



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO.361 OF 2016

OLIVIA OWUOR.....CLAIMANT

VERSUS

PRIMEFUELS (KENYA) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 14TH September, 2015, on the 16th September, 2015 through the firm of Mangerere Bosire and associates and associates advocates claiming to have been unfairly termination and to be compensated for the unfair termination.
2. This cause was initially filed in Employment and Labour Relations Court in Nairobi under Cause number 1618 of 2015 and was transferred to this Court by consent Order dated 2nd August, 2016 and adopted by the Court (Ndolo. J) on the 29th August, 2016.
3. The summary of the Claimant's case is that she was employed by the Respondent on the 1st August, 2013 as the Human Resource manager, on probation period of 3 months at a gross salary of Kshs 135,000 and upon confirmation her salary was increased of Kshs 150,000.
4. The Claimant states that, when she was employed she was not issued with job description letter and upon requests he was issued with one on 20th November, 2014 a year later.
5. That on 12th November, 2014 the Chief operating officer and the Business manager visited her work station in Nakuru to discuss issues of non-performance in her department.
6. Later in December 2014, the immigration department officers arrested 4 expatriates who were the Respondent's employees for being in the country without proper work documents. The Respondent blamed the Claimant for failing to ensure the expatriates' documents were proper which according to the Claimant was not one of her roles. Subsequently the managing director visited the branch to discuss the expatriates' issue and ordered her to give an explanation to the same and further advised the Claimant to resign, which the Claimant refused.
7. On 19th February, 2015, the Respondent summoned the Claimant to their Nairobi officers for a meeting scheduled for 23rd February, 2015 with regard to performance of her department of Human Resource, which the Claimant protested the short notice and the Respondent issued another notice dated 24th February, 2015 for a meeting scheduled on 2nd March, 2015.
8. The Claimant was then issued with a termination letter on the 6th March, 2015 after undergoing the disciplinary hearing.
9. The Claimant contents that she was not subjected to any performance appraisal before the hearing and subsequent termination therefore that the termination for reason of poor performance was not objective but pre-determined and tainted with malice.
10. The Claimant therefore avers that she was unfairly terminated and prayed to be compensated for one-month salary in lieu of Notice, six days worked in March, 2015, gratuity pay, leave for 40 days, maximum compensation and to be issued with a certificate of service.
11. The Claimant sought the following reliefs; -

i. Payment of her terminal dues as stated in paragraph 10 above.

ii. Costs of this suit.

iii. Any other remedy the Court deems fit to grant.

12. The Respondent entered appearance on 9th October, 2015 and filed a response to claim on the 29th October, 2015 admitting to employing the Claimant as its Human Resource manager at a salary of Kshs. 150,000.

13. The Respondent avers that the Claimant duties included ensuring the Respondent and its employees complied with the labour laws in Kenya and later on she was tasked with processing work permits and special visas for foreign nationals working for the Respondent, which duty the Claimant agreed to carry out.

14. On or about 12th November, 2014, the Chief Operations Officer and the Business and corporate manager expressed concerns with the Claimant's work performance and to remedy the situation they implemented a performance improvement plan then tasked the Claimant with setting the timelines within which the said performance was to be measure which plan the Claimant failed to follow through and instead the Claimant requested for job description complaining that she was carrying out duties over and above what an ordinary Human resource officer was carrying out.

15. The Respondent avers that on 16th December 2014, 4 of its employees, who were foreign nationals, were arrested for being in Kenya illegally and it's at that time that the Respondent learnt that the work permits and visas had not been processed by the Claimant when she had been notified of the arrival of the said employees well in advance.

16. The Respondents states that when the 4 foreign employees were arrested, the Claimant failed to notify the senior management of the Respondent and instead handled the matter in a casual way.

17. Further that the Claimant's employment was marred with acts of misuse of office, non-execution of performance improvement plan and unprocedurally employing her relatives. That all these acts informed the decision of the Respondent to summon the Claimant to a disciplinary meeting which was scheduled on 2nd March, 2015 at Nakuru office.

18. It is stated that after the hearing and consideration of issues discussed and deliberated in the meeting the Respondent resolved to terminate the service of the Claimant and as a parting package she was paid Kshs 196,663, being; one-month salary in lieu of Notice, 6 days worked in March, 2015, 7.5 pending leave days and 50% bonus pay for the year 2014.

19. The Respondent also stated that the Claimant was not entitled to gratuity since she was a member of NSSF and therefore not entitled to the same. Further that gratuity was payable on the discretion of the Respondent.

20. The Respondent then contends that the termination was fair in the circumstances and therefore that the Claimant is not entitled to any further relief having been paid her terminal dues in full.

21. During hearing the Claimant testified as CW-1 and adopted her witness statement dated 12.5.2021 and produced the documents filed together with the claim. She then stated that throughout her employment at the Respondent there was no performance evaluation done. As regard the disciplinary hearing, the Claimant testified that the issues for determination were the immigration issue, nepotism and the issue of performance. She stated that she was not given any job description till November, 2014 and among her duties, the issue of obtaining work permits for foreign employees was not one of them even though she admitted that she was always notified when new foreign employees were joining the company. She also stated that when the issue of obtaining work permits and visas was required she was specifically instructed by the Respondent to assist since the immigration department was a preserve of regional business management team being Wilson Meneses and Jayne Musomba.

22. Upon cross examination, the Claimant testified that before she was issued with job description, she worked as the Human Resource manager in accordance with her profession and once she was given the job description she then performed her duties as per the said contract. It was her testimony that she was instructed separately from time to time to procure work visa, permits and passes when need arose and that the same was not part of her job description.

23. On whether she was put on performance improvement plan, it was the Claimant's testimony that she indeed received the performance improvement plan but that the same was not proper having not been preceded by performance evaluation.

24. Upon further cross examination, the Claimant admitted to employing two of her relatives which employment followed due process and the regional officer one Mr. Menezes approved the said employment and even signed them with contracts. She contends that she never hid their relations from the Respondent.

25. She then testified that before the termination, she was issued with Notice to show cause, summoned to a disciplinary hearing, however that she never received the outcome of the disciplinary hearing and was only issue with an open termination letter which did not disclose the reason for termination. Additionally, that the Respondent did not inform her that her terminal dues were to be paid and that she only received notice from her Bank of the said money.

26. On re-examination the Claimant maintained that the issue of immigration should have been sorted in Nairobi Office which was the point of entry of the expatriates and not Nakuru where she was serving.

27. The Respondent summoned two witnesses Loice Wanjiku as RW-1 and Faith Kamau as RW-2.

28. RW-1 testifies that the Claimant was placed on performance improvement plan because she had performed dismally in her department. The witness herein further testified that the Claimant being a Human Resource manager was tasked with procuring work permits, visas and passes which was to be done before the foreign employees landed in the country.

29. It was RW-1 testimony that the recruitment of the Claimant's relatives was without authority and when confronted she only came clean with regard to her son and not her brother, which issue was contrary to policy and further created a lot of conflict of interest at the Respondent.

30. On the gratuity sought, it was RW-1 testimony that gratuity was payable to employees at the discretion of the employer and when the Claimant separated from the Respondent due to disciplinary issue, gratuity was not payable to her. Finally, that the Claimant dues were fully paid to her upon termination.

31. Upon cross examination, RW-1 testified that she was employed by the Respondent in August 2017 and her testimony was based on the documents on record. She stated that the Claimant was never assessed before being placed on performance improvement plan and further stated that assessment can only be done after performance assessment is carried out. She then admitted that the immigration issue was never part of the Claimant's job description but stated that not all duties of the Human resource manager should be spelt out in the job description.

32. Upon further cross examination, she admitted that the point of entry for the expatriates was the head office in Nairobi, however that there is no Human resource department in Nairobi and the Claimant even though based in Nakuru ought to have carried out those duties. The witness then admitted that some employees were paid gratuity however that payment of the same was dependent on the Respondent's discretion and not an entitlement. She then concluded and admitted that the termination letter issued to the Claimant did not give the reason for the termination and that the Respondent did not send the outcome of the disciplinary hearing to the Claimant.

33. RW-2 is the Respondent current human resource manager, who adopted her witness statement of 21.3.202 and in addition testified and stated that her role included processing work permits, Visas and passed for expatriates.

34. Upon cross-examination, she testified that she was employed by the Respondent in January, 2013 and worked as the Claimant's assistant and that she was tasked with undertaking all immigration issue which duties she was delegated to by the Claimant who was her immediate Boss.

35. RW-2 then testified that there was no performance evaluation carried out against the Claimant.

Claimant's Submissions.

36. The Claimant submitted from the onset that the Respondent terminated her on unsubstantiated ground and the reason for termination was not indicated in the letter of termination. It was then argued that the outcome of the disciplinary hearing was not served upon the Claimant to enable her appeal the Respondent's decision if need be, therefore that the entire process was a sham that resulted to the unfair termination.

37. On the Performance improvement plan initiated by the Respondent, it was the Claimant submission that she was not subjected to any assessment as admitted by both Respondent Witnesses therefore the improvement plan could not have been practical when there was no assessment conducted prior to the performance improvement plan. The Claimant then submitted that the plan was merely brought in to justify the Respondent's need to terminate her services unfairly.

38. The Claimant also took issue with the disciplinary hearing and submitted that the person who was responsible for immigration issue being Jayne Musomba laid blame on her and was the very person that conducted the disciplinary hearing which according to the Claimant tainted the impartiality of the disciplinary hearing leading to the termination which was not conducted in adherence to section 45(1) of the Employment Act. The Claimant in support of her case cited the case of **Emily Chepkirui Sang V The County Service Board, Kericho County and another [2021] eKLR** and the case of **Banking insurance and Finance (Kenya) V Consolidated Bank of Kenya Limited [2018] eKLR**.

Respondent's Submissions.

39. The Respondent submitted that the Claimant was subjected to the proper procedure under the law before she was dismissed. It was argued that the Claimant was issue with a show cause letter and given time to respond then summoned to disciplinary hearing which she attended with an employee of her choice. These facts according to the Respondent, were admitted by the Claimant during cross examination, therefore that there was procedural fairness and supported their argument by citing the case of **Rose sang Tarus V Barclays Bank of Kenya Limited [2020] eKLR**.

40. With regard to reason for termination, it was the Respondent's submissions that the reasons leading to the termination were enumerated in the show cause letter to include; performance improvement plan, immigration issues, irregular recruitment of relatives and misuse of company assets/property and despite taking steps to aid the Claimant in improving her performance by initiating the performance improvement plan the Claimant failed to adhere to the same, therefore that the reasons for termination were communicated to the Claimant as per section 43 of the Employment Act.

41. Accordingly, it was submitted that the termination of the Claimant's services passed the fairness test and the Respondent urged this Court to find as such and dismiss the claim with costs since the Claimant had been paid all her terminal dues.

42. I have examined the evidence and submissions of the parties herein. The issues for this Court's determination are as follows:-

1. Whether there were valid reasons to terminate the Claimant's service.

2. Whether the Claimant was subjected to due processes before termination.

3. Whether the Claimant is entitled to the remedies sought.

ISSUE NO. 1 - Remedies

43. The Claimant was employed by the Respondent vide a letter dated 1/7/2013 with effect from 1/8/2013 as a Human Resource Manager of the Respondent. She was to be initially based in Nakuru.

44. Her duties and responsibilities were to be defined in her role profile which was indicated will be supplied. The Claimant was later confirmed in employment and her salary increased to 150,000/= with effect from 1/11/2013.

45. As per her employment letter her duties and responsibilities were issued to her on 20/11/2014, more than a year from the date when she was employed in August 2013.

46. The Claimant was terminated vide a letter dated 6/3/2015 which didn't spell out reasons for the termination but which referred to the disciplinary hearing held on 3/3/2015 and submissions made therein.

47. Before the termination, the Respondents Jayne Musomba had had discussion with the Claimant concerning her performance. The said Jayne wrote an Email to the Claimant on 17/11/2014 at 3.50pm indicating the areas of concern. The areas of concern were on the development of the HR Manual, the recruitment process and disciplinary process to be done in a speedily and procedural manner, Training calendar to be developed, industrial relation, performance appraisals, management approval meeting, periodic review of law suits, HR monthly and periodic report, cost cutting measures and proposals staff welfare initiatives.

48. She was expected to respond in a week's time for review. She was also informed that a bi-monthly review of the progress made will be checked.

49. It is worth nothing that though the Respondent expected the Claimant to perform her duties, her job description was issued to her on 20th November, 2014, more than a year after her employment.

50. She was now to be subjected to a performance review even before the job description was issued on 13/11/2014. She was to be reviewed within 1 week and thereafter by monthly from November, 2013.

51. She was summoned to a meeting on 23/2/2015 to discuss her performance in the presence of her other bosses the Chief Operation Officer and Business Corporate Manager.

52. Vide an Email dated 19/1/2015 the Claimant had been asked to explain why special passes, visitor's VISAs and work permits had not been processed for some of the expatriates.

53. She was also asked to proceed on leave for 30 days from 20th January, 2015.

54. It beats logic that the Claimant was being vilified for not processing certain documents for expatriates when she was in Nakuru whereas these processes are done in Nairobi and this was also not part of her job description issued to her on 20th November, 2014.

55. Whereas she was directed to proceed on leave of 30 days from 20th January, 2015, she was being summoned to meetings to discuss her performance appraisal on 19/2/2015 even before her leave was over.

56. She was also summoned for a disciplinary hearing on 24/2/2015 to take place on 2/3/2015 and some of the issues discussed were the same immigration issues which were not part of her job description.

57. She was also accused of ruining company property which was acquiring a printer in her office.

58. Issues of non-performance of duty were also raised which issues she couldn't have executed because she was sent on leave immediately the plan was raised.

59. She was also accused of recruiting her relatives which she admitted but indicated that they were recruited because of their qualifications and this was done after prior consultation and approval by the Operations Department.

60. In my finding, the reasons advanced in the disciplinary hearing set up against the Claimant were not viable reasons that would have led to the termination of the Claimant.

61. Section 43 of the Employment Act 2007 states as follows;

"43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required 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](#).

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

62. The essence of the law is that the reason that led to termination must be valid.

63. In the case of this case, the issues raised against the Claimant were raised before a job description was issued to her. She was expected to perform the performance improvement plan despite the fact that her Managing Director had already directed her to proceed on leave for 30 days with effect from 20/1/2015.

64. In the termination letter issued to the Claimant, reasons for termination were not spelt out.

65. It is therefore my finding that the reasons for terminating the Claimant were not valid and the claimant was not notified of the finding of the disciplinary hearing that she had been subjected to.

66. I therefore return the verdict that there were no valid reasons to warrant the Claimant’s termination.

ISSUE NO. 2 – Due process

67. The Claimant was informed that she was requested to attend a disciplinary hearing vide a letter dated 24/2/2015 on issues raised in the notice.

68. The meeting proceeded on 3/3/2015 as per the minutes submitted to Court.

69. Given that the Claimant was notified of the disciplinary hearing and the issues she needed to respond to, I find that she was subjected to a fair disciplinary hearing and therefore due process was followed.

ISSUE NO. 3 – Remedies

70. Section 45 (2) of the Employment Act 2007 states as follows;

45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

71. Given that this Court has made a finding that the Claimant was terminated without valid reasons, it is my finding that her termination was unfair and unjustified.

a. I therefore award her compensation equivalent to 10 months’ salary for unfair and unjustified termination and dependent on the fact that her career was cut short by the Respondent

= 10 x 150,000 = Kshs.1,500,000/=

Less statutory deductions

b. The Claimant should also be issued with a certificate of service.

c. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

Dated and delivered in open Court this 17TH day of MARCH, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Bosire for Claimant – present

Javen for Respondent – present

Court Assistant - Fred