



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 188 OF 2020

SAIMA YUSUF KASSIM.....CLAIMANT

VERSUS

AFRICAN SAFARIS DESTINATIONS LIMITED....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent vide a Statement of Claim dated 5th May 2020 seeking various reliefs for the alleged unprocedural/unfair termination of her employment. The Claimant avers that she had been an employee of the Respondent from 1st August 2011 working as a Manager at its premises located at Riverside in Nairobi and that the Respondent did not issue her with an appointment letter defining terms and conditions of her employment. She further avers that her starting monthly salary was Kshs. 88,000/- and she was also additionally entitled to Commission at 10% of the total gross monthly sales made and that at the time of termination of her employment, she was earning a monthly salary of Kshs. 120,000/- exclusive of the agreed monthly sales commission. The Claimant contends that she had diligently worked for the Respondent until the 7th May 2017 when she received an email from the Respondent's Managing Director Mr. Dipesh Ghalani notifying her of termination of her employment services effective from 7th July 2017. The Claimant averred that the email cited the reason for the intended termination as "the inability of the Company to afford her services" and that contrary to the law, the Respondent did not accord her any opportunity to explain herself and consider her representations, if any, before terminating her employment. The Claimant avers that on 10th July 2017 at 3:00pm, the said Managing Director called her to a meeting and verbally confirmed the termination of her employment while promising to pay the commission arrears in instalments. That the Respondent issued to her a cheque of Kshs. 253,679/- as a net amount after statutory deductions, being payment for 29 accrued leave days and service pay at 15 days for every year for the 5 years worked but that it failed to honour its promise on the commission arrears. She avers that the Respondent owed her a substantial amount in arrears as commission accrued from 2013 up to 2016 amounting to Kshs. 6,000,750/- which has been demanded from the Respondent to no avail. The Claimant avers that the said Managing Director convened a meeting with her on 9th January 2020 for purposes of amicable settlement of the dispute over the unpaid commission and came up with a resolution that she computes/tabulates her claim and present the same for consideration by the Respondent's management through the firm of CFL Advocates and that she complied and sent the same to the said Advocates on 16th January 2020 via G4S Courier services and when the Respondent failed to comply, she instructed Mizozokazi Consulting Agencies who intervened and wrote to the said Respondent's Advocates, raising an illegality in the manner her termination was handled and demanding compensation for the unfair termination. The Claimant avers that the Respondent's Advocates denied all the alleged claims as ill-founded and threatened to strenuously defend its client. The Claimant avers that her termination of employment was occasioned by her persistent demand for the accrued commission from the Respondent, which is unfair and that if indeed her termination was based on operational requirements, the Respondent ought to have complied with the law on redundancy. She thus claims damages against the Respondent for the unlawful and/or unfair termination of her employment services and also seeks one month salary in lieu of notice and accrued unpaid commission. The thus Claimant prays that judgment be entered against the Respondent for:

- a. A declaration that the termination of the Claimant's employment services by the Respondent was un-procedural, unlawful, unfair, and illegal.
- b. A declaration of payment of the sum of moneys claimed as damages for the loss of her employment amounting to Kshs. 7,440,750/- (Seven Million Four Hundred forty thousand Seven Hundred and Fifty).
- c. A declaration for payment of accrued commission from un-computed sales for the period of April 2016 to April 2017.
- d. The costs of this suit.
- e. Interest on 'b', 'c' and 'd' hereinabove.
- f. The issuance of the "Certificate of Service" as envisioned under Section 51 of The Employment Act, 2007, Laws of Kenya.

g. Any other further and better relief this Honourable Court may deem fit and just to grant.

2. The Respondent was opposed and in reply filed a Response dated 12th June 2020 admitting to have employed the Claimant and the salary terms as pleaded by her in the Claim but denying that she was entitled to a commission on total gross monthly sales as alleged. It avers that it issued the Claimant with two months' notice prior to termination of her employment because it could not fulfil her demands for pay increment which it could not afford. The Respondent avers that it sufficiently explained to the Claimant the reasons for termination in the said notice issued on 7th May 2017 and that because it did not terminate her for gross misconduct or poor performance, the provisions of Section 41 of the Employment Act, 2007 did not apply in the circumstances. It admits terminating the Claimant's services on 10th July 2017 but denies making promises to settle the Claimant's alleged commission in instalments. It further avers that it paid the Claimant Kshs. 60,000/- for unpaid leave days and a cheque of Kshs. 250,049/- towards notice pay and agreed exit package and denies paying the Claimant service pay or that she is entitled to service pay. The Respondent further avers that on the accrued commission, the Claimant only provided a summary list with figures but without supporting documentation to justify the figures and that she never honoured its continued invitation for the supporting documents. Further, the Claimant never replied to the Respondent's letter dated 26th March 2020 which had been made in response to the Claimant's demand letter. The Respondent denies that the Claimant was declared redundant or that her termination was based on operational requirements and avers that the Claimant began demanding for unpaid commission as an afterthought years after her termination and that the alleged outstanding commissions could therefore not have been the reason for terminating her services. It is the Respondent's averment that the Claimant's termination was lawful and fair and she was paid all her benefits and that she is therefore not entitled to the prayers sought, including the unproven and unfounded alleged commission. In response to the prayer for a certificate of service, it avers that vide letter dated 26th March 2020 it had committed to issue the same to the Claimant once the COVID-19 pandemic is over and the Respondent's offices resume normal operations. The Respondent prays that the Claimant's Statement of Claim be dismissed with costs to the Respondent. The Respondent also filed a witness statement made by its Managing Director Dipesh Galani who states that the Respondent issued the Claimant with a contract of employment which stipulated all the terms and conditions. He stated that the Claimant's employment contract did not make any provision for the payment of a commission on total gross monthly sales made. He further states that the meeting he had with the Claimant regarding the allegations of outstanding commission arrears was necessitated by the fact that the Claimant had in 2018 visited the Respondent offices in the company of her friend and disrupted the peace with the intention of bullying the Respondent to settle the unfounded claim of alleged commission arrears. The director stated that it is at the same meeting that they resolved she provides a breakdown of the alleged arrears but when she did, it was not accompanied by supporting documentation justifying the figures.

3. The Claimant and the Respondent's witness Dipesh Galani testified along the lines in their respective pleadings. What is instructive in respect to the claim for unpaid commissions by the Claimant is the admission by Dipesh Galani when he was referred to an email he sent to the Claimant to which he responded – *I sent the email to the Claimant. It had some percentages. The bulk of the sales was done by me. Booking and transport were done by the team and the Claimant did management of operations.* The Respondent's witness testified that the Claimant was aware of the situation facing the Respondent due to Covid 19 and that the subject of her leaving was communicated. He also admitted that he wrote to the Claimant telling her he would meet her and clear her dues and that she could leave.

4. Claimant's Submissions

The Claimant submits that because her position had become redundant, the Respondent was supposed to follow the procedure laid out under Section 40(1) of the Employment Act during the process of termination of the employment contract, including issuing her and the local labour office with a written notice. The Claimant submitted that however none of the mandatory requirements were followed by the Respondent and which as such made the termination of her employment unfair. With regards to notification to the labour office, the Claimant relies on the case of **Luke Kinyua Kamunti v Amigos Nuts and Commodities Limited [2019] eKLR** where the Court held that failure to issue a notice to the labour officer violated the provisions of Section 40 of the Employment Act with the result that that redundancy was unprocedural and therefore unfair.

5. On the alleged reason that the company was unable to afford her services, the Claimant submits that the Respondent did not produce in court any documentary evidence to prove its financial inability to sustain her emoluments in the foreseeable future. The Claimant submits that the Respondent could have at least included audited financial statements of the company for several years, professional cash-flow projection or evidence of lawsuits or threats of intended action from creditors. The Claimant submits that the Respondent thus failed to discharge the burden of proof placed on it by Section 107 of the Evidence Act that he who alleges must prove and that this Court should find that the Respondent's reason for termination of employment was not proven. She cites the case of **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Mombasa Sports Club [2014] eKLR** where the Court held:

“It cannot be disputed that termination through redundancy is stated to be based on operational requirements. The grounds covered under operational requirements are very broad and would include economic reasons and these must be subjected to the test required by Sections 43 and 45(1) and (2) of the Employment Act like any other termination or dismissal. An employer is under an obligation to prove the economic reason(s), and that the reason(s) are valid and fair. And where a Court makes a finding of unfairness, it is open to it to make an award of compensation in addition to the dues stipulated in section 40 of the Employment Act.

In my view, the Respondent has failed to prove that the declaration of redundancy on the basis of financial constraints in relation to the kitchen unit were valid and fair reason(s) based on its operational requirements or that it was in accord with justice and equity. The terminations were therefore unfair.”

6. The Claimant submits that Section 10(7) of the Employment Act places the burden of proving or disproving any alleged term of employment covering issues, inter alia, remuneration upon the employer where the employer in any legal proceedings fails to produce a written contract. The Claimant submits that to prove existence of a contract for payment of commission, she attached at page 5 of her Further Affidavit sworn on 12th August 2020 a print-out of two emails dated 26th June 2013 which streams of emails run for 6 pages. She submits that the said Managing Director committing to pay her the accrued commissions is proof of the Respondent's admission of the same and that the Respondent did not also deny authorship of the said email. It is the Claimant's further submission that the act of the Respondent seeking breakdown of the unpaid commissions is inconsistent with its claim that there was no commission agreement in the first place or that she was

not entitled to payment of commission.

7. In support of her claim for unfair termination she relies on the Court of Appeal case of **Violet Kadala Shitsukane v Kenya Post Savings Bank [2020] eKLR** where it was held that termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reason or if the reason itself or the procedure of termination are themselves not fair. The Claimant submits that applying this to the present circumstance her termination was thus based on an invalid reason as the Respondent failed to substantiate its financial incapacity to sustain the Claimant's employment. She submits that she is therefore entitled to compensation and that the computation should include amount payable under redundancy laws at the rate of ½ month pay for each year worked, one month's notice pay and 12 months' pay for unjustified/unfair termination, and the unpaid commission of Kshs. 6,000,750/-.

8. Respondent's Submissions

The Respondent submits that the Claimant's employment was terminated on notice pursuant to Section 35 of the Employment Act and that the Claimant has not rebutted the fact that, as early as 2016, she and the Respondent agreed to part ways on account of the Respondent's inability to afford her services. The Respondent submits that it was thus well within its rights, as an employer, to issue the Claimant with the two months' termination notice and to terminate her services once the notice took effect and that to this end it relies on the Court of Appeal case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR**. It further submits that it produced its Bank statements to prove it settled the Claimant's dues and with the Claimant alleging it had millions in its accounts to sustain her services the onus is upon her to prove the same but which issue it notes was never pleaded in her Claim. Further, the Claimant cannot also seek notice pay as she admitted in her pleadings of having received an email notice on her termination and that the same would thus amount to unjust enrichment. The Respondent submits that the claim of redundancy does not arise in this case and that it was not under any obligation to notify the labour officer as asserted by the Claimant. It relies on the Court of Appeal case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** wherein Githinji JA in his dissenting opinion held that "*What constitutes a fair reason is subjective and that the phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy*". The Respondent submits that it provided valid and fair reasons subject to Section 45 of the Employment Act and there is both substantive and procedural fairness in this matter as was held in the case of **Walter Ogal Anuro v Teachers Service Commission [2011] eKLR**.

9. The Respondent submits that the Claimant's Supplementary Bundle of Documents dated 2nd August 2021 is inadmissible as it was filed without leave of court after the period of filing documents had already closed and ought to be disregarded from the onset. The Respondent submits that the Claimant also filed with the said bundle, the computer printout of QuickBooks System and the Excel list which are electronic in nature and thus contrary to the provisions of Sections 106 A and B(4) of the Evidence Act. Further, one Ms Virginia who operated the system was not presented before the Court and also did not prepare a certificate for electronic records since the Claimant stated that she only managed the system when Virginia was away. To this end, it relies on the case of **Kenya Agricultural Research Institute v Farah Ali & Another [2017] eKLR** and urges the Court to similarly find that the Claimant's Certificate is defectively incurable and therefore inadmissible in evidence. It also relies on the authorities of **Rachael Njoki Kahara v Gideon Migiro Nyambati [2020] eKLR**; **William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR** and **Republic v Barisa Wayu Matuguda [2011] eKLR**. The Respondent submits that the Claimant has failed to prove that she was entitled to any commission as alleged and that the same must fail. It submits that the allegation that she has received Kshs. 3,384,000.23 from the Respondent has not been proved and the supplementary electronic documents and other documents (also electronic) filed on 2nd August 2021 are not admissible in evidence for lack of a proper Certificate of Electronic Records as under Section 106B of the Evidence Act and that in the circumstances the Claimant is not entitled to compensation for unlawful termination.

10. The Claimant sued the Respondent seeking payment of her accrued commissions as well as redundancy pay as her employment was terminated on account of the Respondent's inability to maintain her in its employment. The Respondent on its part asserts the termination was not only lawful but that it complied with the law on notice *et al* and that the Claimant has no valid claim to press against it. The Claimant testified that she was entitled to commissions and that the Respondent's director asked her to compute or compile the same. She asserts she did so and the sum owed is stated to be Kshs. 6,000,750/- the Respondent's director stated in his testimony that the Claimant was paid all her dues and that the attempt at collecting commissions was an afterthought on the part of the Claimant. It would seem the Claimant was entitled to some commission and as the Respondent was not forthcoming with the information needed to resolve the issue, the Claimant had retained a hard disk that showed the sums due. On one, the sum in total sales was in the region of Kshs. 1,303,800/- in cumulative sales if the screenshot of the email of 26th May 2016 is anything to go by. In her claim, the Claimant bases her commission calculation on the sum of Kshs. 96,847,502.27 and asserts she received commissions totalling Kshs. 3,384,000.23. The Claimant proved she was terminated on account of the Respondent being unable to afford her. While ideally this should have been a redundancy, the Claimant was able to negotiate her exit and was called in for discussions where she attended a meeting with the Respondent, its lawyers, her father and a witness Aston Inzoberi. She was to prepare tabulations for payment and it would seem that is where the problems started as the Respondent sought to renege on his promise to pay her for the work done. She is entitled in respect of her commissions a sum of Kshs. 6,000,750/-. She was not able to prove dismissal that was of the colour that would attract censure from the Court and as such she will not recover for unlawful termination. She will be entitled to costs of the suit as she did not have to file this suit to recover what had been promised to her by the Respondent. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 6,000,750/- being unpaid commissions;
- b. Costs of the suit;
- c. Interest on the sum in a) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2021

NZIOKI WA MAKAU

JUDGE