



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2076 OF 2015

DOROTHY JEMATOR KIMENGECH.....CLAIMANT

VERSUS

DAVID MUKII MEREKE

T/A MEREKA & COMPANY ADVOCATES.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that at all material times she was employed by the respondent as an advocate. She was issued with a letter of appointment dated 27th April, 2011 taking effect from 1st April, 2011. The letter of appointment was later revised on 28th February, 2013 by a letter dated the same date.

2. Under the revised terms of employment, the claimant was entitled to a commission of 15% on all net fees excluding VAT and disbursement from fees received paid by clients introduced by the claimant through her own efforts. The claimant averred that through her own efforts she introduced the Independent Electoral and Boundaries Commission (IEBC) to the respondent firm and further proceeded to source for legal briefs including election petitions arising from the 2013 elections. The claimant also followed payment from IEBC from briefs forwarded to the firm.

3. The claimant further pleaded that following her efforts the firm received the sum of Kshs 5,823,134/= and pursuant to memo dated 7th August, 2015 the respondent's accountant calculated the net amount after deduction to be Kshs 4,679,480/=. The commission due to the claimant was therefore Kshs 701,922/ = which the respondent declined or refused to pay despite earlier admission that he would pay the same. According to the claimant she tried raising the issue with the respondent including involving intermediaries to help resolve the- matter but the respondent remained adamant.

4. The respondent thereafter made the conditions of employment difficult forcing the claimant to quit her employment. The claimant quit her employment on 30th September, 2015. According to the claimant the termination was not voluntary but was as a result of the actions of the respondent hence a constructive dismissal. The respondent on the other had pleaded that it was the true that the terms of employment were revised by a letter dated 28th February, 2013 as pleaded by the claimant.

5. The respondent however denied that the claimant introduced the client alleged. According to the respondent the firm was already in the panel of advocates for the said client and was not introduced by the claimant. The respondent further pleaded that it was in fact the respondent who introduced the claimant to the relevant personnel of the said client some of whom were former pupils in the respondent's firm. In addition the nature of the briefs emanating from the said client were seasonal and arising only during the preceding annual general elections. The respondent therefore referred the claimant to the personnel of the said client in order to get briefs emanating from election petitions of 2012 general elections and which the respondent received 5 in number.

6. The respondent further stated that the fact that it allocated the election petition briefs from the said client to the claimant to handle was in the course of employment and had nothing to do with the alleged introduction. The respondent further admitted receiving the sum of Kshs 4,679,480/= but denied that there was any commission due of Kshs 701,922/= or any other amount at all. According to the respondent on or about 9th ^ July 2015 it gave an amount of Kshs 150,000/= to the claimant in appreciation of her efforts in following up payments from the client but denied the said amount was part of the alleged commission.

7. The respondent further pleaded that the claimant was underperforming in her work, was unable to work with other members of staff and had threatened to leave office three times earlier. Further the claimant became rude, disobedient and uncontrollable after the issue of the alleged commission and would spend most of her time out of the office and on frolic of her own. At the hearing the claimant adopted her witness statement recorded on 15th March, 2018 as her evidence in chief. She also relied on the list of documents filed.
8. The claimant additionally stated that she received Kshs 150,000/= from the respondent in form of cash. The respondent said it was token for good work done. It was her evidence that during her employment she never went through any disciplinary process and that she never received any warning letter or notice concerning her work. It was her evidence that after signing her contract the respondent failed to honour his side of the bargain and this caused a strain in their relationship. This also affected other staff since they were both not in talking terms. According to the claimant failure to honour the agreement meant her tenure at the firm had ended. She therefore involuntarily left. She acknowledged that the email exchange with the respondent was not very pleasant. She however denied threatening the respondent's life.
9. According to the claimant in early 2013 the respondent inquired whether she had information about working for IIEBC. He said the respondent firm had been impanelled to work for IIEBC but had not received any instructions. The respondent asked her to step in and see if the firm could get some work from IIEBC.
10. According to the claimant a colleague called her to IIEBC offices where she was interviewed about her past experience in litigation and preferred geographical areas. After the meeting she met with the respondent and briefed him about the meeting. It was at this point when she asked if the respondent would be agreeable to commission and he agreed and an agreement was prepared. They signed the agreement the following day. It was her evidence that it was the respondent who prepared the agreement. The internal memo attached to the memorandum of claim was however prepared by the accounts department. According to her the commission from IIEBC was to be Kshs 701,922/=.
11. In cross-examination she stated that the respondent refused her resignation she however did not have the letter refusing her resignation. It was her evidence that her duty was to advance the interest of the firm and all agreements concluded were on behalf of the firm. She further stated that when the letter revising her terms of employment was done on 28th February, 2018, the respondent was already in IEBC panel. The letter however did not mention IEBC. According to her, she was the one who introduced the respondent to IEBC in 2013 and that there were letters from IEBC addressed to the respondent for her attention. Further that there were tenders after she introduced the respondent to IEBC. She also introduced other clients to the respondent and was paid her 15% commission.
12. In re-examination she stated that IEBC was not constituted by the time the respondent was empanelled and that IIEBC ceased to be respondent's client by end of June 2012.
13. The respondent's 1st witness Ms Agnes Ngugi stated that she recorded a witness statement on 11th March, 2019 which she sought to adopt as her evidence in chief. It was her evidence that she worked for the respondent as an accountant. She stated that VAT was payable on advocates fees at 16%. The claimant gave her a draft to prepare calculations and that the instructions were not from the respondent. The amount due to the claimant should have been Kshs 203,974/ =. According to her, the work from IEBC was brought by the respondent. She was however aware of the commission arrangement between the claimant and the respondent.
14. In cross-examination she stated that the instructions were issued by the respondent. It was the claimant who asked her to prepare the memo and address the same to the respondent. It was her evidence that VAT was at 16% and that she never raised the issue of VAT at 11%. The document was prepared for purposes of the claimant's commission.
15. Ms Ngugi further stated that IEBC became the respondent's client in 2011. However, she did not know when IEBC was formed but stated that IIEBC and IEBC were two different entities. Their contract was upto 2012. The respondent applied for prequalification as IEBC lawyer in 2013. The respondent second witness Ms Judith Mwangi stated that she worked for the respondent as a secretary and was responsible for filing tender applications. To get work, one had to apply first.
16. In cross-examination she stated that she was not an employee when the claimant joined. In 2013 the respondent did not apply for work from IEBC. It was further her evidence that the claimant used to come late when the respondent was away but she was not aware if the respondent took any disciplinary action against the claimant.
17. The respondent's third witness Mr David Mukii Mereka informed the court that he was the one who ran the respondent law firm. He adopted as his evidence in chief the statement he recorded on 22nd December, 2015. He also relied on the bundle of documents filed. According to him the letter dated 20th June, 2011 from IIEBC was assigning respondent work for 5 years. The letter was addressed to the respondent and not the claimant. It was Mr Mereka's evidence that he was familiar with the IEBC before the claimant was employed by the respondent. He introduced her to director legal services IEBC so that she could follow up work for the smooth running of the firm as he looked for work from other clients.
18. There was no interview the claimant attended at IIEBC since ' there is none once one wins a tender. According to him the claimant introduced one client and was paid her commission. He denied having any problem with the commission agreement. He denied the Kshs 150,000/= he paid to the claimant was deposit towards the IEBC commission. Mr Mereka further stated that he seconded the claimant to a committee of lawyers who were owed fees by IEBC.
19. According to him the commission agreement was for the claimant to introduce work and not help in fee collection. The claimant did not introduce IEBC. Mr Mereka further admitted that the memos were addressed to him but he did not acknowledge them. The calculations were also not correct. He further stated that he counterclaimed Kshs 150,000/= paid to the claimant and a further Kshs 150,000/= on account of a car loan.
20. In cross-examination he stated that he gave the claimant the sum of Kshs 150,000/= as a token of appreciation. It was appreciation for

following up on fee-notes to IEBC which had been outstanding for almost two years. It was further his evidence that the amended agreement included fee-sharing and he had no problem with that. Further IEBC was there in 2011 when the respondent got prequalified. He bid only for election petitions which came after every 5 years. There was no advertisement for prequalification in 2012 and that he was not required to bid again in 2012.

21. Regarding performance he stated he had no evidence in court with regard to claimant's performance but that they used to talk about it with the claimant.

22. The claimant had as one of her prayer a claim for constructive dismissal. It is a cardinal rule of evidence that a person who alleges must prove those allegations to the required standard before a court of law can make a finding in favour of the person making those allegations.

23. Constructive dismissal has been defined by this court and scholars and writers on employment law to mean a work environment created by an employer which leaves the employee with no option but to repudiate the contract and sue for compensation for unfair termination. The environment and conditions ought to be so intolerable that the only option left is to quit. The employee on his or her part must be willing, ready and able to continue with the performance of the contract but for the environment created by the employer.

24. The matter before me revolves around a disagreement or failure to reach an understanding over a fee sharing agreement clause in the claimant's contract, the said contract reads in paraphrase as follows:

"you shall be entitled to a commission of 15% on all net fees from clients, excluding VAT and disbursements, who have been introduced to the office through your own efforts".

25. According to the claimant, in 2013 the respondent inquired whether she had information about working for IIEBC and that respondent had been empanelled to work for IIEBC but had not received any instructions. The respondent therefore asked her to step in and see if the firm could get some work from IIEBC. According to the claimant, she was called by a colleague to IIEBC offices where she was interviewed about her past experience in litigation and preferred geographical areas. After this meeting she briefed the respondent's principal partner Mr Mareka and at the same time asked him if he would be agreeable to commission and he agreed and a commission agreement was prepared.

26. The respondent's position as stated by the principal partner Mareka was that he was familiar with IEBC before the claimant was employed by the respondent. According to him he introduced the claimant to the director legal services IEBC so that she could follow up work for the smooth running of the firm as he looked for work from other clients. According to him, there was no interview the claimant attended at IIEBC since there would be none once one wins a tender. Further he seconded the claimant to a committee of lawyers who were owed fees by IIEBC. In Mr Mareka's view, the commission agreement was for the claimant to introduce work and not help in collection of outstanding fees. He denied the claimant introduced IEBC.

27. The foregoing is the genesis of the misunderstanding between the claimant culminating in her resignation in September, 2015. They further inform the background to the emotionally charged email exchange between the claimant and the respondent which were filed by the latter as supporting documents.

28. The court has carefully reviewed the email exchange and is of the view that neither party was controlled or restrained in the exchange. It was a simple case of a serious misunderstanding. It would therefore be unfair to blame either of them. The situation was created, sustained and escalated by the parties and neither could be blamed. The claimant cannot therefore sustain a claim for constructive dismissal over a work environment. She contributed in creating, sustaining and escalating. To this extent the claim for constructive dismissal and connected claims hereby fail and are hereby dismissed.

29. This brings me to the issue of fee sharing agreement. The agreement quoted in material part above, made reference to 15% commission on net fees from clients who have been introduced to the office through the claimants own efforts. The question then is, did the claimant introduce IEBC to the respondent?

30. As observed earlier in the judgement the claimant alleged that in 2013 the respondent inquired whether she had information about working for IIEBC and that the respondent had been empanelled to work for IIEBC but had not received any instructions. The respondent therefore asked her to step in and see if the firm could get some work from IIEBC. According to the claimant, she was thereafter called for an interview and asked about her litigation experience and preferred geographical areas. The claimant did not apart from these allegations produce any letter or written memorandum on this issue. She further did not cite any case or matter IEBC allocated to the respondent subsequent to the alleged interview.

31. The respondent on the other hand maintained that it interacted with IIEBC in 2011 and was issued with a letter advising it that the firm had been approved as one of the prequalified providers of legal services. This letter was dated 20th June, 2011 and produced by the respondent in the further list of documents filed on 17th January, 2019.

32. According to the respondent the claimant was introduced to the IEBC to follow up on pending fee notes and not to solicit for new work since the respondent was already empanelled by IEBC.

33. The court takes judicial notice that IEBC or IIEBC are public bodies hence bound by the Public Procurement and Disposals Act (PPDA). All procurements therefore go through tendering process, bidding and final award. This is what the court seems to think happened before the letter to the respondent dated 20th June, 2011 was issued. The letter makes reference to a tender number 3/2011-2012. To this extent the court is of the view that it was unlikely that the claimant could have been assigned new work by IEBC by merely being interviewed and asked for her preferred geographical areas.

34. It is more likely than not that the claimant was assigned by the respondent to follow up on pending fees for work already done as claimed by the respondent. The fee-sharing agreement was in respect of new work introduced to the law firm by the claimant and not collections on pending fee-notes.

35. To this extent the court finds and holds that the respondent by refusing or declining to pay commission on the fees collected from IEBC did not breach or violate the fee sharing agreement with the claimant. The claim in this respect is therefore found without merit and is hereby dismissed.

36. Regarding the counterclaim, the respondent in its evidence before the court conceded that the Kshs 150,000/= was given to the claimant as a token of appreciation over the efforts in collecting outstanding fees from IEBC. It would therefore not be equitable to turn around and reclaim the same. Therefore the claim for Kshs 150,000/= will be disallowed as no evidence was tendered sufficient to prove the same.

37. In conclusion this claim and the counterclaim by the respondent are both dismissed with no order as to costs.

38. It is so ordered.

Dated at Nairobi this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

Delivered this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

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