



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1111 OF 2016

ANGELA GWIYO KURIA.....CLAIMANT

VERSUS

SCHENKER LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 09.06.2016 through Ongoya & Wambola Advocates. The claimant prayed for judgment against the respondent for:

- 1) A declaration that the respondent constructively terminated the claimant's employment contract hence the same amounted to unlawful termination of employment.
- 2) The claimant's compensation be readjusted so as to be based on the salary of Kshs.440,000.00 which was earned by one of the junior employees.
- 3) The claimant be paid compensation equivalent to 12 months gross salary for constructive and unlawful termination of employment.
- 4) A declaration that the claimant was entitled to payment of commissions and bonuses and the same be and are hereby paid to her.
- 5) A declaration that the claimant was discriminated against on the basis of her sex hence her right to equality and freedom from discrimination under the law was violated.
- 6) A declaration that the claimant's right to fair labour practices such as right to fair remuneration and reasonable working conditions was violated.
- 7) A declaration that the claimant's right to access of information was violated.
- 8) An order that the claimant be compensated for underpayment during her entire contract period arising from the difference between her actual remuneration and the sum of Kshs. 440,000.00.
- 9) An order for compensation of general damages under Article 23 of the Constitution for violation of the claimant's rights as protected under the Constitution.
- 10) An order for issuance of the certificate of service.
- 11) An order for costs of the claim.
- 12) An order for payment of interest on all the heads of compensation above from the time of filing the claim to the time of full payment.
- 13) Any other or further relief that the Court may deem fit to grant to meet the ends of justice.

The respondent's memorandum of reply was filed on 30.06.2016 through Wonge Maina & Onsare Partners Advocates. The respondent prayed that the claimant's memorandum of claim be dismissed with costs.

To answer the **1st issue** for determination, there is no dispute that the parties were in a contract of service. The respondent employed the claimant as Head of Sales with effect from 01.10.2013 in the Sales and Marketing Department of the respondent. The contract of employment made on 05.07.2013 is exhibited and it sets out the terms and conditions of service. The agreed gross monthly pay was Kshs.360,000.00 comprising basic salary Kshs.240,000.00; house allowance Kshs.60, 000.00; and mileage and car maintenance allowance of Kshs.60,000.00. The contract's remuneration clause further stated thus, **"You will also be entitled to a monthly 10% commission of any amount above the minimum target of Kshs.1,500,000.00 monthly gross profit realised from new business. Payment of the Commission shall be made after each quarter of the year and shall be subject to the prevailing local tax legislation. You will be entitled to a yearly performance-based bonus subject to the company's performance and at the discretion of the management."**

The contract's notice clause provided thus, **"This contract may be terminated by either party by giving one month notice in writing or payment in lieu of notice if not served. Employment may be terminated by the employer without notice or payment in lieu in the event of gross misconduct or persistent misconduct or underperformance by the employee."**

To answer the **2nd issue** for determination, the Court returns that the contract of service was terminated by the claimant's letter of resignation dated 01.03.2016 and addressed to the respondent's Human Resource Manager thus,

"Dear Moses,

RE: RESIGNATION

I hereby submit this letter of resignation and as per my terms of employment together with one months' notice effective from the above date.

Thank you for giving me the opportunity to work with you.

Regards,

Signed

Angela Kuria (Mrs)

Cc: Mr. Darren Brown, Managing Director, Schenker Ltd"

The respondent acknowledged receipt of the claimant's resignation letter by the letter dated 01.03.2016 through the respondent's letter dated 07.03.2016 signed by Darren Brown, the respondent's Managing Director. The replying letter advised the claimant as follows:

- a) The resignation was effective 01.03.2016 and her resignation was being accepted with regret. The notice period was therefore lapsing on 31.03.2016.
- b) The claimant's final dues would consist days worked up to 31.03.2016.
- c) 12 days' leave pay for unutilised leave days as at 31.03.2016.
- d) In relation to performance discussion on 24.02.2016, in view of the resignation decision, the Work Performance process that was to begin that week was abandoned. The performance targets for sales team that the claimant was to prepare and complete by 07.03.2016 would be done by someone else and the claimant was to abandon the task.
- e) The claimant was to handover all company property by 31.03.2016 and thereafter sign the pension scheme withdrawal form.
- f) The cheques for final dues would be ready for collection by 04.04.2016 at the HR department.
- g) The respondent thanked the claimant for the two and a half years of dedicated service to the respondent and wished her the very best in her future endeavours.

The Court returns that the two letters constituted the circumstances of the termination of the contract of service.

To answer the **3rd issue** for determination the Court returns that in this case there was no constructive and unfair termination as pleaded and urged for the claimant. The claimant pleaded that she was forced to resign because the respondent had declined or refused to pay her due commissions per the contract of service; that the respondent had paid persons under her supervision more than she earned; and that she was being put on Work Performance Programme (WPP) suggesting she was not performing satisfactorily but which was not the actual position. The respondent pleaded that the claimant was a cantankerous individual who treated her duties with disdain and who on more than one occasion had failed to meet her obligations and thereby occasioned the respondent monetary loss. Further during her tumultuous employment period with the respondent she was under-performing employee and who the respondent committed resources to assist to improve her performance but in vain. The Court finds that in accepting the resignation the respondent thanked the claimant most sincerely for her 2.5 years of dedicated service and the Court finds that commendation by itself defeated the respondent's allegations that during the service the claimant had been cantankerous and tumultuous. However as pleaded and submitted for the respondent, the claimant clearly resigned in accordance with the contractual notice clause. The Court finds that the alleged constructive dismissal was a mere afterthought because the

purported grounds as pleaded about unfair pay, withheld commissions and being emplaced on WPP were all never stated by the claimant as the grounds for resignation. Even if such grounds are shown to have existed, it is clear that the claimant opted to resign under the contractual notice clause and it is the Court's considered view that her intention was clear and express.

The Court considers that if an employee has two or more options to terminate the contract of employment and expressly exercises one of the options, the employee is thereby bound by the option as voluntarily exercised and it is not for the Court to make a finding of separation on account of the other options that were available but the employee never exercised. The Court finds that in the instant case the claimant was misconceived in attempting to abandon the clear and voluntary resignation letter and purporting to impose constructive dismissal. Further, as the Court will find later in this judgment, the 3 grounds the claimant pleaded as constituting constructive dismissal have not been established to constitute the respondent's fundamental breach of the contract of employment or adverse work environment that made it completely impossible for the claimant to discharge the contract of service, and that, the claimant had promptly refused to condone the grounds as alleged. In **Benuel –Versus- Awand Enterprises Limited Cause No.191 of 2013 at Mombasa**, Ndolo J held, **“It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer.”** In particular, it could be that the respondent breached the contract when, as will be found later, failed to pay commissions as was agreed. However, the failure to pay had been since 2014 and the claimant appears to have condoned the failure to pay so that the breach cannot be the reason for the resignation whereas the resignation letter was express that the contractual notice clause had been invoked. Similarly as will be found later, the respondent may have engaged in discrimination against the claimant when some of the staff were paid commissions but not the claimant as was entitled but once again, the same amounted to an adverse work environment that the claimant had condoned for a long time. Thus, the Court finds that constructive dismissal has not been established in the instant case. The Court also follows the list by Onyango J in **Milton M. Isanya –Versus- Aga Khan Hospital Kisumu [2017]eKLR**, that the ingredients of constructive dismissal included that:

- a) the employer must be in breach of the contract of employment;
- b) the breach must be fundamental as to be considered a repudiatory breach;
- c) the employee must resign in response to that breach; and
- d) the employee must not delay in resigning after the breach has taken place, otherwise the court may find the breach waived.

Thus the Court finds that the termination was not constructive and unfair but that the claimant voluntarily invoked the contractual notice clause. Compensation for unfair termination under section 49 of the Employment Act will therefore fail.

The 4th issue for determination is whether the claimant is entitled to the commissions as prayed for. The claimant has pleaded that by an email dated 25.01.2016 from the respondent's chief accountant to the human resources manager, the respondent calculated the commission payable to the claimant at Kshs.393, 799.00 but the same was not paid to the claimant despite the fact that the amount was not disputed. Further it is the claimant's case that she was entitled to higher commissions at Kshs.575, 111.60 for the year 2014 and Kshs.1, 193,799.00 for the year 2015 and she claims a sum of Kshs.1, 768, 910.60 in commissions. The respondent has pleaded that it does not owe the claimant any commissions because she failed to meet her targets and the email of 25.01.2016 is an isolated one in a trail of emails and conveniently so as to serve the claimant's convenience in the claim. Further if the respondent earned from new clients then only invoices by clients would prove and the claimant should not be allowed to earn commissions on money not received by the respondent - as the alleged new customers are with respect to accounts that are still largely outstanding and it was the claimant's duty to ensure that the clients made payments to enable her collect her alleged commissions.

The Court finds that there is no dispute that the claimant was entitled to a commission at the rates and conditions set out in the remuneration clause of the contract of employment. The relevant contractual provision stated, **“You will also be entitled to a monthly 10% commission of any amount above the minimum target of Kshs.1,500,000.00 monthly gross profit realised from new business. Payment of the Commission shall be made after each quarter of the year and shall be subject to the prevailing local tax legislation.”**

The claimant must show that she met the target of Kshs.1, 500,000.00 monthly gross profit realised from new business. The Court has revisited the claimant's pleadings, evidence and submissions. The claimant has not pleaded the particulars of the monthly gross profit and particulars of the new business she brought in. She has urged that Green Energy is a new business she brought in but the particulars of how she brought in that business are not pleaded. RW1 stated that Green Energy was an old client from Iceland. As submitted for the respondent it is not clear how the claimant never raised the demand since 2014 when she says brought in the Green Energy account. Similarly the claimant says that GSK was an old dormant client and that she activated the account. But it is not clear why the claimant took too long to raise the claim. The contract was that the commissions were payable quarterly and the claimant has not specifically pleaded and proved the unpaid commissions on quarterly basis showing the demands she made on quarterly basis as they fell due. On a balance of probabilities the court returns that the claimant has failed to satisfy by way of evidence the contractual conditions for payment of commissions. On that prayer, the Court will award only **Kshs.393, 799.00** in commissions being the amount the respondent acknowledged as due and has not been shown to have been paid. That is the amount RW1 testified had not been paid as the respondent had no evidence of the payment.

The 4th issue for determination is whether the claimant's rights and fundamental freedoms were violated by the respondent as claimed. First the claimant has alleged that by her advocates' letter dated 17.05.2016 she requested for information under Article 35 of the Constitution including copies of payslips for Fred Oburu and Martin Karingithi for the month ending 29.02.2016 required for exercise or protection of the claimant's right or fundamental freedoms. The evidence is that the information was not provided and the Court returns that the right was violated as was claimed.

Second the claimant's case was that her right to equality and freedom from discrimination as protected under Article 27(5) of the Constitution was violated. Her case was that her juniors who were men were paid more than her and on that account she was discriminated against on account of sex. The evidence was that the claimant negotiated a contract of service. Further Fred Oburu and Martin Karingithi who worked under the claimant were employed by the respondent long after her employment and the evidence by RW1 and the claimant was

that they earned more than the claimant who was the head of Sales. The contracts of service for Fred Oburu and Martin Karingithi were not exhibited but the evidence was that they were interviewed and given more favourable terms – and the Court is not got the benefit of the scope of their duties and the negotiations at the time of their employment. There was no evidence on the respondent's remuneration policy for the various grades and cadres of its staff and the Court cannot find that such policy was breached or applied adversely to the claimant because she was a woman. Further there was no evidence that Fred Oburu and Martin Karingithi were given higher pay than the claimant because they were men and she was a woman. There is no established basis for the court to make a finding that because the claimant was the Head of Sales, then she ought and must have been the highest paid staff in her department and failing, she was discriminated on grounds of sex. The Court considers that clearly such would be an irrational finding. Thus the Court returns that on the material before the Court, the claimant has failed to establish the violation of Article 27(5) on discrimination on account of sex.

The Court has considered that the violation of Article 35 on failure to provide information was intertwined with the claimant's case towards establishing that the two men working under her earned more than her and because she was a woman. The Court has found that the two men in issue were entitled to negotiate their terms and conditions of service and which have not been shown to have been actuated with considerations of sex as had been urged for the claimant. In that consideration, the Court returns that for breach of Article 35, there is no established basis to award damages as had been urged and prayed for the claimant. Further the Court returns that parties were bound by their respective contracts of service and the claimant has not established a justification for translating her terms of service to a higher monthly pay than the parties actually agreed upon.

The evidence was that the claimant was not paid commissions as was agreed upon whereas others in the respondent's employment also entitled to the commissions were paid. On that limb the Court returns that the claimant was subjected to unfair labour practices or treatment but the accruing injury has already been sufficiently cured by the Court awarding the claimant the withheld commissions.

To answer the 5th issue for determination, the court finds that the claimant has not made submissions to guide the Court in the claim for bonus. The claim and prayer is deemed abandoned. In any event the award of bonus was in the respondent's discretion and the conditions for award have not been established.

The claimant is entitled to a certificate of service.

The claimant has substantially succeeded in her claim and she is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of **Kshs.393, 799.00** by 01.05.2020 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- 2) The declaration that the respondent violated the claimant's right to information for exercise or protection of her right and as is provided for in Article 35 of the Constitution.
- 3) The respondent to deliver the claimant's certificate of service within 30 days from the date of this judgment.
- 4) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 13th March, 2020.**

BYRAM ONGAYA

JUDGE