



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1320 OF 2014

WINNIE AGUNDA.....CLAIMANT

v

OCTAGON PENSION SERVICES LTD.....RESPONDENT

JUDGMENT

1. Winnie Agunda, an advocate (Claimant) was offered employment as Legal & Compliance Officer on 10 April 2012 by Octagon Pension Services Ltd (Respondent).
2. On 8 August 2014, the Claimant instituted legal proceedings against some 3 Respondents alleging unfair termination of employment and breach of contract.
3. On 18 August 2014, the Claimant filed an *Amended Statement of Claim* in which she removed 2 of the Respondents and maintained the suit against the current Respondent.
4. The Respondent filed a *Response to the Claim* on 5 September 2014. The Claimant joined Issue with the *Response* on 23 September 2014.
5. The Cause was heard on 18 March 2015, 27 October 2015, 4 December 2017 (before Nzioki wa Makau J), and on 18 March 2019 and 28 March 2019 before this Court.
6. The Claimant and the Executive Director of the Respondent testified.
7. The Respondent closed its case on 25 November 2019 without calling its last witness.
8. The Claimant filed her submissions on 16 December 2019 while the Respondent's submissions were filed on 3 February 2020 (should have been filed by 27 January 2020).
9. The Court has considered the pleadings, evidence and submissions and the Court has adopted the Issues as set out in the Claimant's submissions.

Sexual harassment

10. The first Issue identified by the Claimant in her submissions was sexual harassment.
11. The Court has looked at the *Statement of Claim* and the *Amended Statement of Claim* and has not been able to find and/or discern any pleadings relating to sexual harassment.
12. The Court is under a duty to determine the Issues which arise out of the pleadings. The pleadings serve to limit the Issues upon which the Court should pronounce itself (see *Samsung Electronics East Africa Ltd v KM (2017) eKLR*).
13. It is also noteworthy that the Claimant failed to join the alleged perpetrator of sexual harassment as a party to the suit and/or disclose the name in the pleadings.
14. Although the Claimant filed documents relating to allegations of sexual harassment, it is the view of the Court that sexual harassment having not been expressly pleaded to enable the Respondent adequately respond thereto, it would be prejudicial for the Court to determine

the question.

Unfair termination of employment

Procedural fairness

15. The background facts leading to the separation between the Claimant and the Respondent are in the main not in dispute.

16. The Claimant testified that on or around 14 July 2014, she applied for part of her annual leave to run from 15 July 2014 to 18 July 2014, ostensibly to seek medical attention.

17. According to the Claimant, she received a text message advising her that the application had been declined.

18. Despite the non-approval, the Claimant visited Avenue Hospital on 15 July 2014 and was issued with a Certificate of Incapacity for 3 days.

19. The Claimant testified that when she reported to work on 21 July 2014, she went to present the Certificate of Incapacity to the Respondent's Executive Director but he informed her that her services were no longer required and that she should handover as a result of which she prepared handover notes, but later in the day she received a letter alleging she had absconded duty and seeking an explanation.

20. The Claimant responded the same day indicating that she had gone to seek medical attention and attached a copy of the Certificate of Incapacity to the response.

21. On 22 July 2014, the Respondent invited the Claimant through email to attend a meeting accompanied by a named colleague. The Claimant stated that she attended the meeting and that after the meeting, she received a letter informing her of the decision to terminate her employment.

22. In the instant case, the Court is satisfied that the Respondent complied with the statutory requirements of section 41 of the Employment Act, 2007 by affording the Claimant an opportunity to be heard on the allegation of absconding from duty.

Substantive fairness

23. The reason given for the termination of the Claimant's employment was absconding from duty. This is the reason the Respondent was expected to not only prove but prove as a valid and fair reason to dismiss the Claimant as contemplated by sections 43 and 45(1) & (2) of the Employment Act, 2007.

24. Claimant denied having absconded from duty.

25. In an attempt to discharge the burden, the Respondent's witness testified that the Claimant did not report to work despite having been informed on 15 July 2014 that her application for leave had been rejected.

26. The Respondent's witness also testified that the Claimant was expected to apply for annual leave to the Managing Director at least 7 days in advance, but the Claimant opted to apply 1 day in advance, not to the Managing Director but to the Executive Director, and that since there was no approval, the Claimant had absconded duty.

27. The Respondent asserted that the Claimant's attendance at the hospital was an afterthought.

28. It is not disputed that the Claimant did not report to work from 15 July 2014 to 18 July 2014. When she reported on 21 July 2014, she had a Certificate of Incapacity.

29. An employee is under a contractual obligation to report to work as agreed with the employer and where the employee fails to report to work without permission or other lawful cause, the employee is susceptible to summary dismissal, but after a hearing as contemplated by section 41(2) of the Employment Act, 2007.

30. However, in explaining her failure to report to work, the Claimant produced medical evidence showing that a doctor had recommended sick-off.

31. Illness, and more so where there is medical evidence, in the view of the Court, would constitute lawful cause not to report to work without prior notification to the employer.

32. In this case, the Claimant had and produced a copy of her Certificate of Incapacity. The Respondent had the option or opportunity to verify the authenticity of the certificate. It did not.

33. The Court can therefore and does conclude that the Respondent did not have and has not proved that it had valid and fair reasons to terminate the employment of the Claimant as contemplated by sections 43 and 45 of the Employment Act, 2007.

Compensation

34. The Claimant served the Respondent for about 3 years, and in consideration of the length of service, the Court is of the considered view that compensation equivalent to 3 months' gross wages would be appropriate and fair (gross salary according to a payslip for May 2014 was Kshs 90,000/-).

Wages deducted on account of absence

35. The Claimant sought Kshs 3,000/- deducted for the 3 days she did not attend work.

36. Section 19(1)(c) of the Employment Act, 2007 provides for when an employer may deduct the wages for absence.

37. The Claimant had lawful cause to be away and is entitled to refund of the deducted wages.

Fine for withholding salary

38. The Claimant also sought that the Respondent be fined Kshs 100,000/- for unlawfully withholding/deducting part of her wages.

39. Since the Claimant did not address this question during testimony or in the submissions, the Court declines to make any award.

Conclusion and Orders

40. Arising from the above, the Court finds and declares that the termination of the Claimant's employment was not for valid and fair reasons.

41. The Claimant is awarded

(i) Compensation Kshs 270,000/-

(ii) Deducted wages Kshs 3,000/-

TOTAL Kshs 273,000/-

42. The other reliefs sought are dismissed.

43. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 14th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyasimi instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Mr. Simiyu instructed by Musyoka Murambi & Associates Advocates

Court Assistants Jane Sikulu/Lindsey