



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 226 OF 2017

(Before Hon. Justice Mathews N. Nduma)

DIANA ADHIAMBO ODHIAMBO.....CLAIMANT

VERSUS

THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed the suit on 23rd May 2017, seeking the following reliefs:

- (i) One-month salary in lieu of notice Kshs. 130,000.
- (ii) Maximum compensation for unlawful dismissal.
- (iii) General damages and
- (iv) Provision of certificate of service.

2. The claimant testified as CW1 and adopted a witness statement attached to the statement of claim as his evidence in chief. CW1 told the court that she was employed by the respondent on 14th November 2012 as a unit manager reporting to the Business Development Manager and was promoted later to the position of Business Development Officer on 25th April 2016.

3. That the claimant earned a consolidated salary of Kshs. 130,000.

4. CW1 testified that Homa Bay County Assembly vide a letter dated 16th December 2014 awarded the respondent a tender to provide medical cover. That CW1 accepted the tender on behalf of the respondent by a letter dated 18th December 2014 and a contract was subsequently signed. CW1 testified that on 18th December 2014, CW1 sent a letter of authorization to Homa-Bay County Assembly in which CW1 authorized Ocean Breeze Insurance Agency to negotiate and sign the contract provided by the respondent.

5. The contract was concluded and the respondent was paid premiums by the County Assembly and the Ocean Breeze Agency was paid Commission by the respondent.

6. CW1 testified that she was subsequently served with a show cause letter on allegations that she had unlawfully and with intent to benefit from the insurance cover transaction authorized Ocean Breeze Agency to be an intermediary between the respondent and Homa-Bay County Assembly. That at the time CW1 knew that Ocean Breeze Agency was owned by one Fred, a boyfriend of her daughter and that upon receipt of commission Mr. Fred paid part of the money to CW1 and her daughter.

7. That this conduct was alleged to be misconduct on the part of CW1. CW1 testified that she responded to the show cause letter explaining that she did not know that Ocean Breeze was owned by Fred who was a boyfriend of her daughter at the time she wrote the letter authorizing the Agency to be an intermediary in the insurance transaction. That she only knew of that fact later. That after all Ocean Breeze Agency had previously acted as the Agency for the Homa – Bay County Assembly. That she did no wrong.

8. That she was victimized by her supervisor for no good reason and upon criminal investigations being conducted by police, she was not charged with any offence. That she attended a disciplinary hearing with her lawyer but the lawyer was not given a hearing. That she

defended herself but was unlawfully and unfairly summarily dismissed. The claimant prays for the reliefs sought in the statement of claim.

9. CW1 was closely cross examined by Mr. Oduor for the respondent. CW1 denied having appointed Ocean Breeze Agency stating that the Agency had an existing relationship with the Assembly. That in her capacity as the recruiting Agent, she only authorized Ocean Breeze to transact the deal. CW1 admitted that it is the client in this case Homa-Bay County Assembly who appoints the intermediary.

10. CW1 also admitted that on 18th December 2014, she wrote a letter authorizing Ocean Breeze to transact the business between Jubilee and the County Assembly. CW1 stated that she had authority to do that.

11. CW1 also admitted having written a second letter on 18th December 2014, to Homa-Bay Assembly, confirming Ocean Breeze as the authorized intermediary. CW1 denied knowledge of loss of premiums paid by the Assembly to Ocean Breeze Agency.

12. CW1 admitted that the owner of Ocean Breeze was her in-law but stated that she had dealt with one Olwale and did not know Fred was the owner of the Agency. CW1 admitted that Fred had paid dowry for her daughter and that Fred had paid CW1 some monies for transport to transact the business regarding this specific cover.

13. CW1 admitted that she knew Fred in 2013 but denied having known that Fred owned Ocean Breeze Agency. CW1 denied any conflict of interest in the matter.

14. RW1 Sammy Kigo testified on behalf of the respondent. RW1 stated that he was the Human Resource, and business partner Jubilee Insurance, the respondent. RW1 adopted a witness statement dated 3rd September 2019 as his evidence in chief.

15. RW1 produced exhibits "1" to "18" in support of the defence case. RW1 testified that intermediaries in Insurance Cover transactions are appointed by the particular client, the respondent intends to cover. That in this case, CW1 who represented the insurance company purported to authorize Ocean Breeze Agency to be the intermediary in a transaction between the respondent and Homa-Bay County Assembly.

16. RW1 testified that it was later discovered that the owner of the Ocean Breeze Agency was an in-law of CW1. That there was conflict of interest in that CW1 could not purport to nominate Ocean Breeze as the intermediary without disclosing her relationship with the owner of the company.

17. RW1 testified further that CW1 and her daughter received direct payments from Ocean Breeze upon payment of commission by Homa-Bay County Assembly. That this was evidence of the stated conflict of interest. RW1 testified further that Ocean Breeze Agency defaulted in remitting premiums received from Homa-Bay Assembly to the respondent to the loss and detriment of the respondent.

18. That the respondent was forced to suspend the insurance medical cover for the employees of Homa-Bay County Assembly due to the default by Ocean Breeze Agency to remit received premiums for the period 2014/2015.

19. RW1 denied that Ocean Breeze had any previous transactions with the respondent company. RW1 emphasized that in a transaction of between 5 to 50 Million Kshs. Communication by the respondent to client had to come from Chief Operations Officer but not an officer at the level of the claimant. That business between the Insurance and the client may be direct or through a broker. That the present cover was negotiated by the intermediary. RW1 stated that at the time the claimant wrote the letter on 18th December 2014, the respondent was not aware of Ocean Breeze and the claimant did not disclose that fact prior.

20. RW1 stated that the claimant was issued with a notice to show cause to which she responded. That CW1 also attended a disciplinary hearing. That the explanation by CW1 was not satisfactory hence was summarily dismissed. That the dismissal was lawful and fair and the suit be dismissed.

Determination

21. The issues for determination are:

- (i) Whether the respondent had a valid reason to summarily dismiss the claimant.
- (ii) Whether the respondent followed a fair procedure in dismissing the claimant.
- (iii) Whether the claimant is entitled to the reliefs sought.

22. In answer to issues (i) and (ii) above, the court has carefully analyzed the testimony by CW1 and that by RW1 and summarized the same in the judgment. The court has considered the documents produced by both parties and the submissions filed and has come to the following conclusion of facts:

- (i) CW1 authorized Ocean Breeze to be the intermediary between the respondent insurance company and Homa-Bay County Assembly in a medical cover transaction for the employees of the County Assembly.
- (ii) At the time of the said authorization, the owner of Ocean Breeze was the son in-law of CW1. CW1 did not disclose this fact to the respondent or the County Assembly at the time she wrote the letter on 18th December 2014.

(iii) CW1 was not candid on the issue of knowledge of the ownership of Ocean Breeze at the time she gave them the Agency business. CW1 came out under cross examination as untruthful and unreliable witness.

(iv) The court is satisfied that CW1 engaged in serious misconduct in receiving monies from Ocean Breeze upon conclusion of the insurance contract. The behaviour by CW1 directly or indirectly contributed to the default by Ocean Breeze to remit premiums received from the County Assembly to the employer of CW1, the respondent.

(v) The conduct by CW1 led to the loss of revenue to the respondent resulting to suspension of the insurance cover for the period 2014/2015.

23. It is the court's considered finding that the respondent followed a fair procedure in subjecting the claimant to a disciplinary process which commenced with a notice to show cause. CW1 responded to the notice to show cause and was invited to a disciplinary hearing which she attended and defended herself. Failure by the respondent to allow legal representation in an internal disciplinary process did not negate the process.

24. The court finds that the respondent has satisfied the requirements of *sections 41, 43, 44, 45 and 47 of the employment Act, 2007* in that it has demonstrated that it had a valid reason to summarily dismiss the claimant from her employment.

25. Furthermore, the respondent followed a fair procedure in summarily dismissing the claimant in that the explanation she gave was not satisfactory.

26. The court was not satisfied with the defence put forth by the claimant in this matter.

27. The court finds that the respondent satisfied the criteria set forth in ***Nakuru ELRC NO. 474 of 2017, Consolata Kemunto Aminga vs Milimani High School*** in that it strictly adhered to the aforesaid provisions of the law.

28. The claimant has not discharged the onus placed upon her under *section 47(5) of the Employment Act, 2007*, to show that the summary dismissal was wrongful and unfair.

29. Accordingly, the claim of compensation and payment of general damages for unlawful and unfair dismissal lack merit and is dismissed.

30. However, the respondent is obliged by law to provide the claimant with a certificate of service and must do so within 30 days of this judgment.

31. The claimant was summarily dismissed and so was not paid terminal benefits including notice pay. The claimant had served the respondent from the year 2012 up to the date of dismissal. In recognition of that service, the court finds this a suitable case for each party to bear the cost of the suit.

32. In the final analysis, the suit is dismissed with no order as to costs. The respondent to provide a certificate of service to the claimant within 30 days of the judgment.

Judgment Dated, Signed and delivered at Nairobi this 15th day of October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment 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. Kabalika for the Claimant.

Mr. Oduor for Respondent

Chrispo- Court clerk