



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1356 of 2010**

**CAROLINE MURIGI ..... CLAIMANT**

**VERSUS**

**KENYA INTERNATIONAL SPORTS LIMITED.....1<sup>ST</sup> RESPONDENT**

**ALLAN SPORTS LIMITED .....2<sup>ND</sup> RESPONDENT**

(Before Hon. Lady Justice Hellen Wasilwa on 18<sup>th</sup> October, 2012)

**JUDGMENT**

The Claimant herein Caroline Murigi filed her statement of claim before this court on 29<sup>th</sup> October, 2010 through the firm of Ojiambo & Company Advocates. Her claim is against the Respondents herein Kenya International Sports Ltd and Allan Sport Limited. She sought orders against the Respondents as follows:-

**1<sup>st</sup> Respondent**

- (a) General damages for unlawful and unfair termination.
- (b) Wages for the days worked from 8<sup>th</sup> August 2010 to 10<sup>th</sup> September 2010 of Ksh.46,669/=.
- (c) Directors' remuneration at the rate equivalent of one month's basic salary for each and every month served.
- (d) Compensation for loss of office.
- (e) Costs of this suit
- (f) Interest on a, b, c, and d above till payment in full.

**2<sup>nd</sup> Respondent**

- (a) Director's remunerations at the rate equivalent to one month's basic salary for each and every month served.
- (b) Compensation for loss of office.
- (c) Costs of this suit.

(d) Interest on (a) and (b) above till payment in full.

The Claimant gave oral evidence before this court and stated that she was an employee and director of the Respondents from 26<sup>th</sup> February 2008. She states that she was a Salesperson and Marketer for the Respondents' shops at T-Mall Shopping Mall along Langata Road and Westgate Shopping Mall at Westlands. She was also a director of the Respondents as per her exhibit CM – 1 a copy of the Notification of change of Director dated 3<sup>rd</sup> September, 2009 and Appendix CM4 a notification of change of particulars of Allan Sports Ltd dated 24<sup>th</sup> August, 2009.

She gave evidence that on 8<sup>th</sup> August, 2010 on a Sunday, she closed shop at 6.30 p.m. instead of 7 p.m. as was the norm. She says on this day she had a problem with an agent manning their house as she had not paid rent due to receiving salary late. The agent wanted to close her house. Having gotten the money the previous day, she decided to close shop early so as to go and meet the agent and pay rent. As she left while along Mbagathi way, she received a call asking if she had closed the shop. She said yes. It was one Mr. Idris who called her. He told her to go to their shop at Nakumatt Junction and meet him. When she met him he asked her to hand over the key and phone of the shop and leave until further notice. She tried to explain the reasons for closing earlier but her explanation fell on deaf ears. He did not give her any notice. When he did not call her, she went to her Advocates who wrote a demand letter. To this too, there was no response.

On 1<sup>st</sup> September, 2010, her advocate called her and informed her that he had received a letter which contained her cheque for Ksh.56,087/=, for leave, notice pay and 8 days' pay for August, 2010. She says that as director, she was never paid. That the memorandum of Association (Appendix CM 2) states that directors should be paid equally. She says she as only paid Ksh.36,667/= all inclusive.

Cross examined by Mr. Mungu for the Respondent, she admitted that she closed shop at 6.30 p.m. instead of 7 p.m. That two of them, herself and another salesperson worked under her worked at this shop. She says she closed to attend to a personal issue. She says she was also appointed a director but did not attend Board of directors meetings for the two companies and she is not aware that directors are appointed by shareholders. She says she used to sign for directors at the bank in getting loans. She also requested for cheque books and made payments to suppliers. She says she used to make decisions on behalf of other directors when he was away. She says there was no agreed amount to be paid to her as a director.

The Respondents filed their answers to claim through the firm of Mungu and Company Advocates. Two separate Answers were made; one for each Respondent. The Respondents relied on these answers and submitted that termination of the Claimant was justified. They submitted that the dismissal was reduced to a normal termination. They further submitted that the Directorship of the company cannot form a contract of employment. That this was an internal matter of the company which can be resolved through arbitration and that this is out of this court's jurisdiction.

The Respondents called one witness who stated that he deals in retail shops for sports equipment and apparels and shoes. They have shops at T-Mall junction, T-Mall, Westgate and Galleria Shopping Malls. On 8<sup>th</sup> August, 2010 at 3.00 p.m. on a Sunday he went to T-Mall and found the shop closed. He called the owners of the company and informed the owner of the position. The owner told him to inquire as to why the shop was closed and if there is no explanation, he should fire the supervisor of the shop. RW 1 called the Claimant on shop phone and she picked up. Then he asked her how the sales were and she said they were not bad but there were no many people. She stated that she was at the Mall. He told her that he was outside the shop and the door was closed. The Claimant kept quite on the phone and said she was sorry. She had closed earlier before 7 p.m. as 7 p.m. Is the closing time!

He further stated that the Claimant was aware she was wrong and she asked her to bring the keys and phone to Nakumatt junction and she obliged. She asked for forgiveness but he told her that the owner could not forgive on matters of breach of trust and that she could get her terminal dues later. He says her dismissal was justified.

In cross examination by Ojiambo for Claimant, RW I stated that Claimant was director of 2<sup>nd</sup> Respondent but currently she is not. He says he does not attend Board meetings and is not aware of decisions directors take nor who appoints them.

At close of Respondent's case both Counsels opted to file and exchange written submissions. The claimants submitted that the Preliminary Objection that the Respondent had suggested was never raised and the Respondents having participated in the proceedings to the last stage have admitted the courts jurisdiction. In relation to referring the dispute to arbitration, the Claimant submitted that Article 40 of the Articles of Association refer to disputes between directors and members but not between directors and so Article 40 does not apply to the Claimant.

The Respondents on the other hand submitted that the Claimant's dismissal was lawful as she closed shop before time and did not even allow the other employee at the shop to keep the work going on. That the Claimant knew why she was terminated and so there was no need to explain to her since she had a discussion with DW I who listened to her and told her that he would be in touch.

The Respondents submit that the issue of the Claimant being treated unfairly does not arise as she committed actions that were a gross abuse of the trust placed on her by her employer. In the circumstances, reason for the termination fall squarely within the provisions of Section 45(1) of the Employment Act. The Respondents also submitted that Claimant was not a shareholder of Respondents and she did not demonstrate how she was elected to be a director or how she was to be removed. That on issue of directorship the Respondent submit that his court has no jurisdiction. The Respondents submit that the Claimants claim should be dismissed accordingly.

Having heard both parties, the questions for determination by this court are framed thus:-

1. Whether this court has jurisdiction to entertain this claim.
2. Whether the Claimant was wrongfully dismissed by Respondent.
3. What remedies if any, is the Claimant entitled to.

On the 1<sup>st</sup> question, the Industrial Court has jurisdiction to entertain any dispute between an employer and employee. The Respondents admit that the Claimant was their employee at their mall shop. As an employee/employer relationship exists between Claimant and Respondents. I find that this court has jurisdiction to hear this matter.

What of the issue of directorship? The circumstance under which the Claimant was appointed as a director of the Respondents is not known. However, it is apparent that the Respondents did this appointment. The notice of change of directors was presented to the Registrar of Companies by the Respondents' Advocates on record Mungu and Company Advocates. The Advocates must have had instructions to do so from the Respondents herein. They cannot now submit that the issue of Claimant being a director of the Respondent is a non-issue. The Respondents chose to use the Claimant's name for their own use. Whether they consulted the Claimant or not, is not clear but having chosen to use Claimant as a director to further their companies' interests, they must remunerate her for that purpose. The initial relationship is that of employer/employee and within it the idea of a director is born. To say this court has no jurisdiction to entertain the matter of directorship is in my view meant to perpetrate an injustice to the Claimant. She may have to be forced to finalise the employment part before this Industrial Court and then proceed to another High Court to address the issue of directorship. The matters having arisen out of an employment relationship, I find that this court has jurisdiction to entertain this matter.

Having answered question 1, I go to the Second question relating to the dismissal of the Claimant. The Respondents say that the dismissal of the Claimant was done summarily following breach of trust bestowed upon her. One of the reasons for summary dismissal under Section 44 (4) of the Employment Act, is

***“without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.”***

It is alleged in this case that the Claimant left her place of work earlier than the time allowed and this the Claimant agrees but says it was so as to attend to a personal pressing matter. However, the manner of leaving work before time falls within ambit of Section 44(4) of the Employment Act and this could warrant summary dismissal.

The Respondent however varied this right to summary dismissal because they converted into a normal termination. This is evident from the Respondent’s Ex CM where they paid her salary for 8 days worked in August, one month in lieu of notice and 21 days leave not taken for the year 2010. In this case, then the Claimant was also entitled to other benefits permitted for normal termination including a hearing.

What benefits then is the Claimant entitled to? Having been paid 1 month salary in lieu of notice, salary for days worked in August and leave, I find that she is also entitled to payment of:

1. Service pay provided under Section 35 (5) for every year worked. The Claimant had worked from 28<sup>th</sup> February, 2008 up to time of dismissal on 8<sup>th</sup> August, 2010. She had worked for two and a half (2 ½ ) years for the Respondents. I calculate the service pay prorated at 15 days salary for each year worked. That comes to 37½ days salary = Ksh.45,834/=.

2. The Claimant was dismissed on 16<sup>th</sup> September 2010 as evidenced from Appendix CM 3. She was paid up to 8<sup>th</sup> August, 2010. She is therefore entitled to the period she was supposedly on duty on 9<sup>th</sup> August 2010 to 16<sup>th</sup> September, 2010 = 38 days

= 46,445

3. On issue of directorship, I award her discretionary directorship pay of Ksh.30,000/= as the amount fixed is not apparent for this court for the period she served.

Total awarded = Ksh.122,279/=.

4. Each party will bear costs of this suit.

Dated, signed and delivered in open court this 18th day of October, 2012 before Rachael Gichuki Court Clerk, Kimeto holding brief for Mungu for 1<sup>st</sup> and 2<sup>nd</sup> Respondent, Muihuri holding brief for Ojiambo for Claimant.

**HELLEN WASILWA  
JUDGE**