



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 2065 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PHYLLIS WAIRIMU NJIHIA.....CLAIMANT

VERSUS

AMAZING TOURS AND TRAVEL LIMITED.....RESPONDENT

JUDGMENT

The Claim herein is filed by the firm of D. K Githinji & Company Advocates on behalf of Phyllis Wairimu Njihia, the Claimant herein alleging unfair termination of employment by the Respondent and failure to pay salary arrears and leave days. She seeks the following reliefs:

- a) A declaration that the Claimant's termination of employment was unfair.
- b) 12 months' salary being damages for unfair termination Kshs.420,000
- c) Illegal deduction for the month of August 2015 Kshs.10,000
- d) One month salary in lieu of notice Kshs.35,000
- e) Salary for September 2015 Kshs.35,000
- f) 11 leave days already admitted Kshs.17,500
- g) Interest on (b), (c), (d), (e) and (f) at Court rates from the day each payment fell due and payable until payment in full.
- h) Certificate of Service for the Claimant.
- i) Costs of the Suit.

The Respondent filed a Response to Claim dated 23rd March 2016 and filed in Court on the 29th March 2016, in which the respondent admits that the Claimant was its employee in the office of Tours Manager in the Tours Department with effect from 27th March 2015.

It is further admitted that the Claimant was terminated from the Respondent's employment but the respondent contends that the termination was on the grounds of non-performance of duty and that the same was done in accordance to the law.

On 15th October 2018, the Claimant adopted the witness statement dated 4th September 2018 and filed in Court on 24th September 2018 as her evidence in chief. The Claimant in her statement reiterates the averments made in her Statement of claim adding that she was employed by the Respondent on or about 27th March 2015 earning a salary of Kshs.35,000.

She further states that the Appointment letter set out the general terms, the key objectives and key tasks. The appointment was not subject to any probation period. She further states that no sales targets were ever given to her.

It was her further statement that no meeting was held to explain any of her shortcomings in terms of not bringing in business. On or about

27th July 2015, about 4 months into the contract of employment she was demoted from the position of tours manager to tours consultant vide the Respondent's letter dated 27th July 2015.

It was her evidence that she made a request in writing to the Respondent via the letter dated 9th September 2015 requesting an adjustment on free hours for study that was previously agreed to verbally between the Claimant and the Respondent.

The claimant further states that in the month of August 2015, she received Kshs.25,000 as her monthly salary being Kshs.10,000 less than the agreed salary.

The Claimant avers that on 30th September 2015 the respondent issued her with two successive termination letters and paid her Kshs.24,583.30 terming the same as full and final settlement of her terminal dues.

The Claimant contends that the demotion and termination were unfair for the reasons that no notice was issued under the law; lack of sufficient details of default or non-performance, having regard to the totality of the terms of the Contract of employment aforementioned to warrant the demotion/ and or termination and no opportunity was given to the Claimant to answer to any accusations before the demotion/termination.

The Claimant further contends that her employment was on merit as the Respondent had the chance to interview her and review documentation and hired her on merit. Further the Claimant states that a period of 4 months is not sufficient for the Respondent to adequately assess her performance.

The Respondent despite having been served with a Hearing Notice and an Affidavit of Service filed to that effect, failed to attend Court for the hearing. It's the case subsequently closed and parties were directed to file and exchange submissions.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and her Affidavit duly adopted by the Court as the Claimant's evidence.

The Claimant submitted that her termination was unfair for want of notice, lack of sufficient verifiable performance targets and lack of opportunity to respond to the accusations.

It is further submitted that beyond the Respondent filing its response it elected not to call any evidence or even use the opportunity to cross examine the Claimant. She further submits that the pleadings are unsubstantiated and must fail. The Claimant relied on the authority of **High Court of Kenya in Machakos Civil Suit No. 25 of 2016 Shaneebal Limited Versus County Government of Machakos (2018) eKLR.**

It is further submitted that the termination was contrary to Sections 41, 43, 45 and Section 47 (5) of the Employment Act, 2007.

The Claimant further relied on the Authority of **Mombasa Industrial Cause No. 276 of 2013 Johnson Kaingu Versus Breeze Point.**

The Claimant submitted she was entitled to a refund of the deduction of Kshs.10,000 for August salary as provided for under Section 19(2) of the Employment Act, 2007 that provides:

“No employer shall make a deduction from the wages payable to an employee as an advance of wages in consideration of, or as a reward for, the provision of employment for that employee, or for retaining the employee in employment.”

The Claimant relied on the authority of **Mombasa Industrial Cause No. 117 of 2013 Thomas Sila Nzivo Versus Bamburi Cement Limited (2014)eKLR.**

On the issue of costs and interest the Claimant submitted that as a general rule under Section 12 (4) of the Employment and Labour Relations Court Act and Rule 29 (3) of the Industrial Court Rules allow the Court wide discretion to award costs. The Claimant relied on the case of **Mombasa Civil Appeal No. 36 of 2014 Diamond Trust Bank of Kenya Limited Versus Saidi Hamad Shamisi & 2 Others (2015) eKLR.**

The Claimant urged the Court to allow the Claim as drawn.

The Respondent did not file any submissions.

Determination

Having considered the facts of this cause, evidence, submissions and authorities cited by the Claimant and in the absence of evidence from the respondent the following are the issues for determination: -

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

3. Who bears the costs of the suit

The Law

The law relating to fair termination is contained in Section 41, 43 and 45 (2) of the Employment Act.

Section 41 of the Employment Act provides for the procedure for termination while section 43 of the Employment Act provides that the employer must prove valid reason.

From the evidence on record and the law, I find that the termination of the Claimant's services was unfair for the reason that she was not taken through the disciplinary process as set out in Section 41 of the Employment Act, 2007.

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

Further in the case of Francis Mbugua Boro –Vs- **Smartchip Dynamics Ltd (2017) eKLR** it was held:

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 and missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

Similarly in the case of **David Njoroge Muiru -Vs- Elsa Limited (2014) eKLR** it was held that:

“It is obvious that the claimant was not given notice of misconduct or a hearing before the termination. The court finds that the dismissal was unfair under Section 41 of the Employment Act 2007. The reason for removal has not been shown to have been established to exist at the time of termination.”

It is my finding that the termination was invalid both procedurally and substantively.

Remedies

The Claimant claims for the following:

- a) A declaration that the Claimant's termination of employment was unfair.
- b) 12 months' salary being damages for unfair termination Kshs.420,000
- c) Illegal deduction for the month of August 2015 Kshs.10,000
- d) One month salary in lieu of notice Kshs.35,000
- e) Salary for September 2015 Kshs.35,000
- f) 11 leave days already admitted Kshs.17,500
- g) Interest on (b), (c), (d), (e) and (f) at Court rates from the day each payment fell due and payable until payment in full.
- h) Certificate of Service for the Claimant.
- i) Costs of the Suit.

Having found that the claimant was unfairly terminated, I declare the termination unfair and award the claimant one month's salary in lieu of notice in the sum of Kshs.35,000. The claimant is also entitled to salary for September 2015 as her employment was terminated on 30th September 2015. She is also entitled to the sum of Kshs.10,000 deducted from her salary for August 2015 and prorated leave for the period served being 6 months at 10.5 days at Kshs.14,135 which I award her.

On compensation, the claimant had worked for only 6 months. It would not be justifiable to award her maximum compensation in spite of the unfair termination. In my opinion, 3 months' salary would be reasonable compensation and I accordingly award her the same.

In conclusion therefore I enter judgment for the claimant against the respondent as follows –

- (i) Salary for September 2015 at Kshs.35,000.

(ii) The shortfall on her August salary Kshs.10,000

(iii) Pro-rata leave Kshs.14,135

(iv) Pay in lieu of notice Kshs.35,000

(v) Compensation Kshs.105,000

Total Kshs.199,135

The respondent shall pay claimant's costs.

The respondent shall further pay interest at court rates as follows –

(a) Items (i), (ii), (iii) and (iv) from date of filing suit.

(b) Item (v) from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE