



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1349 OF 2016

(Before Hon. Justice Hellen S. Wasilwa 28th January, 2020)

EDNA SEMITI.....CLAIMANT

VERSUS

INTEX CONSTRUCTION LIMITED...RESPONDENT

JUDGEMENT

1. The Claimant instituted this suit vide the Memorandum of Claim dated 12/7/2016. However, she later amended her claim vide the Amended Memorandum of Claim filed on 16/6/2017 wherein she sought the following reliefs-

- a. An order restraining the Respondent, its servants, agents and or any other person acting through the Respondent from altering, varying, breaching, terminating or in any other manner whatsoever so deal with the Claimant's employment contract dated 12/1/2015 its servants, agents and/or any other person acting through the Respondent from altering, varying, breaching, terminating or in any other manner whatsoever so deal with Claimant's employment contract dated 12/1/2015.**
- b. A declaration that the termination of the Claimant's employment was unprocedural, unfair and unlawful.**
- c. An order that the Claimant be paid 1 month's salary in lieu of notice of Kshs. 425,000.00 and 12-months' salary for unlawful termination.**
- d. Payment of service charge for the duration worked.**
- e. General damages for the pain of losing an ability to earn a living.**
- f. Costs of the suit.**
- g. Any other relief as this Honourable Court may deem fit to grant.**

2. The Claimant was employed by the Respondent on 12/1/2015, as a Human Resource Manager earning a monthly salary of Kshs. 350,000.00. Her salary was subsequently increased and at the time of her termination it was Kshs. 425,000.00.

3. The Claimant avers that she received the Respondent's letter of 26/4/2016, which was to the effect that the Respondent had accepted her verbal resignation. Vide the letter of 31/5/2016, she informed the Respondent that she did not wish to resign.

4. She avers that since then, the Respondent came up with strategies to compel her to resign such as issuing her with a consultancy agreement for her execution.

5. It is her position that by issuing her with a consultancy agreement, the Respondent breached the provisions of her contract which provided that termination could only occur pursuant to clause 6 and 7 and therefore the consultancy was a constructive dismissal.

6. The Claimant avers that on 16/1/2017, this Court issued orders to the effect that the Claimant's services could not be terminated without following due process and for valid reasons. Consequently, the Claimant was called by the Respondent at noon to proceed for a disciplinary hearing on the same day at 2:30pm. She protested the short notice and the hearing was moved to 30/1/2017.

7. However, the Respondent protested the person she had brought in as her witness and ordered him out of the meeting hall. Her plea to have the hearing postponed to enable her procure an acceptable witness fell on deaf ears and the hearing proceeded. On the same day, she received an email as well as a letter informing her that her employment had been dismissed on the following grounds-

a. Inefficiency and poor performance of work.

b. Lack of leadership and teamwork with her department.

c. Conduct resulting to breach of trust.

8. She avers that the disciplinary hearing was a sham as it was commenced after the court ruling with the aim of sanitizing her unfair termination.

9. During cross-examination, the Claimant was asked about her letter of 31/5/2016 and she stated that she had planned to move to Tanzania, due to personal reasons. However, she contended that her move would not have interfered with her work.

10. She admitted that she had indicated that she would give 3 months' notice. She also admitted that there were discussions around a consultancy agreement but denied that there were discussions regarding a consultancy.

11. The Respondent filed an Amended Memorandum of Response and Counterclaim on 26/7/2017 and sought the following reliefs-

a. The sum of Kshs. 370,000.00 per month from 26th July 2016 until the discharge or variation orders of this Honourable Court issued on 14/7/2016.

b. Interest on the sum at (a) above at court rates from 26/7/2016 until settlement in full.

c. Costs of this suit.

d. Any other relief deemed fit by this Honourable Court.

12. The Respondent contends that the Claimant verbally tendered her resignation on 14/3/2016. The resignation was accepted and the acceptance communicated vide the letter dated 26/4/2016.

13. The Respondent avers that the Claimant agreed to its request made in the letter of 12/5/2016, to issue them with a 3 months' notice so that there could be a comprehensive handover. This was despite the fact that the Claimant had changed her mind regarding the resignation.

14. The Respondent denies the allegations of coming up with strategies to force the Claimant to resign. They aver that the consultancy agreement was drafted with the intent of keeping the Claimant as a consultant, and only after she emailed the management seeking to make amends. Further, that it was the logical approach to take since the Claimant had resigned and was only serving her notice period.

15. The Respondent avers that the Claimant indicated in her email of 4/7/2016, that she would be willing to explore the option of consultancy and even made comments on the draft in her email of 8/7/2016. Further, that the Claimant did not inform the Respondent that she had reservations about entering into the consultancy agreement.

16. The Respondent denies breaching the terms of the Claimant's employment contract. The Respondent contends that the Claimant did not bring any witness to her disciplinary hearing and avers that the Claimant opted to bring an official from another union to the hearing. The official was denied access and the Claimant refused to participate in the hearing. The Respondent avers that the Claimant was dismissed for fair and lawful reasons and that due procedure was followed.

17. Sharon Mwakugu, the Respondent's legal manager testified as RW1. On cross-examination, she admitted that there was no written evidence that the Claimant resigned, but contended that there was an email where the Claimant confirms the resignation.

18. She also conceded that there was no evidence that Claimant proceeded to give the 3 months' notice. She maintained that the Claimant issued her resignation notice vide WhatsApp but conceded that the same was not issued to her.

19. She stated that a consultancy was done after discussions between the parties, and, to accommodate the Claimant's family. However, she conceded that she did not know who requested for the consultancy.

20. It was her testimony that the Claimant was never issued with warnings prior to her termination on account of incompetency. She also conceded that she did not have evidence regarding the issues raised in the termination letter. She maintained that due process was followed.

Submissions by the Parties

21. In her submissions filed on 17/10/2019, the Claimant submitted that the termination was unlawful contrary to section 45 (1) of the Employment act as the reasons stated in her termination letter were not valid as there was no proof of poor performance a fact which was admitted by RW1 who stated that she had no proof of the reasons for termination. Further, the correct procedure was not followed as she was not issued with any warnings or a notice to show cause prior to the hearing and her representative was denied access to the hearing premises.

22. The Claimant argued that she had suffered mental anguish due to the termination of her employment and had never gotten another job since the termination. She submitted that she had demonstrated that her employment was terminated unfairly, as such, she was entitled to the reliefs sought.

23. In its submissions filed on 11/11/2019, the Respondent submits that substantive and procedural fairness were adhered to during the disciplinary process. For instance, the notice to show cause indicated that the reason for the disciplinary action was the Claimant's poor performance.

24. The Claimant was informed of the right to make written representations and to be accompanied by a colleague, a disciplinary hearing was conducted, a decision was made and the Claimant was informed of her right to appeal that decision. The Respondent relies on the cases of **Jane Samba vs. Mukala vs. Ol Tukai Lodge Limited [2013] eKLR** and **Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others [2015] eKLR**.

25. The Respondent submits that the Claimant is not entitled to the injunctive orders as she withheld information regarding her resignation, from this Court. The Respondent maintains that the Claimant effectively resigned vide WhatsApp and submits that WhatsApp is a form of writing.

26. It is the Respondent's submissions that it is entitled to recover the salary that the Claimant wrongfully continued to earn from the date of her resignation. Further, that this Court finds that the Claimant was terminated for a fair reason and that due process was followed.

27. I have examined all the evidence and submissions from both Parties. The issues for this Court's determination are as follows:-

1. Whether the Claimant resigned from employment.

2. If not, whether the Claimant was terminated and if the termination was fair and justified.

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

28. On the first issue, the Respondent have alleged that the Claimant resigned from employment vide WhatsApp and confirmed it through an email. The Claimant stated that she never resigned as alleged.

29. The Respondent's RW1 testified in Court and in cross-examination stated that they did not have proof of the WhatsApp resignation. Vide a letter dated 26.4.2016 the Respondent's Managing Director wrote to the Claimant asking her to submit her written notice of resignation by close of the day. Such letter was never written and vide a letter date 31.5.2016, the Claimant wrote to the Respondent's Managing Director indicating that she had no intention of resigning or giving 3 months' notice of her intention to resign.

30. There is definitely no evidence presented before this Court showing that the Claimant resigned as pleaded by the Respondent and the contention that she actually resigned is not true.

31. On the 2nd issue following the insistence by the Respondents that the Claimant resigns which she declined to do, the Respondent went ahead to offer the Claimant a consultancy agreement which also did not go well between the 2 Parties.

32. The Claimant's case is that by the Respondent issuing her with a consultancy agreement, they breached the provisions of her contract and therefore did not follow due process.

33. I do agree with the Claimant that the Respondents did not follow due process before issuing her with a consultancy agreement.

34. Following the failed attempt to subject the Claimant to a consultancy agreement, the Claimant continued working for Respondent and on 27.1.2017, she was served with a notice for a disciplinary hearing for reasons of poor performance and being in breach of the employment contract by resigning twice without notice.

35. She was expected for disciplinary hearing on 26/1/2017 at 2.30 pm. On 26/1/2017 at 15.37, the Claimant wrote to the Respondent informing them that she had just seen the notice for disciplinary hearing and was not ready to attend and sought more time to prepare for the same. The meeting was now rescheduled to 26/1/2017 at 4 pm.

36. This disciplinary hearing proceeded on 30/1/2017 as per minutes presented by the Respondent. From the minutes of the said meeting, the Claimant appeared with a union representative one John Obure who the Respondent declined to admit and so the meeting went on without the Claimant. The meeting thereafter resolved to terminate the Claimant.

37. From the minutes presented, the Respondent averred that the union representative was an unqualified person but Claimant insisted on having him as her representative.

38. Section 41 of Employment Act 2007 states as follows:-

1. "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

39. By denying the Claimant representation from a union, the Respondent indeed breached the law and then proceeded to hear the discipline case in absence of the Claimant.

40. During the hearing of this case, RW1 indicated that the Claimant’s leadership was wanting but she did not produce evidence of the same and she indicated as such. The witness also agreed that Claimant had been asked to resign by issuing 3 months’ notice but which she never gave.

41. The Respondent did not produce evidence of the reason leading to the Claimant’s termination and neither was due process followed.

42. I therefore find that the termination of the Claimant was unfair and unjustified and I declare it so. Having found the termination unfair and unjustified I award the Claimant as follows:-

1. 3 months’ salary in lieu of notice as per the appointment letter = 3 x 425,000 = 1,275,000/=

2. 10 months’ salary as compensation for the unlawful termination = 10 x 425,000 = 4,250,000/=

TOTAL = 5,525,000/=

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

Dated and delivered in open Court this 28th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kiti for Respondent – Present