



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 96 OF 2019

SYLVIA ONZERE MUNYORI.....CLAIMANT

- VERSUS -

BLINK LOGISTICS (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th October, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 06.12.2019 through Garane & Somane Advocates. The claimant's case is as follows. The respondent employed the claimant to start up the company as a Chief Executive Officer (CEO) from 01.11.2014 at USD450 per month and increased to Kshs. 80,000.00 in 2016 and to Kshs. 100,000.00 in 2018. From 01.04.2018 to 04.08.2018 the respondent unilaterally breached the contract of service by paying the claimant half monthly salary while other staff even enjoyed salary increment for the period 01.04.2018 to 04.08.2018. The claimant in those circumstances was constructively terminated effective 04.08.2018. The claimant claims Kshs. 70,000.00 withheld for April, May, June and July 2018 then Kshs. 13,333.33 for 4 days in August 2018. Further, by a contract dated 01.06.2019 the respondent rescinded the constructive termination by reemploying the claimant as the CEO at Kshs. 126, 520 per month. The respondent then withheld the claimant's salaries for August, September and October 2019 and proceeded to terminate the contract of service by the letter of summary dismissal dated 11.11.2019 and with effect from 01.11.2019. The claimant pleads that she was not given a warning letter or a letter to show-cause prior to the termination. Further the respondent did not follow the procedural fairness per section 41 of the Employment Act, 2007. She claims her salaries for August, September, October and 11 days in November 2019 amounting to Kshs.425, 950.66. A demand notice was served on 22.11.2019 but the respondent has refused to settle the claims.

The claimant prayed for judgment against the respondent for:

- a) Salary arrears for 2018 Kshs. 70,000.00.
- b) Salary 4 days August 2018 Kshs. 13, 333.33.
- c) Salary arrears for:
 - i. August 2019 Kshs. 126, 520.00.
 - ii. September 2019 Kshs. 126, 520.00.
 - iii. October 2019 Kshs.126, 520.00.
 - iv. 11 days November 2019 Kshs.46, 390.66.
- d) One-month salary in lieu of notice Kshs. 126, 520.00.
- e) 12-months x Kshs. 126, 540 = Kshs. 1, 518, 240.00 compensation for unfair termination.
- f) Total Kshs. 2, 154, 043.99.
- g) Certificate of service.

h) Damages for breach of contract.

i) Costs of the suit plus interest.

The respondent filed on 19.12.2019 the response to the statement of claim, counterclaim and set-off and through M/s Oloo & Chatur Advocates. The respondent's case was pleaded as follows:

a) By letter dated 01.11.2014 and exhibited by the claimant, the respondent employed the claimant as the Mombasa Station Representative. It was for a term of one year successfully served and the respondent re-employed the claimant on a one-year contract from 01.11.2015 to 31.10.2016 as CEO. Thereafter, the respondent retained the claimant as CEO on rolling one-year contracts for 2016-2017 and 2017-2018 on terms similar to the previous one-year contract. From 2018 to the current times the respondent has been experiencing difficult financial times. On 04.07.2018 the claimant tendered a resignation.

b) By letter dated 05.10.2018 the claimant wrote to the respondent demanding payment of salary arrears and compensation for alleged constructive dismissal and as exhibited for the claimant. The parties negotiated the dispute and the respondent agreed to reabsorb the claimant into employment for one year commencing 01.06.2019. That contract running from 01.06.2019 to 31.05.2019 is material and subject of the present suit.

c) The claimant's contract of service was mutually terminated after deliberations with the respondent's directors. The claimant is aware the contract was terminated after loss of business generally affecting the transport and logistics sector resulting in the respondent incurring losses. Further the claimant's employment became untenable due to her absenteeism when she engaged in her own private business using the respondent's time and resources amounting to conflict of interest and loss to the respondent.

d) By a letter dated 29.11.2019 the respondent fully informed the claimant's advocates the circumstances of the termination.

e) The respondent admitted owing the claimant salaries for August and September 2019 and, from October till date of termination the claimant had absconded duty and it is unjust for her to claim payment for the days she did not work. The respondent denied breach of contract or statutory obligations as alleged for the claimant.

The respondent counterclaimed as follows:

a) It employed the claimant on a one-year contract from 01.06.2019 to 31.05.2020 as CEO. The contract precluded the claimant from carrying on her personal business in direct competition with her employer and she abused that provision for her personal gain while causing the respondent to incur losses'

b) The claimant engaged in conflict of interest as contractually barred by undertaking her own business through Crispol East Africa Limited, the respondent's partner company and in so doing, incurred shipping line demurrage charges totaling USD 2370 and which the respondent was compelled to settle to avoid loss of the good business relationship with the aforesaid partner company. The claimant was informed in her termination letter that the aforesaid demurrage charges were recoverable from her final dues.

c) The claimant incorporated her own company in 2015 known as Sylvek Limited. Through that company she transacted private business with the respondent's business partner M/s Shengli Engineering Construction Group Limited and she failed to fulfil her obligations to the latter leading to demand letters for compliance and thereby embarrassing the respondent and making her lose credibility in the eyes of the business partner.

d) The respondent counterclaimed USD 2370 plus interest at Court rates, and the same may be applied as a setoff herein.

The respondent prayed for judgment against the claimant for:

a) Dismissal of the claimant's claim.

b) USD 2370 plus interest at Court rates.

c) In alternative USD 2370 be set-off from any amount awarded to the claimant.

d) Damages for loss of business and representation.

e) Respondent be awarded costs of the claim.

The claimant filed on 12.03.2020 the reply to response to the statement of claim, counterclaim and set off The claimant sated that as at employment with the respondent, she was a silent director of Sylvek Limited whose core business was transportation whereas the respondent was in clearing and forwarding agency. The claimant denied the conflict of interest alleged for the respondent and stated that at all times she acted in good faith in the best interest of the respondent. She prayed that the counterclaim and setoff be dismissed with costs.

By a consent order the documents filed for parties were admitted in evidence. By further consent at the hearing, Prayers (c) (i) and (c) (ii) not in dispute and were to be granted. Thus, by that consent, the claimant is awarded **Kshs.253, 040.00**. The respondent did not dispute delivery of a certificate of service and the prayer is granted.

The claimant testified to support her case. The respondent's witness(RW) was one of the directors one Thomas Odoyo Migal. Final submissions were filed for the parties. The Court has considered the pleadings, the evidence and the submissions. The Court determines the pertinent issues as follows.

To answer the **1st issue** for determination the Court finds that parties were in a contract of service. As urged for the respondent, the last annual contract of service contract running from 01.06.2019 to 31.05.2019.

To answer the **2nd issue** for determination the Court finds that the respondent terminated the claimant's last contract of service by the letter dated 11.11.2019. The letter stated that the termination was effective 01.11.2019 and in line with the recently held discussions between the parties. Further, the termination was due to the prevailing tough economic conditions that the respondent was facing. The letter stated that the respondent was greatly financially constrained and therefore totally unable to retain the claimant's position in the company. The letter further stated that the respondent was committed to pay the claimant her salary arrears of three months and one-month salary in lieu of notice as soon as the claimant cleared with the claimant.

The letter further stated thus, **"Do note however that we shall deduct USD 1050 for account MAWA plus USD 1320, for a shipment of Sherinah from the above-mentioned dues which you handled personally because the outstanding amounts on demurrage of the units are still pending to pay CRISPOLL EAST AFRICA LIMITED who are our partners in business.**

We take this opportunity to thank you for the good service you have rendered to our company and wish you all the best in your future endeavors.

Take note that if the economic conditions in the market improve, we shall consider you if the position shall be available."

To answer the **3rd issue** for determination, the Court returns that the parties are bound by the letter of termination which was in accordance with the contractual terms. The relevant clause 9(b) stated, **"The Employer may terminate this agreement and the Employee's employment at any time, with notice of not less than 30 days for sufficient cause with payment in lieu of notice."** The Court observes that the termination letter provided for the payment of the one-month in lieu of notice.

The Court further finds that as per the termination letter, the parties discussed and agreed to separate. The claimant testified that prior to the termination, she met RW and one Vincent and they discussed how the respondent was not doing well. The demand letter by the claimant's advocate does not deny the fact of that discussion. RW testified thus, **"The claimant left employment by mutual agreement. Business was not doing well. Myself and co-director Vincent Makanga met claimant. We were three of us. We agreed claimant to terminate her service. She was pre-occupied to do her side business."** As already found, the claimant testified confirming the discussion and consultations when she testified in cross-examination thus, **"I see page C40 letter of termination dated 11.11.2019. Letter came after deliberations with the respondent's management. I discussed with Director that business was not doing well. We did not discuss termination on account of reduced work. We discussed business not doing well. No decision was made at meeting. We did not discuss my side business. Meeting was between myself and director Thomas and Vincent whose position was not clear. He was an employee. We never discussed my company. We discussed how respondent was not doing well and how it could perform better. Whether I would retain an employee working elsewhere, it would depend."**

The Court finds that on a balance of probability, the termination letter constitutes the deliberations between the parties. The Court further finds that the evidence was that the claimant was engaged in a side business. The demand letter by the claimant's advocates never denied the fact of the discussions and the deduction of the dues flowing from the claimant's side business as stated in the letter of termination. Further the letter was within the contractual termination clause. RW and the claimant mutually testified that there had been no letter to show cause or warning letters. In the circumstances the Court finds that the claimant was misconceived to allege and submit that the termination was unfair for want of a notice and a hearing per section 41 of the Employment Act, 2007.

The Court returns that the termination followed the discussions and the contractual clause on termination. It was not unfair and the procedure adopted by the respondent was not unfair within the provisions of section 45 of the Act.

To answer the **4th issue** for determination the Court finds that the parties and particularly the respondent was bound by the terms of the letter of termination. The letter provided for payment of three months' salaries and the claimant is awarded the prayer for October 2019 **Kshs. 126, 520.00**. The termination was effective 01.11.2019 and there was no evidence that the claimant had worked for the 11 days in November 2019 when the letter of termination was dated 11.11.2019. The claimant's prayer for the 11 days' salary will collapse as unjustified. The claimant is also awarded one-month pay in lieu of termination notice and in terms of the letter of termination being **Kshs. 126, 520.00**.

As relates to claims of salary arrears for 2018, the evidence was that the claimant voluntarily resigned by her letter dated 04.07.2018 and effective 04.08.2018. She requested to be paid her salary arrears for April 2018 to July 2018 together with terminal dues. The suit was filed on 06.12.2019 and the Court finds that the claim was for a continuing injury and the 12 months of limitation (under section 90 of the Employment Act, 2007) from the date of cessation of that continuing injury (04.08.2018) had lapsed when the suit was filed on 06.12.2019. The Court further finds that in any event, the claimant has not pleaded the particulars of the claim, the relevant computation, and, provided the evidence of the halved salary over the period subject of the claim. Over that period the claimant alleged her monthly pay was Kshs. 100, 000.00 and if that was halved, then the amount claimed is clearly at variance with the rate of pay. That claim will as well fail for want of specific pleadings and relevant evidence. While making that finding, the Court further considers that in concluding the subsequent one-year contract, parties must have taken into account their respective prevailing positions so that the new contract must have been negotiated as a closure to all previous rights and obligations – and the claimant appears not to have made a claim in that regard after the subsequent contract and only raised the issue after the letter of termination issued.

The claimant made no submissions on the claim and prayer for damages for breach of contract and the same is deemed abandoned.

The 5th issue is whether the respondent has established the counterclaim and setoff. The Court has found that on a balance of probability there is no reason to doubt that prior to the letter of termination parties discuss the terms of the letter including the amount stated therein as deductible from the claimant's final dues. Indeed, in the demand letter the claimant's advocates remained silent on that issue. The claimant did not deny her side business overlapping with the respondent's business and leading to the amount counterclaimed. The emails and invoices exhibited establish the respondent's counterclaim and therefore set off as genuine as is hereby granted. The claimant attacked the counterclaim as irregular for want of a verifying affidavit as required by the rules. However, and as submitted for the respondent, the Court considers that the objection was belated as made in the submissions long after the respondent had also provided evidence establishing the counterclaim per the exhibited emails and invoices.

The Court has considered parties' margins of success, the respondent's early admission of part of the claimant's prayers, and, each will bear own costs of the entire proceedings.

In conclusion judgment is hereby entered for the parties for:

- 1) The respondent to deliver to the claimant the certificate of service by 01.12.2021.
- 2) The respondent to pay the claimant a sum of Kshs.506, 080.00 less USD 2370 (being Kshs110.4 to USD1 as at time of drawing this judgment thus Kshs. 261,648.00) making a net of **Kshs. 244,432.00** to be paid by the respondent by 01.12.2021 failing the respondent to pay interest thereon at Court rates from the date of filing the suit till full payment.
- 3) Each party to bear own costs of the suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 29th October, 2021.

BYRAM ONGAYA

JUDGE