



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 687N of 2009

Rachel Nafula

CLAIMANT

Beauty Clinic Limited

RESPONDENT

AWARD

1. The proceedings herein were taken by retired Justice Chemmutut. It will therefore be helpful if I gave a brief background.
2. Rachel Nafula (hereinafter the Claimant) filed her claim on 10 November 2009 against Beauty Clinic Limited t/a Urembo Hair Salon. Beauty Clinic Limited (the Respondent) filed a memorandum of Reply on 30 March 2010. Hearing and submissions were held on 4 June 2010 during which the Judge informed the parties that an award would be announced on Notice. Justice Chemmutut left office before pronouncing the award.
3. On 4 October 2012, Mr. Gicheru holding brief for Mr. Namada for the Claimant and Ms. Achieng-Nyaitho for the Respondent signalled their consent to this Court preparing and pronouncing an award based on the proceedings taken before Justice Chemmutut.

The Claimant's case

4. It is not disputed from the record that the Claimant was employed by the Respondent on or before 6 November 1996 as general worker/cleaner. She was terminated on 6 November 2003. At the time of termination she was earning Kshs 7000/- but without house allowance.
5. According to the Claimant, she cannot read or write but she applied for leave to attend the burials of her sister –in-law and the son of an aunt. A leave application dated 3 November 2003 was annexed to the Respondents reply. According to the Claimant the leave was granted and when she resumed duty on 6 November 2003 she was issued with a dismissal letter. She sought for an explanation but was instead told that her dues had been deposited with the labour office.
6. Attempts to conciliate the dispute did not succeed and the Respondent deposited Kshs 4700/- with the labour office as the Claimant's entitlements on dismissal.
7. The Claimant contended that she was wrongfully dismissed instead of being terminated and paid all dues. She therefore seeks for *compensation, payment of salary in lieu of notice, days worked in November*

2003, unpaid off-duty days and service pay.

Respondent's case

8. The Respondent on the other hand contended that the Claimant's services were terminated through a letter dated 6 November 2003 addressed to the District Labour Officer, Nairobi, for absconding from duty without official permission. A sum of Kshs 4700/- comprising 3 days worked in November 2003 and 12 leave days were stated to be enclosed in the letter.

9. The Memorandum of Reply indicates another reason for the termination was insubordination.

10. The Respondent exhibited to its Memorandum of Reply a leave application dated 3 November 2003 but which application was rejected by the Respondent.

11. The Respondent also exhibited various leave applications made by the Claimant from 2000 to 2003.

12. The Respondent also lamented the fact that the Claimant had sued it in Milimani CMCC No. 10013 of 2004 which was later withdrawn by the Claimant but without paying costs.

Issues for determination.

13. From the contention of the parties set out above briefly, the issues which emerge for the determination of the Court are:

- (i) What law is applicable
- (ii) Whether the Claimant was unlawfully terminated for absconded from duty
- (iii) If the Claimant was unlawfully terminated what remedies is she entitled to.

Analysis of the issues

What law is applicable

14. The services of the Claimant were terminated in 2003. At that time, the Employment Act, Cap. 226 was the operative Law. Section 92 of the Employment Act, 2007 repealed the Employment Act. The current Employment Act does not express that it is meant to operate retrospectively. I will therefore determine this case on the basis of the repealed Employment Act which was in operation in 2003.

Whether the Claimant was unlawfully terminated for absconded from duty

15. The termination letter dated 6 November 2003 state that the Claimant was terminated because of absconding from duty.

16. The allegation in the Memorandum of Reply that insubordination was one of the reasons for termination cannot stand. It is an afterthought. It is not open to the Respondent to assert a reason for termination which was not put to the Claimant at the time of termination. If the insubordination happened before the termination, it was in the knowledge of the Respondent and it should have been given as one of the reasons for the termination.

17. The Respondent, in its Reply exhibited a leave application by the Claimant seeking 3 days leave to attend a burial. The application was rejected by the Respondent. The form indicates that the Claimant proceeded on leave without official permission. On 6 November 2003, when the Claimant resumed duty she was confronted with a termination letter.

18. Absence from duty is a reason given in Section 17(a) of the repealed Employment Act as warranting

summary dismissal. But the section also allowed the dismissed employee to question the justification or grounds for dismissal.

19. The Employment Act, 2007 unlike the repealed Employment Act has now made it obligatory to observe the rules of natural justice before a decision to dismiss an employee is taken. The Act requires procedural fairness to enliven the termination process. The Employment Act has radically shifted the goal post. Before the enactment of the Employment Act, 2007, there was no statutory obligation upon an employer to conduct a hearing. Indeed the employer did not even require to give a reason for terminating the services of an employee. The employer only needed to make the requisite payment in lieu of notice and other payments enshrined in the employment contract. This position does and cannot hold any longer in Kenya.

20. This Court is now mandated to inquire into the *why* and *how* of terminating an employment contract. If the *why* cannot be sustained, the dismissal would be declared unfair or unlawful. Similarly, if the *how* does not meet the dictates of natural justice, the Court can intercede and grant appropriate remedy.

21. There is no evidence on the pleadings or otherwise that the Claimant was given an opportunity to make any representations before the decision to terminate her services was taken. This is one of the reasons relied on by the Claimant to assert her claim. Unfortunately I don't have much leeway to entertain this position. My hands are tied by the operative law at that particular time.

22. However, under the repealed Employment Act, it was open to an employee to question the justification for dismissal. That is what is under challenge in the case at hand. The Claimant sought leave to attend to the burials of kin and kith. The application for leave was rejected. The Respondent has not told the Court whether and when the rejection of the application for leave was communicated to the Claimant.

23. In this case therefore I do find that the action taken by the Respondent was too drastic and there not justifiable in the circumstances.

24. Having found that the termination was not justifiable, I have to examine each and every head of claim made by the Claimant.

Remedies

25. The parties appeared before a Conciliator who made recommendations through his letter dated 7 June 2003. The Conciliator's report formed part of the Claimant's pleadings and documents. I have examined that report and find no legal impediment to stop me from adopting it. He is an expert in this type of cases being a Labour Officer and he had the opportunity to examine the records placed before him. I therefore would have adopted the calculations therein.

26. There are 3 claim heads in the Memorandum of Claim which the Conciliator did not deal with. These are the claim for Kshs 88,200/- being compensation for unpaid house allowance and Kshs 25,200/- being service pay.

27. The Claimant has failed to lay either a contractual or legal basis for two of these claims and I therefore would have declined to make an award in her favour on these 2 heads.

28. However, by law the Claimant is entitled to wages earned for the 6 days she worked in November 2003. It is not in dispute that her services were terminated on 6 November 2003. I would have awarded this head of claim also.

29. Having found the termination of the Claimant unjustifiable, I would have awarded the Claimant one month's salary in lieu of notice in the sum of Kshs 7,000/-.

Statute of Limitations

30. None of the parties raised the legal point of the Claim being statute barred. It is not contested that the relationship between the parties was contractual. It was a contract of service. The Claimant's services were terminated on 6 November 2003.

31. According to the Limitation of Actions Act section 4 actions based on contract should be brought before Court within 6 years. The section provides:

4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(a) actions founded on contract;

32. In the instant case, the Claim was commenced on 10 November 2003. Clearly this is outside the time allowed of 6 years. I am not able to establish from the record if there was any leave or extension if any at all granted to the Claimant to commence the action outside the time limit.

33. I have also agonised whether it is open to me to bring up the issue of limitation while making my determination. I only became aware of this position in the course of examining the pleadings and submissions of the parties and after the hearing had closed. The issue of limitation is one which goes to jurisdiction and therefore I cannot ignore it even this late.

Conclusion and Orders

34. Bearing in mind the foregoing, I order that the Memorandum of Claim be struck out. Any monies deposited by the Respondent with the Labour Office in favour of the Claimant may be released to her.

35. There will be no order as to costs.

Dated and delivered in open Court at Nairobi this 2nd day of November 2012.

Justice Radido Stephen

Judge

Appearances

Namada & Co

Advocates

For Claimant

Mr. Gicheru instructed by Swaleh, Mwangi

& Co Advocates

For Respondent