



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1182 OF 2015

NJERI MWIKAMBA.....CLAIMANT

-VERSUS-

ENABLIS ENTERPRENEURIAL NETWORK

EAST AFRICA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th July, 2020)

JUDGMENT

The claimant filed the statement of claim on 07.07.2015 through Opini & Gachuba Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination was unconstitutional, unlawful, and unfair.
- b. A declaration that the respondent violated the claimant's right to equality, to fair labour relations, fair administrative action and right to employment.
- c. An order to compel the respondent to pay the claimant:
 - i. 12 months' gross salary in compensation for unfair termination.
 - ii. Withheld salary and benefits.
 - iii. 35.75 accrued and unutilized leave days.
 - iv. Compensation for violation of her constitutional rights.
 - v. Interest on (i), (ii), (iii) (iv) and (v) above until payment in full.
- d. An order to compel the respondent to issue the claimant's certificate of service.
- e. An order to compel the respondent to assist the claimant secure employment.
- f. Costs of the claim plus interest until payment in full.

The respondent appointed Rabala & Associates Advocates to act in the matter effective 05.08.2015. The respondent filed the statement of defence on 07.08.2015. The respondent prayed that the suit be dismissed with costs. The claimant filed a reply to defence on 17.05.2016.

The claimant testified to support her claims and the documents on record as filed for parties were admitted in evidence as exhibited. The respondent did not call a witness. The Court has considered the material on record including submissions filed for the parties. The Court makes findings as follows:

1. The evidence is that the parties were in a contract of service. While denying that it employed the claimant, the claimant's evidence that the respondent employed her has not been rebutted at all. The claimant initially joined the respondent on 19.11.2012 as an intern. On 01.04.2013 the respondent employed her as a Programmes Assistant until 31.05.2013. On 01.06.2013 she was employed

by the respondent on contract basis as a Programmes Co-ordinator and the contract lapsed on 31.03.2013. By the letter dated 01.04.2014 the respondent employed the claimant as Office and Project Coordinator effective 01.04.2014 at Kshs.72, 000.00 per month. The contract document dated 01.04.2014 stated that the contract would terminate in accordance with the provisions of the contract. Probationary service was for three months and after which either party was at liberty to terminate the contract by giving one calendar month notice or paying salary in lieu of such notice. The termination notice was agreed to be in writing and any outstanding leave days had to be taken during the notice period unless otherwise advised by the respondent. Termination upon redundancy was equally provided for in the agreement. The contract was governed by the laws of Kenya. Clause 21 of the contract provided for resolution of disputes arising out of the contract (upon termination or interpretation, and about any breach or validity) by consultation in good faith and failing, by an arbitrator appointed in the agreed manner.

2. The claimant's employment was terminated by the notice to terminate the employment dated 23.02.2015. The letter stated that the contract between the respondent and the government of Canada, the respondent's main funder in East Africa, was scheduled to terminate at the end of March 2015. Thus the respondent's operations in East Africa would end on 31.03.2015 and all respondent's employees in Kenya, Tanzania and Rwanda would be laid off. The claimant's last day at work was fixed to be 27.03.2015 and the letter served as a 30 days' notice. On the last day the claimant would be paid salary, unpaid leave if applicable and severance as per the contract of service.

3. The claimant alleges the respondent failed to comply with section 40 of the Employment Act, 2007 on redundancy.

4. The respondent alleges that the claimant cannot claim compensation from a non-existent entity. No evidence was placed before the Court to show that the respondent had ceased to exist and the Court finds that the respondent exists.

5. While alleging breach of section 40 of the Employment Act, 2007, the Court returns that the claimant has failed to particularize the amount claimed under that provision of the Act. Further, the Court has considered whether the claimant was terminated on account of a termination notice or redundancy. The termination notice promised redundancy dues. The Court finds that the claimant had served for one complete year and her redundancy dues would be calculated accordingly. The claimant having failed to specifically plead the extent of his claim per entitlements upon redundancy per clause 18 (g) of the contract of service and section 40 of the Act, the Court returns that no amounts will be awarded in that regard.

6. The Court has considered the alleged unfair termination. It is clear in clause 21 that parties agreed to resolve disputes by consultation in good faith and failing by arbitration. The claimant did not invoke the arbitration clause and the Court finds the failure to amount to a complete mitigation against a finding of unfair termination against the respondent. Thus, the Court will not delve into the issue of the alleged unfairness or compensation as the arbitral clause applied but parties failed to invoke it.

7. While alleging violations of the constitution and making prayers in that regard, the Court finds that the claimant gave no evidence and submissions in that regard.

8. The claimant is entitled to a certificate of service as per section 51 of the Employment Act, 2007.

9. Looking at the parties' margins of success each party shall bear own costs.

In conclusion the respondent to deliver to the claimant a certificate of service in 30 days and each party to bear own costs of the suit.

Signed, dated and delivered by the court at **Nairobi** this **Friday, 24th July, 2020.**

BYRAM ONGAYA

JUDGE