



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 2250 OF 2015

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

VIVIAN MUIA.....CLAIMANT

VERSUS

MZOORI LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant served as the Respondent's marketing manager, employed vide the employment contract executed on 2/3/2015.
2. The Respondent is a body corporate incorporated in Kenya to undertake online marketing of products on behalf of third-party retailers for commission, and was the Claimant's employer.
3. The Claimant instituted this suit vide the Memorandum of Claim filed on 16/12/2015. However, the claim was amended vide the Amended Memorandum of Claim filed on 30/10/2019 seeking payment of unpaid dues and to challenge the termination of the Claimant's employment. In particular, the Claimant seeks the following remedies:-

a. The sum of Kshs. 710,000.00 being withheld salaries computed as follows:-

- i. June salary in the sum of Kshs.50,000.00**
- ii. July salary in the sum of Kshs.220,000.00**
- iii. August salary in the sum of Kshs.220,000.00**
- iv. September salary in the sum of Kshs. 220,000.00.**

b. The sum of KShs. 220,000.00 being the forfeited sum in lieu of notice.

c. General damages.

d. Costs of this suit.

e. Interest on (i) and (ii) above at court rates from date of filing suit (sic) payment in full.

4. The Respondent filed its reply and counterclaim on 17/3/2016 seeking the sum of KShs. 220,000.00 being the salary for one month in lieu of notice, for the Claimant's failure in reporting to work in September 2015.

The Claimant's Case

5. The Claimant avers that on 2/3/2015, she entered into an employment contract to serve as the Respondent's Marketing Manager, earning the sum of KShs. 220,000.00 a month. Under the contract, she was also entitled to 3% shareholding in the company once the business attained KShs. 1,000,000.00 in monthly revenues.

6. She further avers that on 29/7/2015 the Respondent halted contract payments until the departments completed certain tasks. It is averred that she was assigned duties and was informed that she would only be paid once they were completed, though some of the duties did not fall under her purview.

7. The Claimant states that she sought audience with the Chief Executive Officer to discuss the issue and requested the presence of a neutral third party to act as a mediator. However, the Chief Executive Officer refused to meet with the Claimant.

8. She further states that on 31/8/2015, she issued a verbal notice on her intention to resign at the end of September, after two months of being unpaid. Despite this, the Respondent issued the Claimant with a termination notice. When the Claimant enquired on her 2 months unpaid salary, she was informed that the same would be paid upon completing the assigned tasks. She was further informed that her salary for August and September would be contingent upon the completion of the fresh tasks assigned to her by the Chief Executive Officer.

9. The Claimant avers that she was aggrieved by the Respondent's adamance not to pay her dues and instructed an advocate to demand the same. Consequently, the Respondent's advocate responded contending that the Claimant was not entitled to any salary as she forfeited her August salary in lieu of notice and had not performed any tasks in September.

10. The Claimant further avers that the Respondent blocked her from accessing her work projects in the online systems, as such, she could not perform her duties.

11. It is her position that by failing to pay her, the Respondent breached the contract terms.

12. During trial, the Claimant testified as CW1. She adopted her witness statement dated 15/12/2015 and filed on 16/12/2015.

13. The witness statement reiterates the averments in the Claimant's amended claim. She deposes that she assumed that the decision to delay their payments was aimed at encouraging productivity and not to indefinitely withhold her salary. It is her testimony that the logistics and distribution team was paid their dues even though they did not complete their first task.

14. The Claimant states that she was to complete her tasks alone even though they were twice the tasks allocated to the others and had previously been delegating her duties.

15. She avers that though the basis for not paying her salary was that she had not completed her tasks, the terms of her contract were that she would be paid a salary, which was not dependent on deliverables. She avers that some of the failures in completing her work were attributable to factors beyond her control such as the CEO's own decisions.

16. It is the Claimant's deposition that the reason the CEO failed to pay her salary and thereafter issued her with a termination notice was because he did not get along with her.

The Respondent's Case

17. The Respondent avers that as the marketing manager, the Claimant was the most crucial contractor for the growth and sustenance of the Respondent's revenue. It is averred that the Claimant misrepresented her competence, experience and her capacity to perform all the tasks and responsibilities, at the time of entering into the contract.

18. The Respondent avers that the payment made to the Claimant of KShs. 220,000.00 was payable monthly for the work performed. It is contended that the contract was specific that the payment was for the tasks completed, payable monthly.

19. It is averred that in the course of the employment, it became apparent that the Claimant lacked the competence, experience and commitment to meet her obligations under the contract.

20. The Respondent states that at the meeting held on 31/8/2015 between the Claimant and the CEO, her performance was discussed and thereafter she was issued with one months' termination notice, effective on 30/9/2015.

21. It is contended that the Claimant did not work in September. The Respondent denies the allegation that the tasks performed did not fall within her purview and contends that the Claimant failed to perform her tasks or achieve the set targets.

22. It is the Respondent's position that as per the contract, the Claimant is obligated to forfeit one months' salary in lieu of notice.

23. The Respondent filed the witness statement of Alvin Mogaka but failed to examine him during trial.

24. Alvin Mogaka deposed that he was the CEO of the Respondent. He stated that the Claimant had the habit of accepting tasks, proposing new activities and new product development but would never follow through. Despite this, the Respondent continued to pay her dues.

25. It was his deposition that the Claimant was put in charge of a new product set to be launched on 1/7/2015. However, though this target was very critical to the release of funding from the investors, it was not met. This had a negative impact on the Respondent's business. He had a conversation with the Claimant on 5/7/2015 regarding the same and on 29/7/2015, the employees were informed that they would not be remunerated until they performed all the tasks assigned to them. A decision which the Claimant understood and agreed to.

26. He avers that in June, July and August 2015, the Claimant either deferred, partially performed or prevaricated the performance of her

tasks. Further, during the entire period, he was in constant communication with Claimant who never complained about the withholding of her salary for the month of July 2015.

27. It is averred that the Claimant issued her resignation on 31/8/2015 and informed him that she was expecting payment for the months of June, July and August despite not working for the last two months. He is of the position that the Claimant is not entitled to the salary for the month of September 2015 for failing to report to work that month.

The Claimant's Submissions

28. The Claimant submits that she was an employee and not an independent contractor as alluded by the Respondent. To buttress this position, the Claimant relies on the case of **Jinnah Muchiri vs. Agriculture Society of Kenya [2019] eKLR** where the Court relied on the control test, the integration test and the test of economic or business reality, to determine the existence of an employment relationship.

29. The Claimant further relied on the case of **Zipporah Gathuya vs. Registered Trustees of Gertrudes Garden T/A Gertrude Children's Hospital [2019] eKLR** where the Court held that the mere reference to a person being a consultant without a conclusive determination of the tests set out in **Everest Aviation Limited case**, cannot determine the nature of the party's relationship.

30. The Claimant submits that the Respondent has not adduced any evidence to prove that she was a piece rate worker to justify the part payment of her June salary and the failure to pay her July, August and September salary. She contends that the phrase "for work performed" does not imply that the contract is for piece rate work.

31. It is submitted the contract ought to have been clear that it was for the performance of piece rate work. The Claimant relies on the case of **Lucy Muingo Kusewa & Another vs. Embassy of Sweden [2017] eKLR** where the Court held that an employment relationship is the key point of reference in determining the nature and extent of the employer's rights and obligations towards their workers.

32. The Claimant submits that in light of the clear violations of the labour laws, she is entitled to the reliefs sought and relies on the cases of **Gilbert Kambuni Ongeru vs. Kenyatta National Hospital [2018] eKLR** and **Stephen Maina Thumbi vs. Equity Bank Limited [2018] eKLR**.

33. There is no record of the Respondent's written submissions in the court file.

34. I have examined all the evidence and submissions filed before court. From the contract of employment between the Claimant and the Respondent, the Claimant was to be remunerated at the rate of 220,000/= per month and this was not contingent upon any known deliverables. For the Respondent to turn around and refuse to pay her salary stating that the Claimant had not delivered certain tasks was in breach of the express provisions of their contract.

35. The Claimant has averred that she was partly paid her June salary and none for July to September hence this claim.

36. The Claimant was terminated on 1/9/2015 and so could not be paid her salary for September 2015 as claimed. She was however entitled to notice of 1 month, which was not given to her.

37. I find therefore that the claim by the Claimant is merited and I award her 710,000/= as prayed less statutory deductions.

38. The Respondent will pay costs of this suit.

Dated and delivered in Chambers via Zoom on this 15th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties