



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 973 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th April, 2020)

CAROLINE WANJIRU MWAI.....CLAIMANT

VERSUS

LABONTE LIMITED.....1ST RESPONDENT

NATHAN MULURE AMAKOBE...2ND RESPONDENT

JUDGEMENT

1. The Claimant filed a Claim on 25/5/2017 alleging that the Respondent unfairly terminated him and failed to settle his statutory payments. She avers that she was employed by the Respondents on 1/1/2014 as a salesperson earning a salary of Kshs. 18,430 per month which the 2nd Respondent later revised to Kshs. 18,000. She avers that the 2nd Respondent dismissed her from work on 31/03/2017 without cause or notice.

2. He seeks the following reliefs:-

a) Declaration that the termination of employment herein was unfair;

b) Respondent to pay the Claimant dues as tabulated below:-

i. One month salary in lieu of notice **Kshs. 18,430/=**

ii. House allowance from the duration of employment **Kshs. 380,000/=**

iii. Compensation for unfair termination

Kshs. 221,160/=

iv. Leave entitlement @ 21 days per year

(3 years)

Kshs. 38,702/=

v. NSSF payments of

Kshs. 7,600/=

vi. NHIF payments of

Kshs. 6,300/=

vii. Unsettled portion of salary for

@ Kshs. 430 for 31 months

Kshs. 13,330/=

TOTAL

KSHS. 672,192/=

c) Interest on (b) above from the date of filing this claim

d) Costs of this cause

e) Any further relief that this Honourable Court may deem just.

3. Each of the Respondents filed a Statement of Response to the Claim on 19/7/2017. The 1st Respondent denies employing the Claimant at a salary of Kshs. 18,430 and avers that it offered the Claimant a salary of Kshs.18,000 vide a written contract which the Claimant refused to sign.

4. It denies dismissing the Claimant and avers that the claimant was retrenched as a result of the negative business environment. It avers that the salary agreed upon by the parties was inclusive of accommodation and that NHIF and NSSF were duly paid.

5. In its counter-claim the 1st Respondent avers that the Claimant received goods valued at Kshs. 840,000 from it for delivery to its customer but she failed to account for the said goods.

6. It seeks the following prayers:-

a) The Claimant's claim be dismissed.

b) The Claimant be ordered to pay the 1st Respondent the sum of Kshs. 840,000 being the value of the goods held by the Claimant but unaccounted for.

c) The Claimant be ordered to return the 1st Respondent's records and cheques

d) Costs of this claim and Counter-claim be borne by the Claimant.

7. The Claimant filed a Response to the 1st Respondent's and 2nd Respondent's response to the Claim on 10/7/2017 and 3/7/2017 respectively. The Claimant denies the Respondents' allegations. She avers that the 1st Respondent's counterclaim is defective and that the Court should dismiss the 1st Respondent's Response to the Memorandum of Claim.

Claimant's case

8. The Claimant, CW1, testified that she was referred to the 1st Respondent by the 2nd Respondent. She testified that she was employed in February 2014 but was not issued with an appointment letter.

9. She testified that she was employed to work in sales. She testified that goods on sale were condoms from Thailand that were new in the market. She testified that she earned Kshs. 18,340/- which was paid via M-pesa by the 2nd Respondent. She testified that she worked until 30/3/2017 when she received a Short Message Service (SMS) firing her.

10. She testified that upon her advocate serving the Respondents with a demand Letter, they responded that she had been declared redundant. She denied that a meeting was held on 3/4/2017. She further denied stealing anything from the Respondent.

11. On cross-examination, she testified the 2nd Respondent was never available and that communication was made via WhatsApp, text or phone calls. She testified that she was not satisfied with the phone operations and that she raised the issue many times. She contended that the 2nd Respondent offered her an opportunity to resign but she did not resign.

12. She testified that after 30/3/2017, she did not proceed with any operations of the Respondent. She testified that the stocks remained with the Respondent. She testified that she did not clear with the Respondent and did not submit clients' documents.

Respondent's case

13. Nathan Amakobe Muluke, one of the Respondent's shareholders testified as RW1. He testified that they were importing and distributing condoms known as Euphoria Condoms.

14. He testified that they had a sales team of 8 girls and a concept known as dial-a –condom. He testified that they engaged the Claimant in 2014 when he asked her to join them in selling the condoms. He testified that he issued all his employees with contracts. He testified that they paid the Claimant on commission. She stated that he was not employed by the 1st Respondent but they used to have weekly meetings.

15. He testified that he never terminated the Claimant. It was his testimony that in 2017 he had informed the employees of the difficulties faced by the company and that the company would no longer operate. He testified that he sent the Claimant an SMS to that effect and suggested that she submits a resignation letter but she did not.

16. He testified that he gave the employees timelines in order to pay them their dues. She testified that the Claimant did not submit her documents. He testified that he was still waiting for the Claimant to clear with the company.

17. He testified that the Claimant continued trading with the company documents and that she is still holding the company cheques. He stated

that the Court should dismiss the claim as the redundancy process was aborted by the Claimant.

18. He testified that the counter-claim of Kshs. 840,000/- is as per the records of what she had taken and did not return. He further stated that the cheques which the Claimant holds is part of 840,000.

19. On cross-examination, he maintained that the Claimant had a written contract of employment. He testified that he sent the Claimant the SMS on 30/3/2017 and had the meeting on 3/4/2017 with all employees. He testified that the forged cheque and audit report which he refers to were not produced in Court. He testified that some employees were paid by cheque or in cash. He stated that salary was inclusive of all other payments but he did not have any evidence of this.

20. He testified that the invoices he produced in court were prepared by the Claimant as she had an invoice book though the book keeper was Joel Angawa. He stated that they started remitting NSSF and NHIF from 2014 but did not have evidence for this payment as well as the audit report.

21. On re-examination, he contended that all documents regarding the counter-claim are held by the Claimant. He testified that the Claimant was paid Kshs. 18,000/- via cash or M-pesa. He testified that during December, the office was closed.

Claimant's submissions

22. The Claimant submits that the Respondents were in breach of Sections 8, 9 and 10 of the Employment Act for failure to issue her with a contract of service. She relies on the case of **Martin Ileri Ndwiga v Olerai Management Company [2017] eKLR** where the Court held that where an employer fails to issue an employee with a written contract of service, the employee's word is to be believed.

23. She submits that being the face of Euphoria condoms which had taken the Kenyan market by storm, the 2nd Respondent sought to dismiss the Claimant from employment via SMS on 31/03/2017 as there was a misplaced fear that she would take over the business.

24. She submits that though the Respondent avers that she was terminated in accordance with existing employment laws, the Respondent's documents were conjured after the fact to try and sanitise its actions.

25. She avers that the meeting of 3/4/2017 was convened after her termination. She further avers that the redundancy letter dated 7/4/2017 from Maina Makome & Company Advocates addressed to the Claimant did not explain why she was being terminated and that pursuant to section 40 of the Employment Act the letter ought to have been written on 28/2/2017.

26. She submits that the Respondent failed to prove that it remitted the Claimant's NSSF and NHIF contributions. She relies on Section 10(1), 6 and 7 of the Employment Act and submits that the Respondent is tasked with keeping records of attendance and work issues.

27. She submits that she never proceeded on leave for the entire duration. She relies on the ***Martin Ileri Ndwiga case (supra)*** where the Court held that without any proof that the Claimant had taken leave and a record kept the Claimant was entitled to claim the amount due.

28. She further submits that having been terminated without prior notice she is entitled to compensation for unfair termination and one month's salary in lieu of notice.

29. She submits that Order 7 Rule 5 (a) of the Civil Procedure Rules as read with Order 4 Rule 1 (2) provides that a counter claim must be accompanied by a Verifying Affidavit sworn by the counter-claimant. He relies on the case of **Bridge-up Container Services Ltd v CFC Stanbic Bank Ltd [2011] eKLR** where the Court held that filing a counter-claim without a verifying affidavit renders the counterclaim defective. It submits that the Respondent had 2 years to remedy the defect but it did not, thus the Court should find that the counter-claim is defective.

Respondent's submissions

30. The Respondent submits that it provided the Claimant with a written contract which she never returned to the Respondent. The Respondents therefore submits that the 2nd Respondent fulfilled his mandate under section 14 (3) of the Employment Act but the Claimant exercised her discretion not to sign or imprint the contract.

31. The Respondents submit that after running into losses, they summoned all its employees including the claimant and proposed to the 1st Respondent that it could not sustain its operation in the circumstances.

32. The 1st Respondent submits that during the meeting held on 3/4/2017, it informed the Claimant to handover all the company records and stocks and that it would pay all the employees including her redundancy dues. It submits that the claimant failed to obey the order and that it did not dismiss her and is still desirous of obtaining records under her custody.

33. The Respondents aver that the 1st Respondent ceased operations and some of its customers have wound up their operations yet it did not receive any outstanding payment of accounts of concealment of records of sales, cash, cheques and stocks held by the Claimant.

34. The Respondents submit that the Claimant continued to trade with the Respondent's stocks and received cash after the date she claims she was terminated. They submit that the Claim is unmeritorious and is based on a fabrication. They submit that the claimant should not profit by their own wrongdoing.

35. The 2nd Respondent submits that he has suffered from the conduct of the claimant and urges the Court to uphold the counterclaim.

36. I have examined all evidence of the Parties herein plus their submissions filed.

37. From the evidence on record, the Claimant was engaged by the Respondent vide an oral contract as no written contract was exhibited. From the M-pesa printout produced by the Claimant, she was paid 18,000/= monthly as her salary over the period she worked for the Respondent.

38. From Appendix 5 the Respondent sent a text message to the Claimant on March 30th 2015 at 14.52 pm as follows:-

“Unfortunately business is in bad shape and cannot continue. Please send us resignation letter for the termination dues. This will be one month’s salary in lieu of notice subject to preparing a handover file with details of clients and stock to the office by Friday this week”.

39. From this text, the Respondent is in effect indicating a redundancy of the Claimant’s services and offering 1 month’s salary as notice but subject to clearance of the Claimant from Respondent’s services.

40. It is not clear whether the Claimant cleared or not but from the letter from her advocate there is no indication that the clearance was done and stocks returned.

41. From the email communication between the Claimant’s counsel and the Respondent, the Claimant chose to hand over documents for Respondent in her counsel’s custody but no clearance was ever done.

42. The Respondent also attached invoices to show goods that were to be paid by the Respondent’s clients all totalling to 28,760/=. This is partly what the Respondent is relying upon for the counter-claim against the Claimant. There is no evidence of how they arrive at the counter-claim of Kshs.840,000/=.

43. There is no evidence that the Claimant was given goods of that amount and for which she failed to account for and so the counter-claim must fail.

44. However, owing to the fact that the Claimant’s services were terminated on account of lack of business, the law at Section 40 of Employment Act 2007 was to be followed. There is no indication that the law was adhered to and so I find the termination of the Claimant unfair and unjustified.

45. I therefore find for the Claimant and I award her as follows:-

1. 1 months’ salary in lieu of notice = 18,000/=

2. Compensation for unfair termination of 8 months’ salary = 18,000 x 8 = 144,000/=

TOTAL = 162,000/=

3. Claim for unremitted NSSF and NHIF deductions dismissed as is not supported by any evidence.

4. 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 Chambers via Zoom this 30th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Mulama for the Claimant

N/A for the Respondent