



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1046 of 2011

PAULINE MWITA MARU.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. On 30th June 2011 the Claimant herein **PAULINE MWITA MARU** filed a Memorandum of Claim against the Respondent **TELKOM KENYA LTD** seeking the following orders-

2. **THAT, the Applicant's termination of her services by the Respondent on 30th November 2009 was unlawful, arbitrary, against its own Staff Regulations, , Employment Act and Labour Institutions Act of 2007 and the given for her termination was not valid.**

3. **THAT, the Respondent, Telkom Kenya Ltd be ordered to pay Special damages for unlawful termination as follows:-**

[i] **One month's salary for one year worked – Kshs.40,386x12=Kshs.484,632/=.**

[ii] **Annual leave allowance [no. of days eligible x basics pay= 23 days x 40,386 = Kshs.30,963/=.**
30

[iii] **Loss of income i.e one month's salary for each year worked = Kshs.(40.386 x 15 years) = Kshs.605,790/=.**

4. **THAT, costs of this claim.**

5. The Respondent filed its replying memorandum on 11th September 2011 denying the allegations in the memorandum of Claim.

6. The Parties were heard by Hon. Justice Isaac E.K. Mukunya (Retired) on 5th March, 12th and 26th April 2012. The Claimant was represented by Mr. Tom Wachakana of Wachakana & Co. Advocates while the Respondent was represented by Ms. Mate of Iseme, Kamau & Maema Advocates.

7. The Claimant testified in support of his claim while the Respondent called 2 witnesses, Stela Nasimiyu Ndirangu and Boniface Kiilu Mwando.

8. The Claimants case is that she was employed by the Respondent in 1993 as a clerical officer III. Her duties then were filing and retrieving documents and writing purchase orders.
9. Her starting salary was Kshs. 2000/- with a house allowance of 1500/-. She was entitled to 27 leave days. She worked for 15 years. Her salary at the time of dismissal was Kshs.43,625.96/-.
10. In 2009 when the Respondent carried out restructuring the Claimant was working in Nakuru as a clerical officer and was the only one who remained in employment in procuring department. She became the officer in charge of procuring materials in the construction yard.
11. Her employment was terminated on 30th November 2009 on grounds that she had released ignition keys of motor vehicle No. KZG 831 Isuzu lorry to Mr. Jonathan Tonui, a senior technician.
12. The Claimant appealed against the dismissal but was not successful.
13. Her claim against the Respondent is for compensation for unlawful dismissal, pending leave of Shs.30,963/- and costs.
14. In cross examination the Claimant admitted having been given a charge sheet to defend herself against accusations, appearing before a disciplinary panel and being given a chance to speak at the disciplinary hearing to defend herself. She also admitted that she was aware of the circular from the Managing Director against misuse of vehicles.
15. The Respondents case is that the Claimant was lawfully dismissed from employment for misuse of official motor vehicle no. KZG 831.
16. The Claimant who was the officer in charge of Nakuru construction yard authorized an officer from Njoro Exchange Mr. Jonathan Cheruiyot to drive the official motor vehicle for private use disregarding the Respondents regulations governing usage of official motor vehicles. She further instructed the security guard at the gate not to log out the motor vehicle in the gate records on the grounds that it was going out for her private duties.
17. The Respondent called 2 witnesses, Stella Nasimiyu Ndirangu, DW1 and Boniface Kiilu Mwando, DW2.
18. DW1 STELLA NASIMIYU NDIRANGU testified that she works in the Respondents Human Resources Department and that the Claimant was employed as a clerk by the Respondent. At the time of her dismissal from employment she was in charge of the Respondents Nakuru construction yard. The yard had company property including motor vehicles. The Claimant was accountable for receiving and issuing anything in the yard.
19. DW1 further testified that the Claimant was dismissed in 2009. This was after the Respondent received a report that the Claimant had misused a vehicle in the yard by organizing with a technician to use the vehicle to carry her own goods, maize and charcoal, to her house in Lanet without authorization.
20. The Claimant was asked to explain the misuse and was suspended from duty to allow the Respondent to carryout investigations.
21. The Claimant submitted her explanation which the disciplinary Committee found unsatisfactory following which she was dismissed.
22. The Claimant appealed and was invited to appear before the Appeals Committee but the appeal was dismissed and her dismissal upheld.
23. On cross examination by Mr. Wachakana DW1 stated that the Claimant had no authority to use the vehicle as she was only the custodian, that Jonathan Cheruiyot Tonui was the same rank as the

Claimant and is allowed to use the company vehicle.

24. **DW2 BONIFACE KIILU MWANDO** testified that he is a Senior Investigator with the Respondent and a holder of a degree in criminology and a diploma in forensic and criminal investigations.

25. He was instructed by the Respondent to carry out investigations on whether the Claimant was involved in misuse of official motor vehicle and recommend appropriate action.

26. His findings were that the Claimant Pauline Mwita released the keys of motor vehicle no. KZG 831 to Jonathan Tonui to ferry personal items, maize and charcoal from Njoro to Nakuru and the goods belonged to the Claimant. He prepared an investigation report which was produced as Respondents Exhibit No.1.

27. The facts of the case are not contested. The Claimant admits having released the keys to the motor vehicle to Jonathan Tonui. The uncontested evidence of **DW2 BONIFACE KIILU MWALO** who investigated the case is that the goods that were carried by the vehicle belonged to the Claimant.

28. The Claimant has not contested the other evidence that was filed as exhibits by the Respondent in the Supplementary Replying Memorandum dated 7th March 2012 which included witness statements from among others, the security guard at the yard **EVELYN OKIOMA** who stated in the statement that she was asked by the Claimant not to book the vehicle KZG 831 as it was going for her private work; the statement of **SENDA OKOYO** who stated that Mr. Tonui did not have authorization to use the vehicle; and the investigation report.

29. From the foregoing I find that the Claimant's argument that she did not have authority to release the vehicle and that she expected Jonathan Tonui to get the work ticket authorized to be of little value in her defense. She admitted being in charge of all the materials in the Respondents Nakuru construction yard and releasing the keys of motor vehicle KZG 831 to Mr. Tonui without authorization.

30. I find that the Respondent had sufficient reason to dismiss the Claimant for misuse of official vehicle Isuzu Lorry registration No.KZG 831. On the issue whether proper disciplinary procedure was followed, the Claimant stated in her testimony that she was given an opportunity to defend herself at the first instance and again on appeal. However she was never informed of her right to be accompanied to the disciplinary hearing by a union official or a colleague. To this extent the Respondent did not comply with the requirements of Section 41 of the Employment Act.

For the foregoing reasons I make the following orders in respect of the Claimant's prayers:-

1. That the Applicants termination of the Respondent was unlawful and arbitrary

I find that the termination of the Claimant was based on valid reason and substantially complied with the requirements of the Respondents disciplinary procedure and the Employment Act save for the fact that the Claimant was not informed of her right to be accompanied by a colleague or union official to the disciplinary hearing. For this reason the dismissal is reduced to normal termination.

2. Special Damages

[i] The claim for one month's salary in lieu of notice succeeds as the summary dismissal has been reduced to normal termination. The Claimant is therefore entitled to Kshs.40,386/- being one months' salary in lieu of notice.

[ii] Annual leave allowance

There was no evidence submitted in respect of this prayer by the Claimant. The claim is therefore dismissed.

[iii] Loss of income at one month's salary for each year worked.

Again no evidence was submitted by the Claimant in respect of this claim. The claim therefore fails. However, having found that the Respondent did not fully comply with the procedure by not informing the Claimant about her right to be accompanied by a union official or a colleague the Court grants the Claimant 2 months' salary as compensation for unfair termination which amounts to Kshs.80,772/-.

The Claimant is therefore entitled to a total sum of Shs.121,158/- as granted in (i) and (iii) above. The said sum should be paid within 1 month from the date of the judgment failing which the Claimant is at liberty to apply for execution.

There shall be no orders for costs.

Orders accordingly

DATED AND DELIVERED IN NAIROBI THIS 18TH DAY OF OCTOBER 2012

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:-

For Claimant _____

For Respondent _____