



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1626 OF 2014
CAROLINE MWIRIGI.....CLAIMANT
VERSUS
AFRICAN WILDLIFE FOUNDATION...RESPONDENT
JUDGMENT

Introduction

1. The issue in dispute stated by the Claimant in her Memorandum of Claim as amended on 10th February 2015 is “unlawful termination of employment of the claimant by the respondent and refusal to pay her terminal benefits.”
2. The Respondent filed a Memorandum of Defence on 11th November 2014 to which the Claimant responded on 18th January 2015.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its Director, Human Resource and Culture, Elizabeth Opee.

The Claimant’s Case

4. The Claimant was employed by the Respondent on 17th March 2004. She served probation until 19th August 2004, when she was confirmed.
5. The Claimant worked for the Respondent for 10 years up to 21st August 2014, when her employment was terminated. She terms the termination as unjustifiable, illegal and malicious, citing the following particulars against the Respondent:
 - a. Purporting to terminate the Claimant’s services against the rules of natural justice and contrary to the Respondent’s terms and conditions of service, the Constitution of Kenya and other relevant laws;
 - b. Failing to consider the responses and explanations given by the Claimant;
 - c. Acting without due regard to the Claimant’s interest and contribution to the Respondent;
 - d. Following an unlawful procedure which did not comply with the requirements prescribed in law.

6. The Claimant lists the following particulars of breach in termination procedure:

- a. Other than the Claimant and her witness, the panel that sat in the disciplinary hearing comprised of the complainant; this did not offer the Claimant an opportunity for a fair hearing;
- b. The Claimant was never informed that the proceedings had moved from reconciliation to disciplinary and in the minutes it was recorded as a forum at which the Claimant was to provide additional information and clarifications to her statement;
- c. The Respondent went ahead to terminate the Claimant's contract of employment without issuing prior warning letters;
- d. The Respondent failed to consider the submissions by the Claimant and her representative, while arriving at its decision;
- e. Any previous meetings held between the Claimant and her supervisor were purely reconciliatory and were never addressed as disciplinary.

7. The Claimant seeks the following remedies:

- a. A declaration that the termination of her contract was wrongful and contrary to the law;
- b. Gratuity in the sum of Kshs. 1,090,592;
- c. General damages for wrongful termination;
- d. Costs.

The Respondent's Case

8. In its Memorandum of Defence dated and filed in court on 11th November 2014, the Respondent admits that the Claimant was its employee from 17th March 2004 until 21st September 2014. The Claimant was initially engaged as a Receptionist and rose through the ranks to the position of Administration Officer at the time of termination, by which time she was earning a consolidated monthly salary of Kshs. 157,530.

9. Regarding the reason for termination of the Claimant's employment, the Respondent states that the Claimant exhibited acts of insubordination against her supervisors, which caused the Respondent unnecessary loss and expense.

10. The Respondent avers that in December 2012, the Claimant unilaterally proceeded to commit it to payment of Christmas party expenses to Intrepid Events & Beyond before approval of the said expenses and without consulting the Human Resource and Administration Manager or the Director of Human Resources and Administration.

11. On 4th December 2012, the Respondent's Director of Human Resources and Administration communicated to the Claimant on the importance of consultation and team work and advised the Claimant to avoid being casual while handling her responsibilities.

12. On 7th December 2012, the Human Resource and Administration Manager, who was the Claimant's immediate Supervisor, expressed displeasure with the manner in which the Claimant had handled her duties, without consultation and communication on matters with financial implication to the Respondent. The Respondent states that the Claimant admitted that she had not consulted her Supervisor and promised that this would not recur.

13. On 10th January 2014, the Director of Human Resources and Administration wrote to the Claimant complaining of the Claimant's failure to copy her Supervisor on an email on critical administrative issues, leading to errors and complaints from both internal and external clients served by the Department.

14. On 3rd March 2014, the Director of Human Resources and Administration wrote to the Claimant, inquiring whether the Claimant had shared the Office Management Service Operations Procedures with the Human Resource and Administration Manager or the Director of Human Resources and Administration.

15. On 20th March 2014, the Director of Human Resources and Administration wrote to the Claimant about an unusually high telephone bill from Telkom Kenya, which the Claimant had not brought to the attention of her Supervisor or the Director of Human Resources and Administration.

16. On 28th May 2014, the Director of Human Resources and Administration wrote to the Claimant regarding updates on the delivery of South Sudan vehicles, about which the Claimant had not communicated to her Supervisor and the Director of Human Resources and Administration.

17. The Respondent states that in May 2014, the Claimant had all the Respondent's motor vehicles undergo inspection and also approved use of taxi services without any communication to her Supervisor. The Claimant is said to have admitted not having informed her Supervisor about the issue.

18. The Respondent further states that on 15th May 2014, the Claimant made communication with the Respondent's Public Officer in South Africa on the Respondent's registration and tax exemption, which information had both financial and legal implications requiring input by the Human Resources and Administration Director; the Claimant is accused of excluding her Supervisor and the Director of Human Resources and Administration from the communication. The Claimant is said to have admitted not having informed the Human Resource and Administration Manager about this issue until her report at a departmental meeting.

19. The Respondent avers that on 4th June 2013, the Claimant received important communication from the Royal Netherlands Embassy (RNE) allowing deployment of double cabin vehicles to South Sudan and Tanzania. The Claimant is accused of failing to share this information with her Supervisor, the Human Resources and Administration Manager, a lapse the Claimant is said to have admitted.

20. The Respondent's case is that the Claimant's employment was marred with issues of insubordination, poor performance and failure to communicate.

21. Regarding the termination procedure, the Respondent states that on 31st March 2014, the Human Resources and Administration Manager held a meeting with the Claimant, in her capacity as the Claimant's Supervisor, where she raised concerns about the Claimant's poor performance, lack of responsiveness to departmental meetings, poor attitude towards work and lack of consultation and communication on important matters.

22. The Respondent further states that the Human Resources and Administration Manager held another meeting on 30th June 2014, where she raised concerns about the Claimant's poor performance and lack of consultation and communication on important issues. The Claimant is said to have been defensive at this meeting, stating that she had not communicated with her Supervisor on a number of issues because she did not wish to overburden the Supervisor.

23. On 9th July 2014, the Claimant was issued with a show cause letter on account of underperformance, non-communication, non-consultation and insubordination. The Claimant was required to respond to the show cause letter within 5 days.

24. The Claimant responded on 15th July 2014. According to the Respondent, the Claimant admitted the mentioned performance lapses, non-communication and non-consultation and pledged to improve but did not follow through.

25. By letter dated 1st August 2014, the Claimant was invited to a disciplinary hearing on 5th August 2014. In the invitation letter, the Claimant was notified of her right to be accompanied by a fellow employee at the disciplinary hearing.

26. The Claimant attended the disciplinary hearing on 5th August 2014, accompanied by Philip Muriithi. She is said to have admitted her performance lapses, including failure to consult her Supervisor on important and critical matters. The Claimant is also said to have pleaded for time to improve on her performance and working style.

27. On 20th August 2014, the Human Resources and Administration Manager sent a draft copy of the disciplinary hearing minutes to all participants, including the Claimant, for confirmation. By an email of the same day, the Claimant confirmed the minutes as an accurate record of the disciplinary meeting proceedings.

28. The Claimant's employment was subsequently terminated by letter dated 21st August 2014. The termination letter set out the terminal dues payable to the Claimant, upon the lapse of a one-month notice period.

29. The Respondent states that the Claimant was entitled to be paid the following, subject to her clearing with the Respondent:

- a. Salary up to 21st September 2014.....Kshs. 109,059.23
- b. Accrued leave.....25,447.15
- c. Pension with Generali Worldwide Insurance Company

30. According to the Respondent, the Claimant has failed, ignored and/or neglected to clear.

Findings and Determination

31. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

32. The Claimant's employment was terminated by letter dated 21st August 2014 stating:

"Dear Caroline,

RE: Termination of Employment

Further to the meeting held on August, 5 2014 and review of issues discussed during that meeting, I regret to notify you that African Wildlife Foundation (AWF) has decided to terminate your employment effective September 21, 2014.

As stated at the meeting and with respect to Kenya Labor Laws, the reasons for terminating your employment with AWF are as follows:

- *Performance below expected standards for the position*

Despite the various avenues availed for consultation, communication and support that have been provided to you and previous corrective action on the same issues, you have had inconsistent performance in the role. AWF is therefore not convinced that availing additional time for improvement will result in sustainable good performance and has lost confidence in your ability to perform this role. Consistent with this decision, your last day of service with AWF will be September 21, 2014.

AWF will pay for your regular salary through September 21, 2014 as well as any accrued unused leave time as at the last day of your employment (consistent with AWF's accrual and carryover policies). All payments will be subject to applicable tax

withholding. Any retirement contributions withheld or contributed as per the terms of your employment contract to the Generali Worldwide Insurance Company will be transferred to you upon completion of the service termination form attached. All your benefits under AWF will end on September 21, 2014.

Please note that payment of your final dues assumes clearance of any outstanding advances, other balances and any other assets held by virtue of your employment. Prior to departing you are required to:

1. submit expense claims for any outstanding advances and credit card charges;
2. complete and submit any outstanding timesheets;
3. surrender to AWF any and all property or equipment belonging to AWF, including but not limited to files and documents prepared for or by AWF, computer, electronic equipment, keys to AWF premises, and any other AWF owned equipment, property and data;
4. submit the duly completed separation clearance checklist and exit interview form;
5. prepare a hand over report for review and approval by your supervisor.

Yours sincerely,

(signed)

Evelyn Wanyonyi

Director of Human Resources'

33. This letter lays out several accusations against the Claimant; specifically, the Claimant is accused of failure to communicate with and consult her superiors on important aspects of her work. The question to ask is whether this constituted a valid reason for termination of the Claimant's employment as provided under Section 43 of the Employment Act.

34. In the written submissions filed on behalf of the Respondent, reference was made to the case of *Kenya Revenue Authority v Reuwel Waitthaka Gitahi & 2 others [2019] eKLR* where the Court of Appeal stated the following:

"...the standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it genuinely believed to exist, causing it to terminate the employee's services."

35. This holding mirrors the reasonable responses test, encapsulated in the **Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642** thus:

"...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the reasonable responses test) is that in many cases there is a band of reasonable responses to the employer's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

36. In her response to the show cause letter, the Claimant admitted having failed to escalate a number of issues to her superiors; the Human Resources and Administration Director and the Human Resources and Administration Manager. In the Claimant's view,

updates made at departmental meetings were adequate information to her superiors.

37. It would appear however, that the Claimant's working style caused significant difficulties in the flow of work within her department and across the organisation. This is evidenced by a record of several instances where the issue of lack of communication and consultation on the part of the Claimant was raised.

38. It seems however that the Claimant did not pay attention to the concerns raised by her superiors; rather, she continued in her lone-ranger mode and this is what led to the eventual termination of her employment. In the totality of the circumstances of this case, the Court is satisfied that the Claimant's conduct constituted a valid reason for termination of her employment, as defined by Section 43 of the Employment Act.

39. The subsequent question to ask is whether in effecting the termination, the Respondent observed due procedure as set by Section 41 of the Act. Pursuant to several instances at which concerns regarding the Claimant's working style were raised, she was issued with a show cause letter on 9th July 2014, to which she responded on 15th July 2014.

40. By a subsequent letter dated 1st August 2014, the Claimant was invited to a disciplinary meeting, which she duly attended alongside her witness, on 5th August 2014. In her pleadings and submissions, the Claimant takes issue with the proceedings of 5th August 2014; she suggests that she was not aware that she was attending a disciplinary meeting and further faults the composition of the panel.

41. The Court does not agree with the Claimant on this account; first, there is evidence that the Claimant was aware that her working style was a matter in issue; second, she was notified of her right to be accompanied at the meeting and third, she did not object to the composition of the panel. It is therefore evident that the Claimant was availed the procedural fairness safeguards provided under Section 41 of the Employment Act.

42. On the whole, I find and hold that the termination of the Claimant's employment was substantively and procedurally fair. Her claim is therefore without basis and is dismissed.

43. Each party will bear their own costs.

44. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Gitonga for the Claimant

Miss Obonyo for the Respondent



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