REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 2081 of 2011

EVERLYN LYNN KAGENDO ……..
CLAIMANT

VERSUS

STATPACK INDUSTRIES
LIMITED…….RESPONDENT

Rika J
Cc. Elizabeth Anyango

-

Mr. Shivanji instructed by Kalya and Company Advocates for the Claimant.

Mr. Mandala instructed by Mahinda and Maina Advocates for the Respondent.

ISSUE IN DISPUTE: UNFAIR TERMINATION

AWARD

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1. Ms. Kagendo was employed by Statpack Industries Limited as its Customer Relations Officer, on 19th November 2004. She was later promoted to become the Sales and Marketing Representative. Her duties required she drives herself out in the market, looking for buyers for the company products. Her contract was terminated by the Respondent on 2nd December 2010. She states that she was not given any notice, or valid reason or reasons, for the decision. She filed this Claim on 9th December 2011. She seeks the following remedies-:

§ A declaration that termination of the Claimant's employment by the Respondent was unfair;

§ Compensation at 12 months' salary calculated at Kshs. 1,080,000; and

§ Costs.

2. The Respondent filed its Statement of Reply on 29th June 2012 and an additional bundle of documents on 29th September 2012. The Claimant gave evidence on 25th September 2012 and closed her testimony on 22nd October 2012. The Respondent testified through Connie Kaari Kaburu the Human Resources Team Leader, and Simon Muriithi the Sales and Marketing Team Leader. They both testified on 22nd October 2012 when the hearing closed. The Claimant filed her final submissions on 1st November 2012, while the Respondent did so on 9th November 2012. The matter was last mentioned in Court on 23rd November 2012, when the parties were advised they would be notified when the Award would be ready.

Kagendo's Evidence-:

3. Kagendo testified that she was employed through a written contract. She was given an appointment letter dated 19th November 2004, and a separate contract containing terms and conditions of employment, which she signed on 22nd November 2004. Her first salary was Kshs. 20,000, all inclusive. Statpack Limited merged with another company called Somavia. Kagendo was offered the position of Sales Representative with effect from 2nd January 2007. She was issued a letter of appointment dated 7th February 2007, and a separate contract detailing the terms and conditions of employment, which she appears to have signed some months later, on the 5th September 2007. Her salary was adjusted to a gross monthly of Kshs. 90,000, with effect from 1st August 2009. This was the rate received by Kagendo, up to 2nd December 2010 when her contract of employment was terminated.

4. The Claimant told the Court that she was assigned a motor vehicle by the Respondent, to enable her market and sell the Respondent's products. The motor vehicle had manual steering function, which exposed the Claimant to continuous physical strain in the course of her duties. She conceived in 2009, but her pregnancy did not go full term. She was driving a Suzuki Maruti. The doctor advised she stops driving that vehicle. The Respondent did not avail to her an alternative vehicle. She lost the baby around August 2009. She was advised by her doctor to take less exerting work in the future, to avoid a recurrence of the pregnancy complication. She conceived again in 2010. She continued to drive the manual steering vehicle. Her baby was born prematurely through a caesarian operation. This was as a result of the Respondent's refusal to change the Claimant's work environment, despite the advice given by a qualified Medical Profession.

5. The Claimant availed to the Court medical records in support of her case. The first is the discharge summary and clinical abstract sheet from Jamaa Home and Mission Hospital, showing she was admitted on 18th October 2009. The second is the note advising against driving, during her second pregnancy. The note states,

''the above-named [Everlyn Lynn Kagendo] has been at our antenatal clinic. She is advised not to drive, to forestall development of complications. Please assist accordingly.

Yours Faithfully,
Dr. S .Wangwe.''

She continued driving the same manual steering vehicle. The last two documents show that on 2nd September 2010, she fell ill. She was admitted at Jamaa Mission Hospital and booked for an emergency caesarian operation. Dr. J.N. Ondeko prepared the resultant Obstetric Ultra Sound Report. She had applied to go on leave from 1st September 2010. On coming from leave, she was slammed with the letter of termination dated 2nd December 2010. The letter reads,

''We wish to bring to your attention that your work performance has deteriorated to a level which is not acceptable to management. You were expected to carry out your duties diligently and guide your juniors, but this has not been the case. In view of the above, management has decided to terminate your services

with effect from 2nd December 2010……''

She testified that this letter was malicious. The Respondent knew of the medical problems that had befallen her, relating to her pregnancy. When it was claimed that her performance had deteriorated, she was on maternity leave. She felt that the Respondent acted illegally; termination was without justification; and the Claimant was discriminated on account of her pregnancy.

6. There was an upward curve in her job performance. She had been evaluated and given salary increment. She had asked the Respondent to avail to her an alternative vehicle. There was no communication from her employer, saying that she needed to improve her performance. She was made to sign some papers by the Respondent, in order to receive some terminal benefits. She had a small baby and needed the money. She was not given a driver to facilitate her work. Kagendo testified that a letter dated 2nd March 2010, where she is alleged to have apologized to the employer for making an error in an invoice document, was not authored by her. Another letter dated 28th September 2006 from the Respondent, titled *'warning letter,'* was not addressed to the Claimant. She did not receive such a letter. She did not sign the letter. Appraisal was carried out even after the warning, and salary increment given.

7. On cross-examination, she testified she worked as Customer Service Representative. She was given a car, but was unsure if this was part of her contract. There was a safety clause in the contract of employment. It did not refer to cars, but equipment and machines at the workplace. It did not refer to driving. She started driving after the appointment of 2007. She could not refuse to drive. The letter from Jamaa Home and Mission Hospital did not say she had complications. Kagendo stated she actually had complications, and the complications arose from her driving. The first complication occurred in 2009. She did not obtain the written advice of the doctor in 2009. The second complication was in 2010 when she got the advice. She drove the same vehicle in 2009 and 2010- a Suzuki Maruti, with manual steering. She asked for an automatic vehicle. She did not do this in writing; she did so orally. It was her duty to go to the field. She was not directly forced to drive the manual car. It was not possible to do her work by taxi cab or other means of public transport. There was a letter dated 6th May 2010 from the Sales and Marketing Team Leader Simon Muriithi. It was addressed to Operations Team Leader, advising that due to Kagendo's prevailing condition, she had been allowed to do her work from the office. If she wished to work outside the office, Muriithi had directed she be assigned a driver. Kagendo testified she did not see this letter from Muriithi. She did not see or write the letter of apology over the erroneous invoice, dated 2nd March 2010. The warning letter of 28th September 2006 was addressed to Mr. Lenny Kagendo. She is not Mr. Lenny Kagendo and did not receive, or sign any warning letter. She used to meet the Team Leader once every week. He did not give her any oral warnings, only commendations. In the staff appraisal forms, the Head of Department had commented that Kagendo needed to put a lot of effort. The Supervisor stated in the second form that she needed to put a lot of effort and work independently. The appraisals do not show her improvement. The salary was not increased as a condition. She was paid leave days at Kshs. 125,553. She was paid Kshs. 278,171 as retirement benefits. She signed saying she had no further claim against the Respondent. She explained that she was forced to do so by the circumstances. She needed the money. She denied the suggestion by the Respondent's Advocate that her Claim was filed in afterthought. She asked the Court to uphold the Claim.

Evidence for Statpack Industries Limited-:

8. Kaburu testified that Kagendo was employed by the Respondent's Sales Department. She was employed in 2004. Kaburu joined in 2007, and her duties were to facilitate other employees in the performance of their duties. The witness interacted with Kagendo. The Claimant's performance was fluctuating. There were comments from her previous Team Leader Muriithi. She reported directly to the Team Leader. She was being groomed for a supervisory role. She received verbal warnings as the Respondent did not have a culture of written warnings. She was appraised and asked to improve her performance. Kaburu did not know why the Claimant's salary was raised. The witness did not write any warning letter to Kagendo. It is true however that, Kagendo was issued a written warning in 2006. She was verbally warned in 2010, and replied with a letter of apology dated 2nd March 2010. Kaburu did not know how people were served with warning letters. The letters were in the Claimant's personnel file. Her

contract was terminated on 2nd December 2010. Answering questions from the Claimant's Advocate, the witness testified that she issued the letter of termination to Kagendo. The appointment letters were signed by the Managing Director. Kaburu was instructed by the Team Leader to write the letter of termination. Kagendo was being groomed to go to the supervisory level. As of the date of termination, she was in supervisory level. Two employees- Jackline and Celestine – were under her supervision. These two employees also applied to go on maternity leave. Jackline had applied on 29th November 2010 to 25th February 2011. The Claimant went on 1st September 2010, to return 2nd December 2010. Kagendo was not there to supervise Jackline, because Jackline had gone on maternity leave. Discussions with the Claimant about her performance, had taken place before she went on maternity leave. The Respondent considered that she had given birth, and did not therefore issue a written warning. The decision to terminate was made by Simon Muriithi. He must have discussed with the Claimant before making the decision. Kaburu computed the terminal benefits. The Claimant earned Kshs. 90,000 monthly, at the time of termination. Her total leave days were computed at Kshs. 171,350. The tax was Kshs. 45,277. It is deductable from leave pay. The Retirement Benefits Scheme started in 2007. The employer contributed 5% of the Claimant's monthly salary, with the Claimant making a contribution of 5% of her salary. Kaburu agreed this would translate into a total of Kshs. 9,000 per month, or Kshs. 108,000 in a year. In 2010, contributions are shown at Kshs. 49,500. The employer was still making its contributions, but these were locked till her retirement age. There is an amount payable after retirement. Her salary was increased. There was no reversion to the previous salary.

9. Simeon Muriithi testified that the Respondent had been in business for the past 22 years, by the date of the hearing. In 2004, he was still in the same department. His duty is to guide all the sales people. Kagendo was employed as a Customer Care Officer. She was made a Sales Representative, operating in the field. Her performances were evaluated. She was very good when she started. Eventually, her performance deteriorated. Muriithi tried to motivate her by raising her salary; she did not improve. He talked to her like part of the family; it did not work. The Respondent does not have a culture of written warnings. He was compelled to issue verbal warnings. He gave one written warning in 2006. She promised she would improve. She did not, but went downhill. Salary increments were to motivate her, not reward for good performance. In 2009, she was supposed to head a new product the Respondent was launching. She refused to do so and the assignment was given to another officer. The Respondent supposed to terminate her contract, even before 2012. She was assigned a motor vehicle as part of her sales requirements. She did not complain. She was to drive herself. She later brought a letter from her doctor. Muriithi agreed to allocate a driver to her. He instructed the operations department to supply Kagendo with a driver. This was done. It was true she wrote an apology letter over the erroneous invoice. She had not even been asked to write, but wrote and signed the letter. She was paid all her terminal dues. Muriithi testified on cross-examination that Kagendo was given a fresh letter of appointment in 2007. She became a Sales Representative. The letter of warning is dated 28th September 2006. It was addressed to the Head of Customer Service. This could be the same officer as the Sales Representative. Muriithi, and not the Managing Director, employed her. His powers to sign the letters of appointment had not been withdrawn by 2007. His boss recommended salary increments, with the advice of Muriithi. The witness did not have evidence to show that it was him, Muriithi, who increased the salaries. Increments were done as an incentive. She did not improve. Salary increments did not have anything to do with her performance. He could not recall which date in 2009, she declined his assignment. She was guilty of misconduct, but the Respondent did not summarily dismiss her. The Respondent operates like a family. The letter of termination did not mention that Kagendo had failed to heed the instruction of a supervisor. The Respondent would have tripled her salary if she focused on her business. He did not think she was irresponsible, but found her to be inconsistent. There are many drivers at the Respondent, but Muriithi could not recall the particular driver assigned to her. He could not remember which invoice she wrote erroneously. He did not have a specific date when the invoice was made, or the amount of money involved. He did not fabricate documents. He did not intimidate the employee. There was a decision to terminate her contract way, way before the date of termination, but the Respondent withheld communicating the decision to her, because of her condition. Muriithi made the decision. He had the power to fire. He consulted the Human Resources Department and Others. He emphasized on redirection that the Respondent waited for the Claimant to clear her problems. The Respondent takes great care of its pregnant employees. The Respondent's Managers could not take a decision immediately as human beings. She had a miscarriage in the recent past. The Respondent waited until she gave birth, upon her

second pregnancy.

Closing Submissions-:

10. The Claimant's position in sum, is that termination of her employment, was directly related to her pregnancies. The warning letter of 2006 is a fabrication, the Claimant never having worked as the Head of Customer Service, upon whom the letter is addressed. Her salary was increased because of her performance, otherwise there was a caveat that if there was no improvement, the old salary would apply. She did not issue any letter apologizing to the Respondent over erroneous invoice. The Respondent did not observe the requirements of Sections 41 and 45 of the Employment Act 2007. Her discharge of the Respondent was confined to payment of terminal dues. She does not claim terminal dues; she seeks compensation for unfair termination. There can be no estoppel against the clear provisions of the law. The Claimant submits that she is entitled to 12 months' salary, totaled Kshs. 1,080,000, in compensation.

11. The Respondent answers that the Claimant did not plead, that her two miscarriages, were caused by her driving a manual steering motor vehicle. The doctor's advice was not that her complications were caused by manual steering; the advice was that the Claimant ceases to drive, to forestall complications. Her contract was terminated for underperformance. A decision had been made to terminate, but kept pending, to give her room to give birth and recuperate. It was communicated to her after she recovered. The reasons for termination were given to her, and opportunity to defend availed severally, before her termination. She was paid all her pension and terminal benefits. The termination followed Section 45 of the Act. It was fair, just and equitable. Section 41 was adhered to by the Respondent at the various consultations held with the Claimant, before termination.

The Court Finds and Awards-:

12. There is common evidence that Kagendo was employed by Statpack Industries Limited with effect from 6th December 2004. She joined as a Sales Representative, earning a consolidated salary of Kshs. 20,000. Another contract issued to her with effect from 2nd January 2007. The designation given under the new contract was that of a Sales Representative. There was no change in the job title in the written contracts, contrary to the evidence given by the various witnesses. Her salary was raised to Kshs. 36,000. With effect from 1st August 2009, the salary was reviewed to Kshs. 90,000. It is agreed she lost a baby through miscarriage in October 2009. A year later on 3rd September 2010, she was admitted to Jamaa Home and Mission Hospital, where she underwent an emergency caesarian section procedure. Her second baby survived. She took her 90 days of maternity leave in September 2010, returning to work in December 2010. It is on return in December, that she was issued the letter of termination dated 2nd December 2010. She alleges termination was based on her pregnancy, while the Respondent holds termination was for poor work performance. According to the Respondent, the decision was arrived at long before she went on maternity leave, but its communication to her delayed, to allow her sufficient time to heal.

13. The Court is not persuaded that Kagendo's contract was terminated for reasons to do with her pregnancy. She appears to blame the Respondent for not affording her the proper vehicle in performance of her work. She does not however show how this failure, was linked to termination. It may well be true that she had been advised by her doctor not to drive the manual steering Suzuki Maruti. It could even be correct that this mode of transportation was the cause of her pregnancy problems. Kagendo alluded to certain infringements by the Respondent of her rights and protections under the Work Injury Benefits Act Number 13 of 2007 and the Occupational Safety and Health Act Number 15 of 2007. Those infringements may attract their own range of penalties and damages, but that is not the issue before the Court. The issue is unfair termination. She did not demonstrate that termination was related to her pregnancy. The evidence given by her, does not show that she lost her employment directly or indirectly, through pregnancy related discrimination, under Section 5[3] of the Employment Act. The Respondent can be argued to have failed to give her adequate facility to discharge her sales and marketing role, or even neglected to provide her with a safe work environment; this however was not linked in any way, to the termination of employment. It was not shown that the Respondent wished to rid itself of Kagendo on

the ground of her pregnancy. She asked to be reasonably accommodated. There was evidence by Muriithi, and this was not clearly challenged, that she was offered a company driver upon the advice of the doctor. She was given at the same time, the option to work from the office. The concern of the Court nonetheless is not what went on around the duty of care owed to Kagendo by her employer, revolving around her pregnancy; the issue is whether any evidence was given that would directly or indirectly be read, as linking the employer's decision to terminate, with the employee's pregnancy. The Court has not found such evidence.

14. The Claimant had been in employment from 2004. She had her first pregnancy in 2009 and lost her baby. There was no adverse action taken by the Respondent. Other employees Mary, Jackline and Celestine are shown to have applied for, and been granted maternity leave, on diverse dates around the same time Kagendo took her maternity leave. There was no adverse action taken against these other employees. It is hard to see, from the evidence on the record, why the Respondent would proceed to terminate the Claimant's contract of employment, on the ground of her pregnancy. Other employees in similar situation were accorded the right to proceed on maternity leave, and the equally important right to return to work after maternity. The Respondent gave another pregnancy-unrelated reason for termination. The Court rejects the Claimant's assertion that she lost her job because of her pregnancy. The question that needs to be answered is whether the Respondent gave a valid reason or reasons, in its letter of termination dated 2nd December 2010; and whether fair procedure was adopted? The question is whether the requirements of Sections 41, 43 and 45 of the Employment Act were observed?

15. These provisions demand that the employee is given valid reason or reasons, for termination. The decision must be arrived at fairly, equitably and justly. The letter of termination gave the following reasons in justifying termination-:

a. Your work performance has deteriorated to a level that is not acceptable to management; and,

b. You were expected to carry out your duties diligently and guide your juniors, but this has not been the case.

The Respondent had been raising issues of performance in the annual appraisal forms. In the form dated 3rd July 2009, her immediate Supervisor characterized her as a very determined person, who however, needed to be a team player. The Head of Department commented that Kagendo needed to improve on all her areas and take her work seriously. In the previous appraisal of 2007, the Managing Director approved the increment of the Claimant's salary to Kshs. 45,000. He commented that the same increased salary would continue to be paid, if the Claimant continued to improve. He suggested that if she did not continue to improve, the company would revert to the old salary. There is an old warning letter dated 28th September 2006. The Claimant disputed this was not addressed to her. The letter complained about the Claimant's poor performance. The law on warning system remains as is stated in the Regulation of Wages [General] Order, which is-:

'' An employee whose work or conduct is unsatisfactory, or who otherwise commits a misconduct which, in the opinion of the employer, does not warrant instant dismissal shall be warned in writing and the following procedure shall apply-

i. the first and second warnings shall be entered in the employee's employment record and the shop steward of his union shall be informed immediately;

ii. the second warning shall be copied to the branch secretary of his union;

iii. if an employee who has already received two warnings commits a third misconduct, he shall be liable to summary dismissal.

Provided that where an employee completes two hundred and ninety two working days from the date of the second warning without further misconduct, any warning entered in his employment record shall be cancelled.

This is the law on warning system adopted by most of the Regulation of Wages and Conditions of Employment Laws.

16. There is a general allusion about the Claimant's poor work performance, but little or conflicting evidence of it. Appraisal does not show poor performance and even if it did, it would not conclusively result in termination. The letter of 2006 warning the Claimant was disputed by her. The law of warning system, even assuming the letter was actually addressed and delivered to the claimant, would not make this letter relevant to her employment record in 2010. It should have been expunged from the record. The law of warning system does not contemplate verbal warnings, as the Respondent alleges to have given to Kagendo. There must issue clear and written warnings before termination. The complaints raised in the letter of 2006 in any case, were not captured in the any appraisal relating to the period. This is a poor piece of evidence whose addressee and addressor, are hardly identifiable on the face of the record. The appraisal of 2007 had evidence of greater probative weight, on the subject of performance. The salary was raised to Kshs. 45,000. Whether, one looks at this as an incentive to work harder, or a reward for achievements made, is not a material distinction. The Managing Director put the Claimant on what he termed as 'probation.' If she improved, she would continue to earn Kshs. 45,000. If she deteriorated, she was advised she would go back to receiving the old salary. This was in March 2007. There is no evidence that the Claimant ever went back to the old salary scale. To the contrary, her salary was adjusted to Kshs. 90,000 effective from 1st August 2009. These increments do not match the evidence of the Respondent that, her performance had deteriorated. The Respondent testified it made the decision to terminate sometime preceding the communication of the decision. It does not appear to be the case, considering this salary increment came about one year before termination. The second reason, that the Claimant failed to guide her juniors, was just an empty allegation. No evidence was given of the Claimant's supervisory responsibilities. The common refrain of the Respondent's witnesses, was that Kagendo, even on termination, was being groomed for a supervisory role. Surprisingly the warning letter of 2006 mentions her failure to supervise, while the evidence of the Respondent's witnesses was that Kagendo was being groomed for supervisory role in 2010, when she left employment. The appraisal forms do not suggest that she exercised this supervisory role, or that it was ever recorded in these forms, that she had failed to guide her juniors. This was not a valid ground for termination. Both grounds were not valid reasons for termination. The termination lacked substantive justification.

17. The termination was completely lacking in procedural fairness. Section 41 requires that before an employer terminates the contract of an employee, on the grounds of misconduct, poor performance, or physical incapacity, explains to the employee in a language the employee understands, the reason for which the employer is considering termination. The employee is entitled to have another employee or shop floor union representative of his choice present during the explanation. These procedural protections were denied the Claimant. Appraisals on performance do not constitute a hearing about poor performance, under Section 41 of the Employment Act 2007; the appraisal forms could only be evidence of poor performance, in the hand of the employer at the hearing, not actual records of a hearing on poor performance. Letters of warning, even where validly issued, do not constitute a hearing under Section 41; they too can only be useful to the employer as evidence at the disciplinary hearing. The warning system does not free the employer from the obligation to hear the employee under Section 41, before termination of the contract of employment. The Respondent had many day to day meetings with Kagendo. It may even have discussed persistently her performance with her. None of these meetings conformed to the minimum statutory disciplinary procedure, created by the Employment Act. Termination was unfair under Section 41, 43 and 45 of the Employment Act. The Claimant is entitled to compensation. The Court Orders-;

[a] Termination of the Claimant's contract of employment by the Respondent was unfair;

[b] The Respondent shall compensate the Claimant by paying to the Claimant, 10 months' gross salary calculated at Kshs. 900,000;

[c] This amount shall be paid within 30 days of the delivery of this Award; and,

[d] No order on the costs.

Dated and delivered at Nairobi this 25th day of April 2013

James Rika
Judge