



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1356 OF 2016

JULIET ATIENO OUKO

CLAIMANT

v

CRAFT SILICON LIMITED

RESPONDENT

JUDGMENT

1. The Cause was heard on 24 October 2019, 5 December 2019 and 28 January 2020.
2. Juliet Atieno Ouko (Claimant), the Finance Manager and Managing Director of Craft Silicon Ltd (Respondent) testified.
3. The Claimant filed her submissions on 20 February 2020 while the Respondent filed its submissions on 2 March 2020.
4. The Court has considered the pleadings, evidence and submissions.
5. The Issues as identified by the parties were
 - (a) Whether the termination of the Claimant's employment was unfair.
 - (b) Whether the termination was on account of redundancy.
 - (c) Whether the Claimant discharged the Respondent upon payment of dues.
 - (d) Appropriate remedies.

Unfair termination of employment

6. The Claimant was employed by the Respondent on a 2 year fixed term contract around 4 February 2016 as Head, Organisational Quality Assurance.
7. Clause 4 of the contract provided that the Claimant would be on probation for 6 months during which period the contract could be determined by either party by giving 3 weeks' notice.
8. On 17 June 2016, a director of the Respondent wrote to the Claimant to notify her of the termination of the contract and offering her 3 weeks' pay in lieu of notice.
9. The Claimant was not satisfied and on 19 July 2016 instituted these proceedings against the Respondent alleging unfair termination of employment.
10. Section 42 of the Employment Act, 2007 exempts the termination of a contract during probation from the requirements of a hearing as contemplated by section 41 of the Act.
11. The Claimant urged the Court to overlook the provision purportedly because *section 42(1) of the Employment Act of 2007 was declared unconstitutional* in the case of *Samuel G. Momanyi v the Honourable Attorney General & Ar* (2012) eKLR.
12. The contention by the Claimant is not only incorrect but is a misrepresentation of the law. The *Momanyi* case did not declare section 42(1) of the Employment Act, 2007 unconstitutional.

13. The said decision related to section 45(3) of the Employment Act, 2007 which restricted access to the Court for employees who had served less than thirteen months in claims of unfair termination of employment.

Was separation on account of redundancy?

14. The Claimant strongly asserted in the submissions that the termination of her employment was on account of redundancy.

15. In the *Statement of Claim*, the Claimant did not plead redundancy but was content to assert that *she was not given any valid reason for the said termination*.

16. Equally, there was no reference to redundancy in the witness statement.

17. Further, the Claimant did not seek any of the reliefs which naturally flow from a redundancy. Redundancy was also not listed among the List of Issues filed by the Claimant on 19 November 2018.

18. The Claimant and her advocate had in their possession the termination of employment letter long before action was commenced. The letter set out the basis for the decision by the Respondent to bring the relationship to an end.

19. To the Court, and the Court finds, the issue of redundancy was an afterthought.

Disclaimer

20. The Court also notes that the Claimant executed a disclaimer that upon receipt of her dues she would not have any further claims against the Respondent.

21. The Claimant did not suggest or prove that she was coerced to sign the disclaimer.

22. The Court finds that the claim for unfair termination of employment was not proved.

23. The Cause herein is dismissed with no order on costs.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 29th day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ochieng instructed by Ojienda & Co. Advocates

For Respondent Mr. Njagi/Mr. Nyakeri instructed by Gitonga Kinyanjui & Co. Advocates

Court Assistant Judy Maina