



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 237 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th April, 2020)

CAROLINE MASIKA.....CLAIMANT

VERSUS

PARAPET CLEANING SERVICES.....RESPONDENT

JUDGEMENT

1. The Claimant filed a Statement of Claim on 10/4/2019 alleging that she was constructively dismissed by the Respondent.

2. She avers that she was employed by the Respondent as the Head Group of Sales vide a letter of offer dated 19.2.2016. She avers that she served the Respondent diligently until 22/2/2018 when she was forced by the Group Chief Executive Officer to hand in her resignation.

3. She seeks the following prayers:-

i. A declaration and finding that the Claimant's employment was wrongfully and unfairly terminated through constructive dismissal.

ii. An order directing the Respondent to pay the Claimant all her outstanding dues as pleaded in the Claim.

iii. A declaration be and is hereby made that the harassment, intimidation, discriminatory treatment and unlawful termination from employment of the Claimant by the Respondent is unconstitutional, unlawful and a violation of the fundamental rights of the Claimant as enshrined in Articles 22 (1), 23 (1), 29 (d), 41 (2) (b) and 47 of the Constitution of Kenya, 2010.

iv. A declaration that the Claimant is entitled to compensation for economic loss and hardships unreasonably, unconstitutionally and illegally visited upon her by the Respondent.

v. An order that the Respondent be and is hereby compelled to compensate the Claimant for damages and/or loss arising from the violation of her constitutional rights.

vi. Costs and interest at court rates from the date of filing this claim until payment in full.

vii. That the Respondent do issue the Claimant with the Certificate of Service.

4. The Respondent neither entered appearance nor filed a response to the claim thus the suit proceeded as an undefended cause.

Claimant's Case

5. The Claimant, Cw1, adopted her Witness Statement filed on 10.4.2019 as her evidence in chief.

6. She stated that in March, 2017 she was called by the Group Chief Executive Officer for a meeting to discuss her under performance. She stated that the meeting led to her being placed on a Performance Improvement Plan (PIP).

7. She further stated that the decision to put her on a PIP was shocking as she had attained 80.3% of her target for the month of March and her performance was consistent.

8. She averred that in November 2017, the issue of a performance review came up again and that the situation was confusing since she was not sure the of period she was being reviewed.
9. She avers that she discussed the performance review process with the Group Head of Human Resource, Mr. Dominic Ooko who agreed with her that the process was flawed but requested her to comply and provide her views.
10. She averred that in the months of November and December 2017, the Group Chief Executive Officer (CEO) became rude, hostile and took every opportunity to demean her. She contended that the Group CEO would call her late in the evening and at night to discuss non-urgent matters for hours on end in total disregard of her private time.
11. She averred that on 7/12/2017 her friend alerted her that her position had been advertised on the Brighter Monday Job Search site. She stated that she confirmed that indeed her position had been posted on the site but was pulled down the same day by 6.30 pm. She stated that the Group Human Resource Manager and 3 of the Respondent's Directors were unaware of the said advert.
12. She contended that the environment at her work place became worse and the Group CEO made a decision that since the department was 'performing poorly', employees would not take time off during the Christmas vacation but were to use the time to prepare for January, 2018.
13. She stated that on 18.12.2018 she met the Respondent's Group Chairman together with the Human Resource (HR) Manager and mentioned to him of the strained relationship between the Group CEO and herself. She stated that the Chairman advised her to go for the performance review and if she was not satisfied with the verdict, not to sign the review document.
14. She stated that during her performance review on 19/1/2018, the Group CEO made unsubstantiated claims and did not give her an opportunity to respond to the allegations as required in a performance review meeting. She stated that her request to be given more time to respond to the issue was turned down and the review was adjourned to 4.30 pm but the CEO did not turn up.
15. She stated that she was later informed that the review meeting had been rescheduled for the following Monday at 11.00 am and the Human Resource Manager asked her not to bother going to work on Saturday and to report shortly at 11.00 am. She stated that she got information that the Human Resource Manager had briefed her assistant of the opportunity to act in her capacity.
16. She stated that on 19.1.2018 while browsing the internet, she was shocked to come across a job advert for the position she was holding at the Respondent.
17. She contended that the aforesaid action was a clear manifestation that the Respondent had made a decision to terminate her from employment and an advert had been submitted to a recruitment agency called Reeds Africa.
18. She stated that on 22/1/018, she handed in her resignation and after an hour, the HR Manager informed her that her resignation had been accepted and she was to proceed for her terminal leave.
19. She stated that while on leave, the Human Resource Manager requested her to share the tabulation of her terminal dues before the Cheque could be drawn and was shocked to realize that the Respondent claimed that she had 6.75 days as leave days not taken, Kshs. 20,000 as leave allowance and that she had been deducted Kshs.54,246.58 for 6 days she had been absent without permission.
20. She contended that she was still an employee in February 2018 and was entitled to salary, mileage and communication allowance up to 22/2/2018 yet only her salary was paid. She stated that at the time of leaving employment, she was paid a gross salary of Kshs. 345,000/- plus other benefits and that the Respondent did not remit her NSSF payments from the month of May, 2017.
21. She contended that her termination from employment and the nonpayment of her dues is unlawful and unfair as the Respondent did not adhere to the provisions of the employment Act and the Constitution.

Claimant's submissions

22. The Claimant submits that the events leading to her resignation, being that her position was advertised while she still held the position and she was demeaned at work amounted to constructive dismissal. She relied on the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga** where the Court of Appeal held that the key element in the definition of constructive dismissal is that the employee must have been entitled to have the right to leave without notice due to the employer's conduct.
23. She submits that the Respondent's agent made her position untenable and the frustrations which she went through meant that she was justified in concluding that she was trying to cope and that she was unwanted.
24. She submits that the Respondent ought to have given the Claimant an opportunity to defend herself against allegations of non-performance but the Respondent chose the most inhuman way to frustrate her. She relies on the case of **Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Union [2013] eKLR** where the Court held that an employee is entitled to be accompanied by a fellow employee or shop floor and ought to be heard and his explanations considered and that this is what is procedural fairness in employment law and the rule of law and natural justice.
25. She further relies on the case of **Kenya Plantation & Agricultural Workers Union v Del Monte Kenya [2016] eKLR** where the Court held that the burden is on the employer to prove that the reasons for termination are justifiable.

26. She submits that in the absence of a statement of defence from the Respondent the only issue that remains to be determined is what amount of compensation the Claimant is entitled to.

27. She submits that in the absence of any tabulation, she is entitled to her monetary claim of Kshs. 5,525,499. She relies on the Court of Appeal decision in **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR** where the trial Judges exercised its discretion in awarding 12 months gross salary as he explained that this award was in consideration of the Respondent's rank and difficulty he was likely to face in obtaining another employment.

28. In conclusion, she asked the Court to grant the prayers sought in her claim.

29. This case proceeded ex parte because the Respondents though served with Memorandum of Claim and the Summons to enter appearance on 12/4/2019 failed to enter appearance nor file their defence.

30. From the evidence submitted by the Claimant, there is no indication that the Respondent had a valid reason to constructively terminate her services by advertising for the position she held before she was terminated. This in effect forced her out of the system by causing her to tender her resignation.

31. The Respondents did not offer any evidence to controvert the Claimant's case and so the Claimant's case stands proved. I find that the Respondent unfairly constructively terminated the Claimant's services and so the Claimant is entitled to the following remedies.

1. 1 month salary in lieu of notice = 345,000/=

2. 41 days leave = 471,500/=

3. Mileage allowance for 21 days worked in February 2018 = $21/30 \times 40,000 = 28,000/=$

4. Airtime allowance for 21 days of February 2018 = $21/30 \times 50,000 = 3,500/=$

5. 10 months' salary as compensation for the unlawful termination = $345,000 \times 10 = 3,450,000/=$

TOTAL = 4,298,000/=

Less statutory deductions

6. On unremitted NSSF, there is no statement from the NSSF to prove no-remittance and so the prayer is tenable. The same applies to the prayer for service pay, the Claimant having been a member of NSSF.

7. The Claim for commission is also not tenable as the same is not proved.

8. 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 on this 15th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Cynthia – Employee Relation Officer of Respondent – Present

Paul Elkington for Claimant – Present