



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.337 OF 2019

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

CAROLINE CHEPKURUI SAWE.....CLAIMANT

VERSUS

ALTGEN LIMITED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant filed a memorandum of claim dated 23rd May, 2019 and the Respondent filed its response dated 9th July, 2019.

CLAIMANT'S CASE

2. The Claimant in her memorandum of claim says she was employed by the Respondent. Her employment she says commenced on 1st February, 2017. She says the offer was made due to Claimant's efforts to bring on board the Agencies de development (AFD) client.

3. The Claimant says she performed her work with diligence and utmost skill and commitment but however on 3rd May, 2018 the Claimant was issued with a letter terminating her services.

She says the reasons given for terminating her services was because the company had made losses in 2017. Indeed the letter referred to redundancy. It is to be effective 2nd May, 2017.

4. The Claimant avers there was no shortage of business as company was still in operation and making profits out of huge project that the Claimant had secured for the Respondent.

5. The contract was for a period of 5 years renewable in which she was to obtain a salary increase from Kshs.165,000/= to Kshs.300,000/= which the Respondent failed to do.

6. The Claimant's position is that immediately her services were terminated the Respondent brought in a South Africa National to take up her position and in that respect states that she was terminated on grounds of discrimination.

7. The Respondent is enjoying the benefits of the Claimant's hard work in respect to the AFD contract while the Claimant is suffering for loss of employment.

8. The Claimant is now praying for redress against the unlawful and unfair and wrongful termination by the Respondent and payment of outstanding dues.

EVIDENCE IN COURT

9. The evidence adduced by the Claimant in the open court on 4th December, 2021 was that she was employed by the Respondent from April, 2017. She says she signed a contract but the same was revised immediately in April, 2017 and she accepted the new terms.

She says her work was related to AFD activities.

10. In May, 2018 she says she got a call from one **SEAN GIBSON** who told her they would not be able to keep her in employment. She got

a termination letter dated 3rd May, 2018. She says that she was informed that the company could not be able to afford her.

11. In the meantime she says that the Respondent employed Angela Hobbs. She says that she was not issued with notice. She adopted her witness statement dated 23rd May, 2019 and a further witness statement dated 20th August, 2018. She also produced her list of documents dated 23rd May, 2019 and 6th August 2019 respectively.

12. The Respondent was absent and so did not cross examine the witness and neither did they call a witness.

RESPONDENT'S EVIDENCE AS PER THEIR STATEMENT OF RESPONSE

13. The Respondent states that the Claimant was employed by them as an Executive Assistant and had nothing to do with AFD contract. He says the Claimant's employment had nothing to do with the AFD contract.

14. The Claimant was a recruiter but was struggling with that role and yet according to that role the inputs had ultimately to translate to placements made and this was used to measure success.

15. He says that contrary to the Claimant's averment of unfair termination the Claimant was issued with a termination notice under redundancy as provided in the contract and law of employment.

He says he had made a loss of Kshs.1,298,471/= in 2017. He says he submitted these losses to the Kenya Revenue Authority.

16. He therefore reiterates that the Claimant's employment had no attachments to AFD and also had nothing to do with nationality.

17. The Respondent says they varied her contract of employment which run from 10th April, 2017 on permanent basis.

According to the contract either party could terminate the employment by giving one month salary in lieu of notice.

18. The Respondent did not file any submissions and the Claimant filed theirs dated 9th February, 2022.

In their submissions they aver that the Respondent who had a burden to prove the process of termination was proper he abdicated that duty but instead he threw allegations to court expecting them to be accepted as the gospel truth.

ISSUES FOR DETERMINATION

19. The issues for determination are to analyse whether the Claimant was unlawfully and unfairly terminated and secondly whether she is entitled to the reliefs sought.

DECISION

20. The court is in a dilemma whether this was a cause of termination for non-performance by the Respondent or was for redundancy. The termination letter dated 3rd May, 2018 refers to redundancy or retrenchment. They go ahead to write that in the area of recruitment only one client had been recruited for the 12 months. In the area of consultancy they say they had not been able to generate any additional consulting revenue. I am not convinced this was a case of termination on redundancy as court was not informed her position was scraped off. Claimant says another lady was employed in her place.

21. The extension of the AFD consultancy they stated was not guaranteed. They said that the company was not going to be a success and so they had decided to terminate her employment.

22. In my considered assessment the Claimant was issued with a termination letter on the basis of poor performance.

23. Employment Act 2007 is very explicit that where an employee's employment is terminated on the basis of misconduct, poor performance or physical incapacity she must be informed in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to another employee or a shop floor union representative or his choice present during this explanation. This is provided in candid mandatory terms in Section 41 of the Employment Act.

24. The reason implied by the Respondent for terminating the Claimant was poor performance as Mr. Sean said the Claimant was struggling in her role as a recruiter. The Respondent therefore made losses in the year the Claimant worked for them (2017).

25. In the law cited across numerous authorities where poor performance is given as a reason for termination of employment, the employer is placed in a high level of proof. The employer must show how they arrived to that decision of poor performance and what employment policy or practice they had put in place to gauge performance. They should demonstrate whether they had a good measure to weight good as opposed to poor performance.

26. In the case of **NATIONAL BANK OF KENYA VS SAMUEL NGURU MOTONYA (2019) eKLR** the court held that beyond having such an evaluation measure before termination on ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weakness.

27. So as well as in the case of **APPEAL OF PIUS MACHAFU ISINDU VS LAVINGTON SECURITY GUARDS LIMITED (2017) eKLR** it was held that the employer must prove reasons for termination as in Section 43 of Employment Act and prove the reasons are valid and fair and that the grounds are justified as provided in Section 45 of the Employment Act 2007 amongst other provisions.

28. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.

29. In this case the Claimant contends she was just called by one Mr. Sean and was told they could not afford to keep her any more. She was served with a termination letter and she was to leave and she was to leave right away. She was not given a valid reason or a specific reason and fair procedure was not followed contrary to the mandatory provisions of Section 41 of the Employment Act.

Having found the Respondent failed to prove a valid reason for terminating Claimant's termination and failure to prove that fair procedure was followed, it is my holding that the termination was unlawful and unfair under Section 45 of Employment Act.

REMEDIES

1. Prayer for remedy for the remaining 22 months is declined as it is not merited or specifically provided under Section 49 of the Employment Act 2007. She was a permanent employee in any event. I award her three months compensation under Section 49(1) (e) considering the circumstances of her termination and the fact that she did not contribute to her termination. She is awarded Kshs.165,000 x 3 = Total 495,000/=.

2. The house allowance is disallowed as she was offered Kshs.165,000/= being gross salary as per her letter of appointment and furthermore it was provided that she would receive no other benefits.

3. Underpayment for three months has no basis and is not clarified how the same is arrived at. The letter of employment provided a gross salary of Kshs.165,000/= per month.

4. Service pay is declined as the Respondent has demonstrated payment of NSSF dues.

5. Certificate of service to be issued within 30 days.

6. Costs of the suit are awarded to the Claimant.

7. Interest at court rates are awarded from date of Judgement till full payment.

8. The total award is Kshs.495,000/=.

9. Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24TH DAY OF MARCH, 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 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 Civil 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.

ANNA NGIBUINI MWAURE

JUDGE