



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 418 OF 2017**

***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**ISABELLE WANGARI KIMANI.....CLAIMANT**

**VERSUS**

**ACE GLOBAL DEPOSITORY KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant filed a claim against the Respondent dated 2<sup>nd</sup> March, 2017.
2. The Respondent put in his defence dated 27<sup>th</sup> March, 2017.

**CLAIMANT'S CASE**

3. The Claimant states that on 1<sup>st</sup> August, 2012 the Respondent offered her employment as Relationship Manager for Kenya which included nine months training contract dated 1<sup>st</sup> August, 2012.
4. She says the contract was thereafter renewed to reflect her status after training and her salary was pegged at USD4000 per month.
5. She says a commission was offered by a further contract dated 1<sup>st</sup> September, 2015.
6. She says she performed her duties diligently but on 15<sup>th</sup> August, 2016 her services were terminated with no reason at all. At the time she says she had 52 days of leave.
7. She says at the time of her termination she had achieved her 2% commission incentives as stipulated in her contract.

She says she worked for the Claimant for four years.

8. She now says her termination was wrongful as she was not given a hearing or a notice.
9. She now asks for compensation for wrongful dismissal being:-

- (a) One month salary Kshs.409,200/=.
- (b) Leave days amounting 52 days Kshs.1,611,225/=.
- (c) 12 months for loss of employment Kshs.3,682,800/=.
- (d) Gratuity Kshs.818,400/=.
- (e) Unpaid commission Kshs.693,295/=.

and she prays for costs and interest at court rates.

## **RESPONDENT'S CASE**

10. The Respondent says the relevant contract of employment is the one dated 1<sup>st</sup> September, 2015.

According to the said statement it provides for 1 year definite term commencing 1<sup>st</sup> September, 2015 and the notice of 15<sup>th</sup> August, 2016 was a mere notice that the Respondent would not renew the Claimant's contract.

11. The contract did not require Respondent to give reason for non-renewal of a fixed contract.

12. Respondent was not required to give notice as contract was to expire automatically by 31<sup>st</sup> August, 2016.

13. That issue of fair hearing did not arise as contract terminated by effluxion of time on 31<sup>st</sup> August, 2016.

14. That the claim for payment in lieu of notice and damages for wrongful termination is denied.

15. Claim for untaken leave is denied and Claimant is put to strict proof thereof.

16. The Respondent says the Claimant did not ask to go on leave so that it was denied by the Respondent.

17. The respondent claimed the commission was for incentive for new business brought in by the Claimant. It is denied that the Claimant brought in new business.

18. The claim for outstanding salary payments from currency fluctuations in dollar between 2014 – 2015 cannot suffice as it is time barred based on contracts of 2014 – 2015 which have already expired and are not subject of these proceedings.

19. The Respondent states the above claim does not relate to the contract which is the subject matter of this claim and in any event the Claimant is estopped from claiming the unpaid sums as she had not claimed the same during the existence of the contract.

20. That the demand letter by Claimant's advocate was in bad faith since the employment agreement dated 1<sup>st</sup> September, 2015 provided for parties to engage in negotiation and mediation before resorting to court process.

21. So the Respondent prays the suit be dismissed with costs.

## **COUNTER CLAIM**

22. The Claimant in the counter claim avers that the Respondent failed to resort to amicable solution out of court and that was in breach of the employment agreement.

23. Further the Claimant says Respondent failed to furnish the Claimant with the company laptop and printer and USD\$ 300 advanced to her.

Claimant's claim is for the company laptop and printer and USD\$ 300 advanced to her in the course of her employment.

24. The Claimant to the counterclaim be entered against the Respondent for delivery of Laptop and printer and refund of USD\$ 300 with interest from 30<sup>th</sup> August, 2016 loaned to her while in the course of her employment.

## **ISSUES FOR DETERMINATION**

25. (1) Was Claimant employed on a fixed contract

(2) Was she wrongfully terminated.

(3) Is she entitled to the reliefs sought?

## **DETERMINATION**

26. The Claimant was given a fixed contract of one year dated 1<sup>st</sup> September, 2015.

27. It was effective 1<sup>st</sup> September, 2015 and paragraph 3 of the same agreement provides that "this agreement shall come into effect for an initial period of one (1) year renewable at the employer's discretion depending on the performance of the employee and may be terminated at any time in accordance with the applicable law and upon such terms and conditions as contained herein."

28. The Claimant signed the same agreement meaning she read it and conceded to its terms.

29. The same is not tied up with any other past contracts and so cannot be backdated to cater for any other covenants not fulfilled in the past contracts. I aver that the Claimant should have raised any issues not fulfilled or breached in the course of the other former contracts.

30. The notice received by the Claimant dated 15<sup>th</sup> August, 2016 was to inform her that her contract was not to be renewed on expiry on 31<sup>st</sup> August, 2016.

That was in accordance to the fixed contract between the Claimant and the Respondent.

31. The law of employment and in particular Section 2 of Employment Act defines a contract of service as an agreement whether oral or written and whether expressed or implied to employ or to serve as an employee for a period of time and includes contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which part XI of the act applies.

32. Section 10(3)© of the Act refers to a fixed term of contract as or where the employment is not intended to continue for a definite period of time and whose last date is indicated.

33. Several case laws have affirmed this law. The case of **MOMBASA APPARELS CPZ LIMITED VS TAILORS AND TEXTILES UNION (2016) eKLR** the court held that fixed contracts were meant to lapse automatically unless parties initially agreed to extend them.

34. In the case for **MARGARET OCHIENG VS NATIONAL WATER AND CONSERVATION & PIPELINE (2014) eKLR** the court stated that "courts have applied that fixed term contract carry no expectancy of renewal in a catena of judicial authorities.

35. I have considered the evidence and submissions by both sides and find the Claimant was employed for several years by the Respondent and the final contract was effective 1<sup>st</sup> September, 2015 and was clearly a fixed contract of one year and obviously the Claimant read the contents and signed for it. She worked for that year without raising any issues until she was informed that her contract was not to be renewed. Hence she now started the legal proceedings.

36. The court noted the agreement provided for amicable settlement of any dispute or mediation but the same did not take place. I will not dwell much on that since this is not mandatory so far even though is a provisions which the parties would have benefitted instead of rushing to court which can take a long time.

37. The court having considered the evidence carefully finds the Claimant was not unlawfully terminated but rather her employment contract expired by affluxion of time.

The Claimant's claim is therefore dismissed forthwith.

### **REMEDIES**

38. The Claimant's prayer for one month salary in lieu of notice is declined since she was not unlawfully terminated.

39. Leave due amounting to 52 days.

The relevant agreement in my considered view is the contract effective 1<sup>st</sup> September, 2015 and Claimant there is entitled to 21 days leave after completing one year of service. Paragraph 6 of the said agreement provide that leave application must be made in writing and submitted at least one month prior to taking it.

40. Paragraph 6.5 says employees shall not be remunerated for leave not taken or to carry forward to the next working year except under special circumstances and unless approved by the Supervisor and Company Manager.

41. The Claimant under this written covenant in her agreement has not proved she is entitled to the 52 days leave.

I will however allow her the 21 days for contract in question because it was her entitlement at the expiry of the one year.

That works out to Kshs.286,440/=.

42. 12 months compensation for loss of her employment this is declined because the Claimant is found not to have been unfairly terminated.

### **GRATUITY**

There is no provision of gratuity in the Employment Act or even in the agreement of employment.

In the case of **CENTRAL BANK OF KENYA VS DAVIS KIVIEKO MUTETI (2009) eKLR** the court emphasized that gratuity is not expressly provided in the Employment Act.

It is payable under terms set out in a contract of service or collective bargaining agreement.

43. Having said so since the Respondent had agreed to pay the Claimant gratuity which offer the respondent claimed they withdrew through their advocate's letter dated 5<sup>th</sup> September 2016. I make an order that the Respondent give his offer of gratuity to the Claimant within the next 60 days It is not clear how gratuity was calculated so Respondent to re-calculate it.

44. The prayer for unpaid commission incentives is declined. There is no evidence of new business initiated by the Claimant because the clients listed were all clients of the Respondent even before Claimant joined the employment of the Respondent.

### **CONCLUSION**

45. In conclusion and as a matter of abundant precaution despite finding the Claimant was not unlawfully terminated, she is still entitled to her dues.

So I award her Kshs.286,440/= being her 21 days leave for her final year of service and gratuity as will be agreed between the parties.

46. She is also to return the company laptop and printer within 14 days hereof as provided in paragraph 11.6 of the agreement and as in the Respondent's counter claim.

47. The refund of USD \$ 300 by the Respondent (employee) as prayed in the counter claim is declined as there is no evidence that she received the same.

48. Claimant did not pray for certificate of service but is demanded in the submissions. It is her right to get her certificate and Respondent is ordered to release her certificate within 14 days.

49. Having considered the Claimant worked for the Respondent for about 4 years and is not clear if she has acquired another employment, I am inclined not to award costs.

Each party to meet their costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF FEBRUARY 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

### **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

1.

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

**ANNA NGIBUINI MWAURE**

**JUDGE**