THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 769 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

CHRISTINE MUMBI TATUA .....CLAIMANT

VERSUS

DHL SUPPLY CHAIN (K) LIMITED.....RESPONDENT

JUDGMENT

By her Memorandum of Claim dated 4th May and filed on 5th May 2015, the claimant avers that her employment was unfairly terminated by the respondent. It is her averment that she was not allowed an opportunity to defend herself or to call witnesses and that the termination was malicious, unlawful, illegal and wrongful. That the same was meant to rubberstamp the respondent's true intentions. That she was issued with a letter of suspension after the disciplinary hearing.

The claimant prays for the following remedies –

a) A declaration that the termination of her employment was unfair, wrongful and unlawful;

b) A Certificate of Service be issued to the Claimant;

c) Damages for wrongful termination tabulated below: -

(i) 12 months' pay in compensation for unfair termination Kshs.1,654,800.

(ii) Incorporeal loss (expectation of stable employment) Kshs.1,000,000.

d) Bonus award entitlement for the year 2014/2015

e) General Damages

f) Interest on the monetary orders from the date of the filing of the Claim.

g) Costs of the Claim

h) Any other relief the Court may deem fair and just to grant.

The respondent filed a response dated 20th May 2016 denying the averments in the claim. The respondent avers that the termination of the claimant's employment was well founded in law and she was accorded the opportunity to defend herself. Further, that she was paid all her entitlements by cheque and she signed a disclaimer to that effect. The respondent denies that the claimant is entitled to the remedies sought in the claim.

The claimant's testimony was taken on 31st July 2019. The respondent, having not filed a witness statement or indicated its intention to call a witness did not call any witness but filed a sworn witness statement of CLEOPHAS AMURONO, its Business Unit Manager in which he adopts the response and documents filed with the response. After hearing directions were given for fling of submissions. Only the claimant filed.

The claimant's case is that she was employed by the respondent as a Transport Planning Assistant on 1st September 2007, that she performed her duties diligently and was congratulated by both the employer and various clients. That due to her stellar performance she was promoted to the positon of Transport Planning Manager where she diligently worked over extra ordinary hours, during weekends and public holidays, sacrificing her family.

The claimant's case is that in March 2014 a new Business Unit Manager was appointed and this marked the beginning of her problems at DHL. That the Manager openly targeted her, shutting her down at meetings and disregarding her contributions to the management meetings. That she raised the issue with the respondents Human Resource Director but was sent back to go and engage her Manager. That the Manager refused to undertake her performance evaluation for the year 2014/2015 while he evaluated her colleagues. As a result it was not possible to conduct her appraisal for 2014 as she had no objectives for purposes of award of bonus for year 2014/2015.

It was further the claimant's case that a new Transport Director was appointed in September 2014 who brought in a transport supplier unfamiliar with the respondent. That the new supplier delivered goods to Nakumatt at 4.45 pm and Nakumatt declined to take delivery as its warehouse staff who do offloading were not available when the delivery was made. That this was the reason for her first show cause letter.

The claimant stated that she was added work of another Manager and her workload became very heavy. She was not given the support she required to perform.

The claimant testified that she was blamed for delay in delivery arising from delay in loading yet this was not her work as her responsibility was to supply transport but not to load.

The claimant testified that she worked late and whenever she reported to work after 8 am it was made an issue, yet she was not paid overtime even when she worked as in excess of 10 hours a day instead of 9 hours as per her terms of appointment. Further that work in her office which involved transporters did not start until late morning.

The claimant testified that she was invited for a disciplinary hearing which took place on 25th February 2015. At the meeting she was attacked and denied an opportunity to call her own witnesses. Further, that new issues were introduced at the meeting that were not in the show cause letter. That she was thereafter suspended for 4 days. When she reported back to work she was issued with the letter of termination. It was the claimant's case that the termination was choreographed hence she saw no need to appeal as her case was a foregone conclusion.

In the submissions filed on behalf of the claimant, it is submitted that her evidence is uncontroverted as the respondent did not call any evidence to rebut the claimant's evidence. She relies on the decision in **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** where the learned Judge stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

The claimant also relied on the case of **Linus Nganga Kiongo and 3 Others v Town Council of Kikuyu (2012) eKLR** where the court found that where no evidence is called by a party, the court would find the averments made by that party as unproved.

It is submitted that the termination was unlawful in terms of Sections 41 and 45(2) of the Employment Act as well as Section 47(5) relying on the decision in **Gilbert Mariera Makori v Equity Bank Limited (2016) eKLR** where the court observed as follows;

> *"Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union.*
>
> *After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decisions whether or not to dismiss or terminate the services of the employee."*

The claimant further submits that she was overworked after her promotion. The new role assigned to the Clamant was handling of the British American Tobacco (BAT) Contract which was twofold. The Claimant was assigned first in early January 2015 and the second shortly thereafter in mid-January 2015. That the work given to the Claimant was in addition to the Unilever Contract which tripled her work. That the Claimant was not given reasons for the new responsibilities and her salary remained the same.

That under the Unilever Contract the Claimant was in charge of transportation of the goods which involved assigning the different truck companies contracted by DHL to perform the work of collection and delivery. That the contractors were different from the Unilever Contract, the routes were also different, the goods were different and yet no one gave the Claimant orientation on the new assignments.

That the Claimant was not issued with a role profile laying out her deliverables and expectations while performing her duties under the BAT Contract.

That there was no official handover of responsibilities from her predecessors and she was not given the reasons why the Respondent added more responsibilities on her yet the predecessors were still in employment.

That at the disciplinary hearing she was denied an opportunity to defend herself relying on the case **of Jared Aimba v Fina Bank Limited [2016] eKLR** the Court of Appeal held that-

> *"However, under section 45 and 41 of the Employment Act, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination."*

The claimant also relied on the case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR**, where Ndolo J. held:

> *"...it does not matter what offence the employee is accused of. If the employee is not heard the termination is ipso facto unfair."*

She submitted that the termination was wrongful relying on the case of **Jane Samba Mukata v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)** where the court held that:-

> *"Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.*
>
> *It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just stay that one has been terminated for poor performance as the effort leading to this decision must be established.*
>
> *Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses."*

That from the Respondent's response, none of the requirements aforementioned were adhered to and thus the reason for non-performance was not established and it could not therefore form a reason for termination of the claimant's employment.

The claimant further relies on the case of **Fredrick Odongo Owegi v CFC Life Assurance Limited (2014) eKLR**, where the court held that

> *"In cases of discipline on grounds of poor performance, all an employer has to prove is that the employee was aware of the applicable standards of performance and efforts were put in place to support the employee with time to allow for improvements with constant review."*

With reference to the respondent's response to claim, the claimant testified that it was mere denials and did not address the issues in the claim, relying on **Mombasa Cause No. 196 of 2013, Meshack Kiiolkulume v PrimeFuels Kenya Ltd**, where the court held that:-

> *"The practice of mere denials and putting Claimant's to strict proof is not the practice or procedure of or applicable in the Industrial Court. This is borne out by the statutory obligation placed upon employers in sections such as the one referred to and sections 43, 45 and 47 of the Act in claims for unfair termination."*

Determination

I have considered the pleadings and evidence on record. I have further considered the claimant's submissions. As stated herein above, the respondent did not call a witness or file submissions.

When the case was mentioned on 11th May 2020 for purposes of confirm compliance with directions for filing submissions, the Counsel for the respondent informed the court that the respondent had a challenge even though it was served with the claimant's submissions in March 2020. The case will therefore be determined on the basis of the evidence and submissions of the claimant only.

The respondent having failed to call a witness or file written submissions, the evidence of the claimant remains unchallenged.

The claimant testified that the termination of her employment was choreographed by her Business Development Director who did not hide his dislike for her. That she was overworked, and blamed for faults of other people. That at the time of termination she was doing triple the work she was supposed to do, was not given any support. That she was in a new role which she took over without a formal handing over, or induction, and that although there were several options for dealing with a non performing employee which included being placed on a performance improvement scheme, the respondent opted for the most severe punishment.

From the evidence on record it is evident that the respondent did not act in accordance with justice and equity in terminating the employment of the claimant and the termination was therefore unfair in terms of Section 45(4)(b) of the Employment Act. Further the claimant was not allowed to call her witnesses. In the minutes of the disciplinary hearing, it is clearly minuted that she was asked about her witnesses whom she named. The minutes state that –

> ***"Discussions***

The meeting was called to order and Christine Tatua was briefed on the purpose of the meeting. It was explained to her that the purpose of the meeting was to give her an opportunity to support her response to the show cause letter in person to give clarity where needed and to provide further evidence that she may have left out in the written response.

Christine was asked if she needed any clarification on the show cause letter and she confirmed that she understood the contents of the letter.

Christine was advised that she had a right to bring a representative to the meeting of which she replied that she had 4 representatives, Robert Oyugi, Douglas Mogire, Samson Obonyo and Linet Lwangu. She was informed that the representatives will be called in if required, but it was not necessary as the team only sought clarification.

She was also informed that the minutes of the meeting will be documented.

From the contents of the response letter Robert Oyugi was the only one required."

It is also clear that in the disciplinary hearing new issues were raised which had not been brought to her attention in the show cause letter which only had the following charges –

A. Lack of delivery on BAT Transport arrangements.

B. Transport Management

C. Unsatisfactory customer service.

D. Time amendment and availability of transport.

At the disciplinary hearing she was asked to respond to additional charges on the issue of update reports which was not in the show cause letter.

From the foregoing I find the termination of the claimant's employment to have been both procedurally and substantively unfair and I declare accordingly.

Remedies

The claimant prayed for a certificate of service. She is entitled to the same in terms of Section 51 of the Employment Act and the respondent is directed to issue her with the same if not already done.

The claimant further prayed for damages for wrongful termination.

Taking into account the manner in which her employment was terminated and the factors surrounding the same, and all the other factors set out under Section 49(4) of the Employment Act, such as her length of service, it is my finding that compensation equivalent to 10 months' salary is reasonable. I thus award her **Kshs.1,379,000**.

The claimant has not justified payment for bonus for the period 2014/2015 and the prayer fails. The prayer for general damages also fails as the claimant has not justified the grounds for award of the same over and above the compensation which has been awarded.

There is no justification for payment of interest on unliquidated awards from date of filing suit and the same is declined.

The respondent shall pay the claimant's costs of this suit and interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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, the 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 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the 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.

MAUREEN ONYANGO

JUDGE