



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 33 OF 2018

(Before Hon. Justice Mathews N. Nduma)

NATASHA HELLE KILONZO KAFARA..... CLAIMANT

VERSUS

SHEER LOGIC MANAGEMENT CONSULTANTS LTD.... RESPONDENT

JUDGMENT

1. This suit was filed on 7th February 2018 by the claimant praying for an order in the following terms:-
 - a. A declaration that the arbitrary termination of the claimant's employment was unlawful and unfair.
 - b. Payment of lost income in the sum of Ksh. 972,000.
 - c. Payment of gratuity and leave pay.
 - d. General and punitive damages for the unlawful termination.
 - e. Costs and interest.
2. CW1, Hellen Natasha testified that she lives at Kisumu and now works at Eagle Power Construction Company.
3. That the respondent hired the claimant on 23/7/2015 for Airtel Ltd in the position of shop manager for Kericho. The claimant was paid a monthly salary of Kshs. 81,000.
4. The claimant worked continuously until 31st March 2016. CW1 testified that the contract of employment indicated that the claimant would be an employee of Airtel Networks.
5. On 12th September 2015, the claimant was involved in a road traffic accident whilst travelling to Bungoma on a personal errand. CW1 sustained injuries including broken left arm and the last bone of the spine known as the sacrum. CW1 was admitted at Moi Referral Hospital. CW1 was in a coma for four (4) days. CW1 was discharged on 25th October 2015. CW1 testified that she was informed by her Doctor Mr. Muteti that Airtel had since terminated her employment.
6. CW1 visited Airtel upon discharge at the Anniversary Towers Nairobi, she was given a cheque of kshs. 98,000 by the secretary for December 2015 salary and the issue of continued employment was not discussed with her.
7. CW1 received a letter of termination from Kisumu Airtel office. The letter is dated 13th November 2015. The termination was for no reason assigned and the claimant was to be paid one month salary in lieu of notice, payment in lieu of seven days leave and ten days salary for convalescent leave. The claimant received the letter on 27th November 2015.
8. CW1 testified that she did not receive salary for November 2015 and she was not told what Kshs. 98,000 was for. CW1 testified that she also did not get salary for January, February and March 2016. That the respondent did not remit NSSF and NHIF dues and so could not use NHIF card at the hospital.
9. CW1 produced exhibits '1 to 8' in support of her case. CW1 said that she had only worked for four(4) months and claims compensation for the unlawful termination, payment in lieu of untaken leave, statutory gratuity since NSSF was not paid and salary for the month of

January, February, March 2016 and November 2015. These months were the unserved term of the contract.

10. The respondent filed a Response to the Memorandum of Claim on 6th April 2018 in which it admits having entered into a contract with the claimant on 23rd July 2015 but denies all the other particulars of claim including that the claimant was involved in a road traffic accident and that her employment was unlawfully terminated by the respondent and that the respondent owes the claimant as prayed in the Statement of Claim.

11. The suit was set for hearing on 2/5/2020 when Mr. Mwesigwe represented the Claimant but the respondent did not attend. The hearing of the suit was adjourned to the 29/1/2019. Matter did not proceed. The matter was rescheduled to the 26/2/2019, when Mr. Mwesigwa appeared for the claimant and M/S Otieno Odinga held brief for Mr. Nick Deda for the respondent. The claimant was ready to proceed but M/s Odinga sought an adjournment on behalf of Mr. Deda on grounds that Mr. Deda was indisposed. Mr. Masigwa opposed the application for adjournment but the same was granted by the court and hearing of the matter set for the 19th September 2019.

12. On 19/9/2019 Mr. Mwesigwa appeared for the Claimant but Mr. Nick Deda did not appear for the respondent. No one held brief for the respondent and no explanation was given for the failure by the respondent to attend court. The court directed that the matter was to proceed to hearing as scheduled since the claimant and his/her advocate were present.

13. The matter proceeded ex parte.

Determination

14. The Claimant and the respondent filed final written submissions on 19/12/2019 and 18 /12/2019 respectively. The issues for determination are:-

- i. Whether the termination of employment of the claimant was lawful and fair and
- ii. Whether the claimant is entitled to the reliefs sought.

15. The claimant commenced work on 22nd July 2015 as a shop manager in terms of a contract of employment dated 23rd July 2015 produced before Court. The contract was for a fixed term period ending on 31st March 2016. The contract was silent on renewal. The contract contained a termination clause in which either party could terminate the employment by giving one month notice. The clause provided that termination could be for no reason assigned.

16. CW1 adduced evidence regarding the unfortunate road traffic accident which occurred on 12th September 2015 whilst the claimant was on a private errand to Bungoma. The claimant suffered serious injuries and was hospitalized at Moi Referral Hospital.

17. The Claimant was in a coma for four days and had broken left arm and last bone of the spine known as the sacrum. The claimant was treated and left hospital on 25th October 2015. The doctor treating the claimant Dr. Muteti informed the claimant that her employment had been terminated whilst she was hospitalized. However the claimant went to the Airtel Headquarters at Nairobi to find out the status. She was only given a cheque of Ksh. 98,000 by the secretary and no one explained to her whether she was in employment or not.

18. CW1 testified that she received the letter of termination dated 13th November 2015 from Airtel Kisumu Office on 27th November 2015. The letter referred to the termination clause in the letter of appointment and no reason was assigned to the termination.

19. The claimant was to be paid in lieu of one month notice, in lieu for leave days not taken and for 10 sick leave days. CW1 has not been paid these terminal dues and claims the same including compensation for unlawful dismissal and service gratuity.

20. The employment of the claimant was for a fixed term of nine months and one week. The termination came after she had served about four (4) months. Though the reason for the termination was not given it is apparent that the road traffic accident that resulted in serious body injuries to the claimant and subsequent hospitalization contributed to the decision to terminate the employment of the claimant.

21. The question that arises is whether an employer may lawfully include a termination clause in a letter of employment for ‘‘ no reasons assigned’’ as the respondent did under clause 7 (c) of the contract of employment between the claimant and the respondent.

22. An employment on fixed term contract or on permanent and pensionable terms that is not subject to probation period or the employee where the employee has served the probation period successfully is an employment in terms of section 35 (1) (c) (4) and (5) of the Employment Act no. 11 of 2007.

23. Therefore, though the employment of the claimant could be terminated by giving a one month termination notice or payment of one month salary in lieu of notice, in terms of section 35 (4) the claimant had a statutory right to dispute the lawfulness of the termination in accordance with the provisions of section 46 of the Act. This is exactly what the claimant proceeded to do in bringing this suit.

24. The respondent is therefore obliged to satisfy the requirements of sections 36, 41, 43, 45, 46 and 47 of the Act in proving to the court that it had a valid reason to terminate the employment of the claimant and that it followed a fair procedure in effecting the termination by giving the employee opportunity to be heard as to why the employment should not be terminated and by paying all the terminal benefits due and owing to the claimant including payment in lieu of notice and salary for days worked and payment in lieu of leave days accrued but not taken.

25. The claimant testified under oath to demonstrate that the respondent did not satisfy any of the above requirements. The court finds that the termination of employment of the claimant violated sections 36,41,43,45 and 46 of the Act.
26. The respondent had no valid reason to terminate the employment of the claimant. The employment was therefore unlawful and unfair.
27. The respondent aggravated the situation by not paying the claimant the terminal benefits it had promised in the letter of termination including payment in lieu of one month notice, in lieu of untaken Leave and for the 10 days sick leave. The claimant was not compensated for the premature termination of contract.
28. The claimant is entitled to compensation in terms of sections 49 (1) (c) and (4) of the Act.
29. The claimant had served for 4 months with about five months left to complete the fixed term contract. The respondent had included an illegal clause in the contract of employment that it purported to use against the claimant. It was not demonstrated by the respondent that the claimant could not any longer continue to work on account of her injuries.
30. The respondent acted in an inhuman and cruel manner towards the claimant. The accident that caused the injuries to the claimant were not self-inflicted she did not contribute to the termination. She was not paid terminal benefits. She was not compensated for the job loss.
31. The Court has considered the case of **Ephantus Macharia – VS- Presbyterian – Church of East Africa and another (2019) eKLR** in which the court awarded the claimant for breach of fixed term contract the equivalent of six (6) months’ salary in compensation for unlawful termination.
32. In the present case, the court awards the claimant the equivalent of four (4) months’ salary in compensation considering the aforesaid factors in the sum of kshs. 324,000.
33. In addition and in answer to issue (ii) above the court awards the claimant one month salary in lieu of notice in the sum of Kshs. 81,000, 7 days salary for private leave not taken in the sum of Ksh. 18,900 and 10 days salary in lieu of unpaid sick leave in the sum of Ksh. 27,000.
34. The claimant was paid salary up to the end of October 2015 but did not receive salary for November, 2015. The accident occurred on 12th September 2015 and she did not work again for the respondent.
35. The salary paid for the months of September and October was due and owing since the claimant was still in lawful employment until the same was terminated.
36. The letter of employment was dated 23rd November 2015 but was received on 27th November 2015. The salary for November 2015 was also due and owing. The claimant testified that she was paid Ksh. 81,000 after she was discharged from the hospital. This in the Court’s view covered the salary for November 2015. The court makes no award in respect of any further salary due to the claimant.
37. Going by the authority cited above, the claim for lost income for the unserved term of contract is also not merited and is dismissed. The claim for punitive damages also lacks merit and is dismissed.
38. In the final analysis Judgment is entered in favour of the claimant against the respondent as follows:-

- a. Kshs.. 324,000 in compensation for the unlawful and unfair termination.
- b. Ksh. 81, 000 in lieu of one month notice.
- c. Ksh. 18,900 in lieu of 7 days untaken leave.
- d. Ksh. 27,000 for unpaid convalescent leave.

Total award Kshs. 450,000

- e. Interest at Courts rates from date of Judgment in respect of (a) above and from date of filing suit in respect of (b) , (c) and (d) above till payment in full.
- f. Costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 11th day of June, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Mwesigwa for Claimant

Mr. Nick Deda for Respondent

Chrispo – Court Clerk