



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 1095 OF 2018

(Before Hon. Justice Ocharo Kebira on 31/01/2022)

PHEOBY ALOO INYANGA.....CLAIMANT

VERSUS

STOCKWELL ONE HOMES MANAGEMENT LIMITED.....1ST RESPONDENT

STOCKWELL TWO HOMES MANAGEMENT LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant was on or about the 1st August 2012 employed by the Respondent as a cleaner. It is not in contestation that the employment was terminated on the 3rd May 2018, however what is, is why and how the termination occurred. The Claimant charged that the termination was unfair, hence the claim herein. The Respondent on the other hand held that the termination was on account of a valid and justified reason, and that the Claimant's case is without merit therefore.

2. When this matter came up for hearing on the 1st December 2021, the parties agreed by consent that the matter proceeds under Rule 20 of this Court's rules. Consequently, the witness statements and the documents that had been filed by the parties were adopted and deemed their respective evidence.

3. Consequently, directions were given to the parties to file their written submissions on their cases, within specific timelines.

The Claimant's case

4. Through a memorandum of claim dated 7th June 2018, the Claimant impleaded the Respondents seeking the following orders and reliefs.

- (i) One month's salary in lieu of notice, Kshs. 13,771.
- (ii) Leave, Kshs. 3,213.00.
- (iii) Gratuity, Kshs. 6,885.50 or full amount of Kshs. 13,771.50.
- (iv) Compensation for unfair termination, Kshs. 165,252.00
- (v) Certificate of employment.
- (vi) Costs of this suit.
- (vii) Interest on (a) and (c) at court rates.
- (viii) Any other relief that this Honourable court may deem fit to award.

5. Contemporaneously with the statement of claim, the Claimant did file a witness statement, and a list of documents, list under which the documents that she intended to put reliance on, in support of her case, were filed.

6. It was the Claimant's case as brought out in her pleadings and witness statement that she came into the employment of the Respondents on or about the 1st day of August 2010.
7. That her employment was terminated on the 3rd day of May 2018. At the time of termination, she was earning a monthly salary of Kshs. 13,771.
8. The Claimant stated that her relationship with the Respondents was that one founded on a fixed term but renewable employment contract. Her 1st such contract was that which was dated 1st August, 2010. It was a one-year contract.
9. The Claimant stated that the contract had a clause that commanded that should an employee desire a renewal, then he or she had to express the desire by applying 30 days to expiry of the contract.
10. She contended that notwithstanding the clause, it was a practice that employees would make the applications for renewal at least two weeks to a contract's expiry date.
11. The Claimant stated that after the contract for the year 2012, which was renewed through a letter by 1st Respondent, there were no further applications for renewal. She continued working without a renewed written contract till the 3rd May 2018.
12. The Claimant contended that the employee-employer relationship ran smoothly until the 2nd May 2018. On this day her colleagues and her reported for duty at 8.00 a.m., only to find that the lock to their office had been changed. They could not gain access, therefore.
13. The Claimant called the caretaker asking why the change, but the caretaker seemed not to be aware of the same. He came and confirmed that the lock had been changed.
14. One of the Claimant's colleagues, Johnson Juma got constrained to call the chair lady of the management committee, Ms. Fellar Kamar to inquire what the matter was. Eventually she directed the Claimant and her colleagues to proceed home, and wait to report back upon being called by the Respondents' management.
15. She asserted that on the 3rd May 2018, the wife to Johnson Juma called her, and informed her that they were expected to report back that morning.
16. Those who reported back were five including her. At a meeting that was held at around 9.00 a.m. the Claimant and one Tabitha, who were said to be the oldest among the five and therefore well acquainted with matters operations of the Respondent company, were sacked on an account that they had been rude. They were told to report back after one week to collect their salary.
17. The Claimant contended that the contract she was serving under then, had two months to expire. She forms an impression that the termination was ill prompted. The Respondents desired to avoid paying her gratuity under the contract. Consequently, she claims for proportionate gratuity of Kshs. 6,885 or full gratuity of Kshs. 13,771 as this court may decide.
18. The Claimant contends that she was not given any termination letter at separation. She further contends that after realizing that this was a misstep, the Respondents kept calling her to go pick a termination letter which thing she did not accede to.
19. The Claimant asserts that she is entitled to a prorated leave pay for the period that she worked i.e. January to April 2018, Kshs. 3,213.00.
20. That since she was unfairly terminated, she is entitled to a compensatory award of Kshs. 165,252.00 equivalent to one year's gross pay.

The Claimant's submissions.

21. Counsel for the Claimant submitted that clause 15 of the contract of employment that was executed by the Claimant and the Respondent made a provision regarding termination notice. Any party desiring to terminate the contract, was obliged to give the other 30 days written notice. The Respondent breached this term by not issuing the notice.
22. It was further submitted that the Claimant's employment was terminated, without a termination letter being issued. That as an afterthought, the Respondent purported to issue one to the Claimant after her counsel issued a demand letter dated 8th May, 2018. The termination letter was backdated to read 4th May 2018.
23. It was contended that the Respondent decided to justify the termination by indicating the reason thereof, as being under section 44 of the Employment Act.
24. Counsel argued that the correct procedure would have been for the employer (Respondent) to handover a written termination letter on the 3rd May, 2018 when the Claimant and her colleague were asked to go home and collect their salaries later.
25. He urged the court to take note of the fact that her yearly contracts were renewed without any issues. If her conduct were as bad as the Respondent's letter of termination dated 4th May, 2018 purported to demonstrate, the contracts would not have been renewed.
26. Counsel reiterated the Claimant's position that the termination was unfair, entitling her to the reliefs sought.

The Respondent's case

27. Suffice to state that the Respondents' case is encapsulated in the response to claim, the witness statement of Innocent Muricho Wanjala & the documents it placed before court. The case was amplified through the written submissions.
28. In the witness statement, Mr. Innocent Muricho Wanjala, presented himself as a caretaker of the two Respondent companies. His job entailed supervising and instructing all cleaners that were working in the subject estate, the Claimant inclusive.
29. It was contended by the Respondent that over a couple of months preceding the month of May 2018, the Claimant had become intransigent and would not follow instructions from her appointed supervisors like him.
30. The witness contended that the Claimant often used abusive language towards her colleagues at work as well as her supervisors.
31. The witness asserted that he noted extreme carelessness on the part of the Claimant in her work as the areas allocated to her for cleaning were almost always dirty and he was always constrained to ask her to re-do the work.
32. He further stated that over time, he came to learn that the Claimant would concentrate on cleaning specific apartments where she had befriended the occupants, outside her terms of employment. This to the prejudice of her official work.
33. The witness contended that the Claimant was summarily dismissed. Consequently, the Claimant was asked by the Respondents to go pick her terminal dues but true to her intransigent nature, she flatly refused to do so.
34. The Respondent's 2nd witness was Johnson Juma Baraza; in his witness statement turned evidence, he stated that he at the material time was in the employment of the two Respondents as a gardener, in relation to Stockwell Homes.
35. He contended that he worked with the Claimant, and he would attest to the fact that she on several occasions used abusive language towards him as well as other house helps within the estate.
36. The witness remembers an incident that occurred on the 13th February 2018, which did not settle down well with him. The Claimant closed the main common area water supply whilst he was watering the gardens, thus hindering his work. When he asked her why she was doing that the Claimant insulted him calling him "mjinga".
37. He alleged that he was aware that the Claimant would concentrate on cleaning apartments like C13 and A12 where she had befriended the occupants, to the detriment of the areas allocated to her by her supervisor.
38. The Respondent's last witness was Thomas Sababady who presented himself as a director of the two Respondents in relation to Stockwell Homes.
39. The witness, like the 1st witness contended that over several months preceding the month of May, 2018 the Claimant had been inexplicably refusing to follow instructions from her appointed supervisors, who further recorded several occasions where the Claimant used abusive language against them as well as her co-workers.
40. That the supervisors severally brought to his attention the fact that the Claimant was in a habit of absconding duty, or to be found engaged in cleaning of apartments C13 or A12 which was well outside her terms of employment.
41. The witness asserted that the acts amounted to gross misconduct that attracted a summary dismissal on the 4th May 2018.
42. That by her conduct, the Claimant indicated that she had fundamentally breached her contractual obligations and thereby presented the Respondents with the option of summarily dismissing her.
43. The witness stated that it was the Respondent's position, informed by the advice of their legal counsel that they were not in breach of section 41 of the Employment Act because the provision only applies to an employee who was dismissed on the grounds of misconduct, poor performance or physical incapacity. Here the Respondents summarily dismissed the Claimant on grounds of gross misconduct.
44. He stated further that the Respondents had no obligation to summon another employee or shop floor union representative during the notification of the dismissal to the Claimant. That the provision of the law that require a hearing and consideration of any representations by the employee was not applicable here.
45. He concluded that the subject termination was lawful and in line with the Claimant's contract of employment, and the Employment Act. The Claimant therefore is not entitled to any of the reliefs she has sought.

The Respondent's submissions.

46. Counsel for the Respondents submitted that the summary dismissal was handed down on the Claimant was as a result of her acts which jointly and severally constituted gross misconduct as defined under section 44 (4) (c) and (d) of the Employment Act.
47. He further submitted that the Respondent's action of summarily dismissing the Claimant had a firm constitutional grounding – Article 26

(1) & (3) and 45 (1) of the Constitution which guaranteed them a right to life as well as recognition and protection of their families. That the Claimant was endangering the health of the families that constitute the Respondents by neglecting to carry out her contractual duties.

48. Counsel argued that section 44 (4) of the Act, puts forth a list of grounds that can independently amount to gross misconduct and which would lead to summary dismissal. The Claimant was guilty of at least 3 (three) of them:

“(c) An employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly or improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.

(d) Employee uses abusive or insulting language or behaves in a manner insulting to his employer.

(e) Employee knowingly fails or refuses to obey a lawful order and proper command which was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.”

49. Counsel reiterated the Respondents position that the provisions of section 41 were not applicable in the circumstance of the dismissal.

50. Counsel cited the Court of Appeal decision in **Kenya Revenue Authority vs Maginga Salim Murgani [2010] eKLR**, wherein the court noted that the fairness of a hearing is not determined solely by its oral nature. It may be conducted through the exchange of letters to buttress his position that the Claimant was given several warnings to remedy her conduct and the last warning being in writing, the Claimant cannot allege that she was not accorded an opportunity to be heard, therefore.

51. It was argued that misconduct and gross misconduct are very distinct and independent matters for which labour laws have provided clear sanctions. It cannot therefore be properly and legally argued that the Respondents actions were irregular and unfair.

Analysis and Determination

52. From the material placed before me by the parties, I distil the following broad issues as the issues for determination, thus:

a) Whether the summary dismissal was procedurally fair.

b) Whether the summary dismissal was substantively fair.

c) What reliefs are available to the Claimant if any in the circumstances of this matter?

d) Who should shoulder the costs of this claim?

53. The Respondents through the evidence of its 3rd witness, one of its directors, and its Counsel's submissions have clearly taken a position that the mandatory procedure provided for under section 41 of the Employment Act, 2007 is not applicable to situations where an employer decides to summarily dismiss an employee from his employment. They were express therefore, that informed by this position, the Respondents did not at all bother to employ the procedure that section 41 (2) provides.

54. From the onset let me state that the position as taken by them is totally erroneous, based on an incorrect interpretation of the provisions of section 41 of the Act, a deliberate partial reading of the relevant provisions of the Act, a failure to appreciate wholesomely the purpose, structure and texture of the Employment Act.

55. The position is astonishing. In a legal labour relations system like ours which has since obliterated the common law way of employers of terminating an employee's employment, which accords employees expansive rights and protection, and which is constitutionary inspired and equity spirited, with due respect the kind of thinking like the Respondents' will have no room.

56. Worth stating that the view taken cannot hold water, besides being a total mis-read of the Act, it is in ignorance of the provisions of the Fair Administrative Actions Act, relevant International Labour Standards, relevant, and the Constitution and more specifically those that relate to fair hearing.

57. Section 41 (2) of the Employment Act provides:

“Notwithstanding any provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and the person if any, chosen by the employee within subsection (1), make.” [Emphasis mine].

58. The provision cannot be looked in any other way, it provides for a procedure *inter alia* to be adhered to before an employer summarily dismisses an employee. One is left to wonder how such an express mention of “summarily dismissing” would escape the sight of the Respondents' Counsel.

59. In the case of **Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR**, the Court of Appeal stated:

“There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary

dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

60. It cannot be off mark therefore for one to conclude that the mandatory procedure provided for under section 41 of the Act was applicable and it ought to have been followed in the process leading to the dismissal of the Claimant.

61. Counsel for the Respondent dwelt on the terms misconduct and gross misconduct, concluding that if it was the intention of the legislation that section 41 (2) applies to summary dismissal situations then the term gross misconduct would have been present in the provision, in addition to the word employee’s misconduct.

62. With respect I do not agree with Counsel’s view, the term misconduct as used in the section is an omnibus term used to denote actions that may constitute gross misconduct as stipulated in section 44 of the Act that would lead to a summary dismissal, and actions of an employee which are not grave enough to be equated to a gross misconduct, that can lead to a termination of employment of an employee.

63. Counsel for the Respondent looked at what summary dismissal is by using the catalogue of actions and inactions of an employee that may lead to a sanction of summary dismissal, catalogue obtaining in section 44 (4) of the Act, instead of looking at it from an angle of the clear explanation provided for under section 44 (1).

64. The Respondents’ counsel argued that the Claimant was warned severally on her conduct, and that the last warning was in writing. That therefore the Claimant cannot be heard to state that she was not accorded an opportunity to be heard. With respect, I see no sense in this submission. When one is being warned either orally or in writing as is alleged to have been the case here, he is not required to give a representation(s) as contemplated under section 41 of the Act. Without a requirement for a representation, one cannot be said to have been allowed an opportunity to be heard.

65. In my view, a hearing opportunity is accorded to an employee once the employer has contemplated dismissing the employee or terminating his/her contract of employment, and identified the grounds upon which the contemplated action shall be premised, for it is on those grounds that the employee is supposed to be heard. The citing of the decision in **Kenya Revenue Authority vs Menginya Salim Murgari [2010] eKLR**, was with due respect, misplaced therefore. The holding therein was misconstrued.

66. In the upshot, upon the premises foregoing, including the Respondents’ admission that they did not follow the procedure under section 41 of the Employment Act, I find that the summary dismissal was unfair in terms of section 45 of the Act.

Whether the summary dismissal was substantively fair.

67. Section 44 of the Employment Act, 2007 stipulates when summary dismissal can occur, thus:

“Summary dismissal shall take place when an employer terminates the employment of an employee without or with less notice than that which the employee is entitled by any statutory provision or contractual term.

(2).

(3) *subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.*

68. What happened here was a summary dismissal, however, whether or not the conduct of the Claimant was one that fundamentally breached her obligations arising under the contract, I shall delve into, shortly hereinafter.

69. Section 43 of the Employment Act places an obligation upon the employer to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

70. Section 44 (4), provides for actions and inactions of an employee that may amount to gross misconduct to attract the sanction of a summary dismissal against the employee. However, it is imperative to state that the list. Therein is not an exhaustive list. An employer can summarily dismiss an employee on an account outside those in the catalogue for as long as the account has the characteristics such as I will demonstrate shortly hereinafter.

71. It was the Respondent case that the Claimant in the performance of her duties could disobey instructions from her supervisor, employ an abusive language against her fellow workers, and work outside her allocated areas of work, engage in working for occupants whom she had befriended, during her working hours. This to the prejudice of her official work. That the Claimant in the months leading to the dismissal had become careless in the performance of her duties.

72. In its pleadings, and the Respondents’ witnesses’ statements, it was clearly put forth and in detail what stirred the summary dismissal. The Claimant did not challenge this by way of a reply to the response to the claim, and or by bringing on board a further witness statement. There is no sufficient material placed before me controverting the Respondents’ account.

73. Whether an employee’s misconduct warrants dismissal requires assessment of the degree of the misconduct and the surrounding circumstances, a contextual approach. In **Mckinley vs BC Tel, [2001] 2 SCR 161,2001 SCC 38 [CanLII]**, it was held:

“29. When examining whether an employee’s misconduct justifies his or her dismissal, courts have considered the context of alleged insubordination. Within this analysis a finding of misconduct does not by itself, give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship can no longer viably subsist.”

39. To summarise, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee’s behaviour. In this respect, courts have held that factors such as the nature and degree of misconduct, and whether it violated the essential conditions of the employment contract or breaches an employer’s faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause.”

74. I have considered the circumstances of this matter, including but not limited to the industry that the Claimant was working in, the nature of the relationship between her and the Respondents, the alleged conduct of the Claimant and find that the dismissal on the account given by the Respondents was valid and fair.

75. Consequently, I find that the dismissal was with a valid and fair reason. The dismissal was substantively fair.

Of what reliefs.

76. The Claimant sought for a compensatory award under provisions of section 49 (1) (c) of the Employment Act, 2007. She sought for a 12 months’ gross salary. Courts have held that an award under this provision is discretionary. The extent of the award shall always depend on the circumstances of each case. In this case I have considered that the dismissal was substantively fair, that the award I will make herein is as a result of ignorance by the Respondents to follow the statutory procedure in the dismissal process, rendering the dismissal unfair, the conduct of the Claimant and the general circumstances of the matter, and consequently find that an award to an extent of five months’ gross pay will serve justice. Therefore Kshs. 68,855.

77. Having found that the summary dismissal was substantively fair and conscious of the provision of section 44 (1) of the Act, I am of the view that the Claimant is not entitled to the sought one month’s salary in lieu of notice.

78. The Claimant has sought for gratuity at Kshs.6,885 or full amount of Kshs. 13,771.85. according to clause 9 of the contract of employment, gratuity was payable at the end of each contract term. The Respondent did not lead any evidence to show that gratuity pay would not be prorated or that upon a summary dismissal the Claimant lost her entitlement to a prorated gratuity. Consequently, I award her Kshs. 6,885 under this head.

79. Her claim for unpaid sum of Kshs. 3,213.00 for leave days not taken, was not assailed through evidence by the Respondents. The claim is allowed.

80. In the upshot, Judgment is hereby entered for the Claimant in the following terms:

- a) A declaration that the summary dismissal of the Claimant was procedurally unfair.**
- b) Compensation pursuant to section 49 (1) (c) of the Employment Act, Kshs. 68,855.**
- c) Gratuity, Kshs. 6,885.**
- d) Prorated leave pay, Kshs. 3,213.55.**
- e) Interest on the awarded figures at court rates from the date of filing suit, till full payment.**
- f) Costs of the suit.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY, 2022.

OCHARO KEBIRA

JUDGE

In Presence of

MS. Gitonga for the Claimant.

Mr. Omulama for the Respondent.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His

Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE