondent's panel but was turned back as her name had been withdrawn from the list of staff of the respondent and thus decided to go to Langata Hospital the following day.

3. On 14th September 2012, while the claimant was still on sick off, the respondent summarily dismissed her on accusations of absconding duty and failing to report to work, continued lack of seriousness, reporting to work late and breach of obligation and suspicious conduct.

On 17th September 2012, the claimant reported on duty but was blocked at the gate by security guards and was informed to see the respondent human resource manager the following day on 18th September 2012. She was then handed her summary dismissal letter dated 14th September 2012. That the summary dismissal was malicious on the basis that the reasons stated were unfair and the removal of the claimant's name from the list of staff members entitled to be treated at Agha Khan hospital, the accusations against her were not true and it was personal vendetta against the claimant with intent to harass her and finally cause her ejection from her employment.

4. That the claimant was not given a hearing before the termination and thus an unfair treatment and malicious. The respondent has not issued the claimant with a Certificate of Service and thus claim her service pay for the 7 years worked amounting to kshs.249, 560.50; compensation for 12 months

amounting to Kshs.855, 636.00; severance pay amounting to Kshs.21, 390.00; general damages for breach of employment contract; costs of the suit and interest.

5. In evidence, the claimant stated that she had been working with the respondent well and given several awards in recognition of her good work. In September 2012 she started having health problem that affected her and that required immediate attention as she was bleeding profusely and needed to see a gynecologist. This was also giving her severe back aches and when she talked to her line manager, she understood the claimant's condition. The line manager Nancy was on leave so the claimant went to the next in line, Winnie Waringa the team leader who allowed her to go and see a doctor and the claimant proceeded to see Dr. Maina Ruga on 11th September 2012. The doctor advised the claimant to take a rest as nothing could be done to her until the bleeding stopped and she got sick off of two days. The claimant passed by the office and left the sick off letter.

6. On 13th September 2012 the claimant went back to see Dr. Ruga since her condition had not improved and he gave her one (1) more day of sick off. The claimant did not go to the office as she was still unwell. Nancy Ngare the line manger called her and the claimant told her that the situation had not improved and needed more time.

7. On 14th September 2012, the claimant was still in pain and she called Nancy Ngare who had earlier on sent a text message to her asking for her whereabouts. The claimant went to Agha Khan hospital at T-Mall but was informed that she was not on their name list as an employee of the respondent, she thus called Nancy Ngare for an explanation since she did not have cash and did not know what to do a she needed Kshs.1,500.00 to see a doctor. The claimant decided to go to Langata Hospital where she was charged Kshs.300.00 for medical advice when she was given one day rest.

8. On 17th September 2012 the claimant reported to work but could not get access at the gate and the security officers told her that they had information that she should report the next day to see the respondent human resource officer. There were instructions that the claimant should not be granted access to the respondent premises.

9. On 18th September 2012, Rosemary Muchiri came for the claimant at the gate and proceeds to see the human resource manager who wanted to know why the claimant had not presented the sick off sheet and also demanded to know the kind of relationship that existed between the claimant and one Anthony Omwenya. The claimant was led to her desk for handing over and to collect her personal effects. She was then issued with letter of termination dated 14th September 2012 with 4 reasons for the termination.

10. The first reason was that the claimant had absconded work to which the claimant gave evidence that on 13th September 2012 she called the line manager and explained her circumstances and that the claimant did what was possible in the circumstances of her illness and condition.

11. The second reason was that the claimant lacked seriousness while at work to which she gave evidence that she did not understand this reason as she had been moved from the human resource office after she disagreed with a colleague and was given a warning. Her performance was good; the last appraisal was good and had received a bonus. Her interpersonal relations did not affect her work performance.

12. The third reason was that the claimant reported late to work to which she gave evidence that this was not correct as on three occasions the line manager had complained that she was not on her desk by 8 am. All the employees of the respondent had a card used to swipe at all doors and when the claimant found somebody else at the door/gate at 8 am she could use the same to gain entry instead of swiping her own card. Sometimes her logging would reflect 8.30 am, but this was not correct as the claimant would have entered the work place using another employee entry time.

13. The fourth reason was that the claimant was in breach of conduct to which she gave evidence that there was a time the stores were broken into, the claimant was suspended and after the respondent completed their investigations, she was recalled back. There was no hearing on the issue.

14. The claimant thus is seeking for her service pay for the 7 years she worked with respondent and severance pay as she has not been able to get another job and that the respondent killed her career. In the case where the claimant was accused of having conflict of interest on the grounds that she had her own company trying to give the respondent business, there was no evidence submitted to this effect and thus not true.

15. The claimant also stated that she was not issued with a certificate of service after her termination.

Respondent's case

16. In defence the respondent stated that the claimant was employed on 18th July 2005 in the Marketing Division as a Marketing Assistant and was later confirmed. In December 2007 the claimant was transferred to human resource unit, in July 2008 she was transferred to the human resource department due to an incident of indiscipline and in April 2011 was transferred to Marketing Department and her last position was at Customer Service-Back officer unit as a Customer Service officer. That the claimant in the course of her employment with the respondent did not carry out her responsibilities with diligence and her performance was not entirely satisfactory with noted instances like;

- a. In June 2008, the claimant had an exchange of words with her colleague, a receptionist, at the respondent reception for which the claimant was reprimanded;
- b. In February 2010 the claimant was suspended without pay on suspicion of participating in untoward behavior which related to stores purchasing;
- c. In March 2010 there was strong evidence against the claimant for conflict of interest and professional negligence where she was involved in obtaining quotes before goods were bought and the respondent issued her with a warning letter.

17. The respondent further states that the claimant was not withdrawn from the list of employees due for medical treatment at Aga Khan hospital as at the material time the claimant was on a staff outpatient medical insurance cover with a benefit of Kshs.100,000.00 provided by APA Insurance Limited and under the policy, the claimant and her beneficiaries were entitled to seek medical services on credit at any approved hospital so long as the utilized benefit was lower than 75% of the limit benefit where credit facilities would cease and had to settle medical expenses then seek a reimbursement from the respondent. That as at 5th August 2012, the claimant had utilized benefit under the policy at kshs.80, 142.00 at 80% benefit limit and thus the claimant and her beneficiaries could not access credit facilities at any approved facility and by September 2012, the claimant was aware that her utilized benefit had exceeded the 75% of her benefit limit and could not access credit facilities including Aga Khan Hospital at T-Mall.

18. On 11th September 2012 the claimant submitted a sick off chit by Dr. Maina Ruga for 2 days hence the claimant was to be away from work on 11th and 12th and was supposed to resume work on 13th September 2012. The claimant did not turn up for work on 13th and 14th September and her line manager Nancy Ngima had to look for her. The sick off letter issued to the claimant for 13th and 14th were never submitted to the respondent and thus the reasons for her termination on 14th September 2012. The reasons for termination were stated to the claimant in that she absconded from duty, lack of seriousness while at work, report to work late despite several warnings and breach of obligations and suspicious conduct. The respondent relied on section 44 of the Employment Act to summarily dismiss the claimant and the termination letter was issued to the claimant on 18th September 2012. She was denied access to the office as she had ceased being an employee. There was no malice, unfairness or personal vendetta or harassment of the claimant as the reasons for termination were stated to her.

19. The respondent further stated that the claimant was given one month's pay in lieu of notice and the leave days earned was paid for. That the claimant is not entitled to service pay or severance pay or any damages. The claim should be dismissed with costs.

20. In evidence Nancy Ngari the respondent Unit Manger stated that the claimant was under her supervision when she failed to report to work on 1st to 14th September 2012. On 11th she was away in

Kisii and when she returned on 12th September 2012, the claimant was not in the office and her deputy said the claimant had a sick off and the chit was with human resource office which was fine as the procedure required as much. On 13th the claimant did not report to work and at 10.30 am, Nancy sent her a text message to which the claimant replied and said she was at the hospital and was still unwell. Nancy wanted to know if the claimant had a sick off since on file there were only 2 days to which the claimant said she would be in the office the next day.

21. Nancy further gave evidence that on 14th September 2012, the claimant called her while at Aga Khan Hospital who had refused to attend to her and asked the claimant to contact the human resource office who may know what the problem was. Nancy was never given a sick off chit by the claimant for the 2 extra day with regard to the 13th and 14th of September 2012. She was not aware as to why the claimant was away from work.

22. The second witness for the respondent was Miriam Gathura of Human Resource since June 2010 and worked with claimant. That on the file of the claimant, she had for the 7 years with the respondent taken six (6) different positions and in all positions, the claimant had been moved due to an issue that related to her conduct;

- a. On 18th July 2011 she was receptionist for 3 months
- b. October 2005 the claimant was moved to marketing assistant due to complaints that she was not handling clients well. She was engaged in private business and thus not concentrating on her work. She was transferred;
- c. In December 2007 the claimant was moved to human resource office as she had a diploma in human resource and as a good employer the respondent wanted to give the claimant a fair chance and thus removed her from direct contact with clients to another department;
- d. In August 2008 the claimant was moved to Finance and Administration to do procurement until March 2011. The claimant was involved in a case of dishonesty where she procured cartilages that were not authentic and there arose an issue of conflict of interest and was suspended and after investigations and disciplinary hearing, the claimant was given a warning letter and returned to work;
- e. In 2011, for 5 months, the claimant was moved to Marketing department as an assistant and even here she was involved in trading and many people came to collect their debts from the claimant and the respondent noted that a person in public relations office was not the right position for the claimant and was thus moved to the back office; and
- f. In November 2011 the claimant was placed in a new department until her termination.

23. That the summary dismissal was inevitable noting that in 7 years, the claimant had worked in 6 departments which were all horizontal to give her a chance to change but this did not happen. There was no promotion but changes due to various incidents. That the bonus given were not due to the claimant's good performance but based on the respondent's criteria, she met the bare minimum. These increments are inflation based and what was paid to any employee and not to the claimant for outstanding performance.

24. On the letter for summary dismissal, Miriam signed it and outlines the 4 reasons for the dismissal noting the first issue to be absconding duty when the claimant was away from work for 2 days without any explanation. When the claimant reported back to work on 18th September 2012, the line manager together with Miriam outlined the reasons, the respondent officers had tried to contact the claimant via phone and text messages, but still she had not submitted any sick off chit or leave application form and nobody was aware as to why the claimant was out of work for two days.

25. The second reason was that the claimant lacked seriousness at work. She was moved to 6 departments where she had issues. Several shylocks followed her to the office demanding their payment which was conduct not expected of an employee of the respondent as this was affecting the image of the respondent whose business depends on public good will.

26. The third reason was that the claimant was perpetually being late for work, she was warned and still failed to use the proximity card to access the office. The proximity card was issued by the respondent to all staff to help employee access the office and it gave a record on time of access and the respondents got records where the claimant was late to work on several occasions.

27. The fourth reason was that of breach of obligations whereby before the claimant took her 2 days sick off days, there was an incident. On 8th September 2012, the claimant was at the office, she accessed the office and opened the desk of a colleague Anthony Omwega who was being sought by the Banking Fraud Unit and there was a newspaper's notice to this effect. This person had disappeared and thus the police were looking for him. On this day, the claimant opened his desk and cleared it of his personal effects and this was held to be suspicious conduct. The claimant admitted that she came to the office and did this since she had the key of Anthony Omwenga. This was a Saturday and since the staff does not work over weekends, there happened to be an audit going on and the responsible staff was in the office where Anthony Omwenga was also placed. The claimant did not use her proximity card to access the respondent premises, and it was not clear how she gained access. Since this was a police case and the respondent officers were supposed to help, the conduct of the claimant in accessing the office over a weekend and clearing the desk of a wanted person was contrary to company policy and thus suspicious and a breach of her duty as an employee.

28. Miriam further stated that on 18th September 2012, when the claimant came to the office, they held a meeting with her where the general manager was present as well as the ITC manager. The reasons stated in the letter of dismissal were also addressed.

29. That in this case the claimant is not owed any service or severance pay as these are not payable in a case for summary dismissal. The termination was fair and thus no compensation is due. The claimant had a medical cover with APA, she exceeded her limit and a statement was issued to her every month and therefore cannot be found to say that she was not aware that by the time she went to Aga Khan Hospital, her credit limit had expired. The claimant was not withdrawn from getting medical treatment, she simply had exhausted her limit and the option remaining was for her to use personal funds and seek reimbursements.

Analysis of the case

There are several questions that emerge in this case;

Whether the claimant was unfairly terminated;

Whether the claimant is entitled to the remedies sought of service pay, severance pay and compensation for unfair termination; and

Whether costs should be awarded.

30. The main claim by the claimant is that of severance pay, service pay and compensation for unfair termination. Was this therefore a case of unfair termination?

31. I find few areas where the law allows summary dismissal as under section 44 of the Employment Act. At section 44(4) (a);

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) Without leave or other lawful cause, an employee absents himself from the place

appointed for the performance of his work;

32. was there conduct by the claimant to justify her summary dismissal? It is not disputed that the claimant got unwell on 11th September 2012 and was given 2 days sick off by her doctor and the respondent was made aware. This far, both parties agree. However, after these 2 days, the claimant in her evidence stated that she continued to feel unwell and had to see a doctor for this purpose and the doctor gave her one more day off for the 13th of September 2012 but she was still not well and she went back to another doctor and got more time off. However, the claimant was not able to take the sick off chit to the respondent until 18th September 2012 when she had her meeting with the respondent officers and realized that on 14th September 2012, her letter of termination had already been drafted and was then issued to her on the 18th of September 2012. The claimant therefore as much agrees that on 13th and 14th September 2012, she was away from work without approval on the basis that she was unwell a fact that her line manager was already aware of.

33. An employee who is unwell must take all reasonable measures to ensure the employer is aware of the circumstances. This is a duty of an employee. There is no way an employer, as diligent as they may wish to be has a reason to know the health status of each employee if not well informed within reasonable circumstances. Section 34 of the Employment Act talks about the conditions that must be met by an employer and an employee one being that an employee who is unwell, must let the employer know of this condition immediately or where practically possible. Was the claimant in circumstances where she could inform her employer of her health condition?

34. On the 13th September 2012, the claimant woke up feeling unwell and decided to go to the doctor before reporting to work. She did not inform her line manager until the line manager sent a text message to make enquires on her whereabouts. She got a sick off chit from the doctor but kept the same to herself. On 14th September 2012, the claimant work up feeling unwell and decided to go to T-Mall, at Aga Khan Hospital but could not receive services as her name was not on the list. The claimant called her line Manager to enquire if she had been removed from the list of staff to received medical services from the facility where she was. She later decided to go to Langata Hospital where she received medical attention. She also decided to go and see her regular doctor who treated her and gave her a sick off chit. She kept this sick off chit to herself.

35. The claimant does not give a valid reason as to why she failed to go back to the office to seek more time off noting her health condition. She went to the doctor on 13th September and decided to keep the sick off chit. On 14th, the claimant went to three (3) separate facilities, Aga Khan Hospital at T-Mall, Langata Hospital and to Dr. Ruga's clinic but failed to do the most crucial thing of calling or going back to the office to seek time off. This is not what a diligent and reasonable employee does in the circumstances such as that of the claimant. As much as the line manager was aware of the claimants condition as of 11th and 12th of September, there was no information from the claimant as to her whereabouts for the 13th and 14th of September. In this era and age of technology, a phone call from one's cellphone in the comfort of one's home or anywhere is largely acceptable as a reasonable means of communication before formalizing the same with what an employer policy and regulations require. Technology also allows people at the work place to communication through emails and text messages and once practically possible to reduce these form of communication to formal approval. The claimant failed to take the initiative to communicate. She only waited for the prompting by her line manager to indicate her whereabouts. Even in a situation where the claimant was too ill and unwell as to be unable to communicate to her employer as to her whereabouts, I find in this case, the claimant, on 13th September 2012, she was able to text back her line manager when she was asked about her whereabouts, an indication that the claimant could communicate without being prompted to do so. Equally on 14th September 2012 when the claimant was not able to get services at Aga Khan Hospital, she was able to call her line manager as an indication that she was not incapacitated to a point of not being unable to communicate. I do agree with the respondent's submissions that the claimant was able to visit 3 different

places, the last place being Dr. Ruga's clinic which is just a building away from where the respondent offices are, yet she failed to in the least drop the sick off chit or call the office to communicate about her situation. The claimant was not diligent and has not demonstrated that she acted in a reasonable manner.

36. was the sanction of summary dismissal too harsh in this case? This would have been seen as such but this case cannot be analyzed on the basis of the claimant's failure to have absconded duty for two days. The same must be seen in the context of the other reasons as cited by the respondent for the dismissal. Of interest were the fourth reasons that the claimant had acted in breach of her contract. That on 8th September 2012, she went to the office and removed various items from the desk of a former employee of the respondent who was being sought after by the Banking Fraud Unit. This issue was never addressed by the claimant in a coherent manner that can be said to be satisfactory. To act as the claimant was said to have acted, the respondent as the employer ought to have acted immediately where an employee, during off hours gets back to the office to aid or abet a crime or to act in a manner that suggest and or indicate that such an employee was acting in collusion with a suspect, in a manner that is not only criminal but contrary to what a good employee should be allowed to do. For the claimant, soon after gaining access to the office in unexplained circumstances on 8th September 2012, things do not seem to work her way as on 11th September she got unwell and had two days sick off. Things spiral out of the claimants' hold and for two days she failed to communicate with her employer about her whereabouts. These circumstances coupled with what the respondent stated as the second reason for termination of reporting late and the third reason of continued lack of seriousness while at work, create a scenario that the claimant as of 8th september 2012 had serious issues to answer to her employer. In the absence of a valid reason or explanation by the claimant with regard to the breach of her obligations, this court is left with no option than to agree with the respondent. The claimant had far too many complaints while at work to benefit any further as regard to the misconduct of being away from the office without formal permission for 2 days. Conditions as set out under Section 44 of the Employment Act must apply. The termination was therefore not unfair to benefit the claimant as under section 45 of the Employment Act.

The remedies

37. On the claim for service pay, the claimant in her pay slip attached to the claim as annexure CCV-2 indicate that she was registered with NSSF and NHIF. This removes the claimant from the provisions of section 35 of the Employment Act with regard to service pay. This will be declined.

38. The claim for severance pay is due to an employee declared redundant. This was not the case for the claimant. This will be declined.

In concussion, the claim is hereby dismissed. No orders as to costs.

Delivered and dated in Nairobi this 17th day of December 2013

Mbaru

JUDGE

In the presence of:

Lillian Njenga: Court Assistant

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