



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 924 OF 2016

EMMA AMAYO.....CLAIMANT

VS

S.B.T KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between the Claimant, Emma Amayo and her former employer, S.B.T Kenya Limited. The Claimant’s claim is by way of a Memorandum of Claim dated 15th November 2016 and filed in court on 6th December 2016. The Respondent’s defence is contained in a Replying Memorandum dated 13th February 2017.
2. The matter went to full trial with the Claimant testifying on her own behalf and the Respondent calling its former Managing Director, Walimohamed Jiwa. The parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that she was employed by the Respondent in June 2015, in the position of Sales Manager, earning a monthly salary of Kshs. 25,000.
4. The Claimant worked for the Respondent until 19th October 2016, when she was summarily dismissed, on allegations of misusing working hours and failing to meet set targets.
5. The Claimant claims that her dismissal was wrongful and unfair in that there was no valid reason for it and she was not given an opportunity to be heard.
6. The Claimant’s claim against the Respondent is as follows:

- a. 1 month salary in lieu of notice.....Kshs. 25,000
- b. Outstanding leave for 11 days.....10,582
- c. 12 months’ salary in compensation.....300,000
- d. Costs plus interest

The Respondent’s Case

7. In its Replying Memorandum dated 13th February 2017, the Respondent admits having employed the Claimant, in the Sales and Marketing Department, from 16th June 2015.
8. The Respondent states that under the Claimant’s terms of employment, it was implied that:
 - a. The Claimant would perform her duties diligently;

b. The Claimant would meet her sales targets as that was her main performance area;

c. The Claimant would achieve the above by effectively carrying out day-to-day activities such as completing phone calls and generating leads from each phone call.

9. The Respondent further states that it was an express term of the contract of employment that the Respondent was to conduct performance reviews on a monthly basis and where poor performance was identified, either steps for improvement would be taken or termination of employment would result.

10. The Respondent alleges poor performance on the part of the Claimant and states that the monthly evaluation reports revealed that the Claimant's performance was not up to the mark and was not satisfactory.

11. The Respondent adds that as a result of the non-performance, which greatly affected the Respondent's business, several meetings were held to advise the Claimant on how to make her targets satisfactorily.

12. The Respondent goes on to state that despite advice, no improvement was forthcoming and as a result, on 4th October 2016, the Respondent via email informed the Claimant that it would no longer tolerate the poor performance and put her on notice that should she fail to improve on her performance, her employment would be terminated.

13. The Respondent avers that further evaluation showed no positive action on the part of the Claimant and the Respondent had no option but to make a final decision, which wholly depended on the Claimant's performance.

14. The Claimant's employment contract was terminated on 19th October 2016.

15. The Respondent asserts that the termination was for just cause based on the Claimant's performance and failure to meet her targets. The Respondent therefore denies the claim for wrongful and unfair dismissal.

16. The Respondent adds that at the time of termination, the Claimant was paid one month's salary in lieu of notice, together with her salary for October 2016. Further, the Respondent maintains that the Claimant had exhausted her leave entitlement.

Findings and Determination

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

e. Whether the termination of the Claimant's employment was lawful and fair;

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

The Termination

18. On 19th October 2016, Wally Mohammed Jiwa; wally@sbtjapan.com sent the following email to the Claimant, Emma Amayo (2556); emma2556@sbtjapan.com:

“Dear Emma,

This letter will confirm your discussion with Mr. Takaku today. Your employment with SBT Kenya Ltd is terminated for cause, effective immediately.

Your employment, as discussed during the termination discussion, is terminated due to misuse of working hours, hence not being able to meet your targets.

You are a salesperson and this inappropriate behaviour is in violation of our code of conduct.

We are hereby giving you two weeks' notice of termination and shall clear your dues at the end of the month.

Kindly handover customer details of incomplete transactions to your team leader for a follow up.

Regards,

Wally Jiwa

(General Manager – SBT Kenya Ltd.)”

19. The foregoing email accuses the Claimant of misusing office hours, which in turn led to the Claimant's failure to meet set targets. This falls within the purview of poor performance and the procedure for dealing with such cases has been established by the courts.

20. In its decision in **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR** the Court of Appeal cited with approval, the following finding in **Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)**:

“a. Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the 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 given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

21. Apart from the email dated 16th October 2016, which effectively terminated the Claimant’s employment, the Respondent produced an earlier email dated 4th October 2016 referenced ‘*Notice/Warning*’ addressed to a number of employees, including the Claimant.

22. While the email of 4th October 2016 cautioned the Claimant and her colleagues on failure to meet their sales targets, it fell far short of the procedural fairness requirements set out above. On this ground, I find and hold that the termination of the Claimant’s employment was unfair and she is entitled to compensation.

Remedies

23. I therefore award the Claimant three (3) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service and the Respondent’s unlawful conduct in the termination process.

25. From the evidence on record, the Claimant was paid one (1) month’s salary in lieu of notice, together with accrued leave pay. The claims thereon are thus without basis and are dismissed.

25. In the end, I enter judgment in favour of the Claimant in the sum of **Kshs. 75,000** being three (3) months’ salary in compensation for unfair termination of employment.

26. This amount will attract interest at court rates from the date of judgment until payment in full.

27. The Claimant will have the costs of the case.

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY JULY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Mbithe for the Claimant

Mr. Bwire for the Respondent