



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 542 OF 2013

PETRONILLA MWIKALI KALAMU.....CLAIMANT

AND

KENYA POSTEL DIRECTORIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 18.4.2013 alleging that her employment was unlawfully terminated by the respondent on 28.9.2012. She further alleged that during the termination, she was discriminated on ground of pregnancy. She therefore prayed for following reliefs:-

- a. The termination of the Grievant/Claimant be declared unlawful and hence null and void.
- b. The Respondent do re-engage the Grievant/Claimant in work comparable to that in which the Grievant/Claimant was employed prior to the termination or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both the period the Grievant has been working and out of office/work.
- c. Reinstate the Grievant/Claimant and treat him in all aspects as if the Grievant/Claimant employment had not been terminated.

In the alternative to the demand for reinstatement of the Grievant/Claimant demand for payment as under:-

- (i) Terminal dues as enumerated under Clause No. 2(j) above thus sum of Kshs.4,498,381.45.
- (ii) Interest on clause 2(j), (i), (ii),(iii),(iv),(v) and (vi) from the date of dismissal until payment in full at Court rates.
- (iii) Any other statutory entitlements.
- (iv) The Respondent does issue the Grievant/claimant with Certificates of Service.
- (v) The Respondent to pay legal costs in this suit.

2. In response, the respondent denied the alleged unlawful termination and averred that she used her right under the express provision of the employment contract to terminate claimant's service. She further averred that the termination was on account of poor performance and not pregnancy on the part of the claimant. Finally she averred that the before the termination the claimant was given an opportunity to defend herself. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 20.3.2018, 25.10.2018, and 28.11.2018 when the claimant testified as Cw1 and the respondent called her Corporate Accounts Executive Mr. Ezron Kabugi who testified as Rw1. Thereafter both parties filed written submissions.

Claimant's Case

4. Cw1 testified that she was employed by the respondent as a Sales Executive from 24.2.2003 vide the offer letter dated 12.2.2003 and confirmed on 9.1.2004. Her duties included visiting clients and selling advertising space in a Directory called Official Yellow Pages. She worked well for 9 years and 7 months before his services were abruptly terminated by the letter dated 28.9.2012. By then she contended that, her salary was Kshs.187,270 and produced her payslip for August 2012 as evidence.

5. Cw1 further testified that on 26.9.2012 at 5 pm, she was served with a show cause memo asking her, to respond by 10.00 a.m. of the following day, explaining why she should not be dismissed on account of poor performance during the Nairobi 21 canvass. The charge in the show cause memo was that she failed to meet her sales target of Kshs.2,801,000 and 132 contracts.

6. Cw1 further testified that she responded to the show cause memo on 27.9.2012 as required, denying the alleged poor performance. She contended that she was number 2 in revenue generation with Kshs.1,657,100 and had secured 128 contracts despite being 32 weeks into her pregnancy. That the evaluation report did not factor the sales made in the immediate previous week before the show case memo.

7. Cw1 further testified that despite the said responses, her services were maliciously and discriminatively termination because she had performed better than some other employees who were not terminated. She contended that she was excellent performer and had not been served with any warning letter before the termination. She produced the letter dated 15.9.2009 reference number NN/TMO/12/002 which recognized her excellent performance. She maintained that the reason for her termination was her pregnancy because she had 2 months before delivery.

8. Cw1 testified that as a result of the termination, she suffered a lot because she had loans and hospital bills to pay with regard to the pregnancy. That since then has tried in vain to secure another job and as such, she had to do self employment. She therefore prayed for compensation for the unlawful termination plus terminal dues.

9. On cross examination, Cw1 admitted that her contract of employment provided for a termination Notice of one month or salary in lieu of notice. She further admitted that her basic salary was Kshs.21,800 per month in addition to a standard car allowance of Kshs.24,000 per month. She further admitted that her commission on sales was not constant but it varied depending on the volume of her sales. That in January 2012 she received a commission of Kshs.45,000, in May 2012 she received Kshs.43,000 while in September 2012 she received Kshs.150,000.

10. She maintained that in the Nairobi 21 canvas she was number 10 out of 13 overall in revenue generation having brought 80% revenue and convinced 80% of existing clients to review their contracts. She further contended that she achieved 60% online sales but admitted that she only achieved 7% of contracts from new clients. She however contended that her previous good performance was not considered.

11. She contended that she had good working relationship with her seniors and admitted that the 2012 pregnancy was the second while working for the respondent. She however maintained that she was discriminated against because other employees who performed below her were not terminated. She admitted that after the termination she was paid Kshs.125,241 inclusive of salary and car allowance for September 2012, 10 leave days, salary in lieu of notice plus commission upto 10.10.2012. That the said pay was net of the gross pay of a gross pay of Kshs.171,905. She however contended that she had an accrued leave of 90 days and that the reason why she took the said dues was because she was desperately in need of money due to her pregnancy and loans

Defence case

12. Rw1 testified that the claimant was the National Sales Manager for the respondent. He denied that the claimant was dismissed because of her pregnancy and contended that the reason was her poor performance. He further denied the alleged discrimination and contended that it was not the claimant's first pregnancy while the respondent's employment. He contended that pregnancy was not covered by the insurance facility and even if she continued working she would still have met her pregnancy bills.

13. Rw1 denied that the claimant was earning Kshs.187,270 as her monthly salary and contended that she started with a basic pay of Kshs.14,000 per month, which was later increased to 21,800 in addition to a standard car allowance of Kshs.24,000. That she was also receiving a commission on sales, which varied on the sales volume every month.

14. Rw1 further denied that the claimant was the best performer and contended that during the Nairobi 21 canvass, she ranked number 10. That due to the said dismal performance her supervisor Ms. Lucy Wanyaga served her with a show cause memo dated 6.8.2012 which identified 6 arrears of weakness and which needed improvement.

15. On cross examination, Rw1 admitted that he never participated in the process of terminating the claimant or attended any hearing of the claimant before the separation. He further admitted that there was no evidence to prove that there was any meeting to hear the claimant before the terminations and that the termination letter did not refer to any meeting. He further admitted that he only learnt about the claimant's termination during morning briefing on 1.10.2012 by Pauline.

16. Rw1 maintained that the claimant was served with show cause memo which she responded on 27.9.2012 stating that she had achieved her targets but she was dismissed on 28.9.2012 because she did not meet her targets. He further contended all employees who performed below the claimant were dismissed except Anne Theuri who was spared because of her previous good record of performance. He however admitted that there was no evidence to prove the alleged termination of the poor performers.

17. He admitted that the claimant worked for 9 years starting with good performance but her performance deteriorated with time. He maintained that the claimant was appraised for 73 days during canvass on 6.8.2012 and she was warned by the show cause memo dated 26.9.2012. He however denied knowledge that she was pregnant that time,

Analysis and Determination

18. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent from 2003 to 2012 as a Sales Executive. The issues for determination are:

(a) Whether the termination was unfair and therefore unlawful.

(b) Whether the reliefs sought should be granted

Unfair termination

19. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. The reasons is valid and fair if it relates to the employee's conduct, capacity or based on the employer's operational requirement. The procedure is fair if it is done in accordance with justice and equity which includes granting the employee a hearing and payment of any dues and issuance of certificate of service.

Reasons for termination

20. The reason cited for terminating the claimant's service in the letter dated 28.9.2012 was poor performance. The letter stated as follows:

“Following a comprehensive review of your performance after the Nairobi 21 canvass, it has been noted with serious concern that there is no significant improvement. A review of your individual performance since July and the performance memo dated 6.8.2012 attest to this fact. Your explanation contained in your letter dated 27.9.2012 that you did very well is not satisfactory as you did not factor your losses during the canvass. This is unacceptable considering that the company has provided you with all the necessary training and resources.

We therefore regret to inform you that you services are hereby terminated with effect from 30th September 2012. You are however released from duty with immediate effect.

You will be paid your salary and any due commissions upto 30th September 2012 in addition to two(2) month's salary in lieu of notice.....”

21. There is no dispute that Nairobi 21 canvass is a performance evaluation cycle done in the respondent. There is further no dispute that in the evaluation report of Nairobi 21 canvass for 2012 that ran from 16th April to 28th September 2012 the claimant never met the set targets. According to Sales Targets signed on 25.6.2012, she was required to achieve Renewal and Cross Sales of Kshs.2,023,00 and 132 contracts, penetration of Kshs.225,000 and 55 contracts, and internet sales of Kshs.286,000 and 55 contracts, totaling to Kshs.2,534,000 and 242 contracts.

22. However, by the appraisal report signed on 20.7.2012, the claimant never achieved the said set targets and as she admitted she was ranked number 10 out of 13. In fact, by her letter dated 27.9.2012 by which she responded to the show cause memo, the claimant admitted that she achieved revenue of 1657.1 against 2081 representing a deficit of 20 contracts; that she achieved 184 against 299 internet revenue representing a deficits of 115, and 40 against 60 contracts representing 20 deficit; and finally she achieved 31.4, and 10 new sales contracts.

23. The foregoing admitted deficit corroborates the respondents case that the claimant was not performing her duties as required and a termination was justifiable. The employer is entitled to terminate her employees for lack of capacity to perform her duties. Although the claimant was pregnant during the said performance cycle there is no evidence to prove that she was dismissed maliciously due to the pregnancy as she alleged

Procedure followed

24. Section 41 of the Employment Act, provides that before the employer terminates the services of his employee on ground of misconduct, poor performance and physical incapacity, he must explain the reason to the employee in a language he understands and in the presence of the fellow employee of his choice and thereafter accord the two a chance to air their defence before the termination is decided.

25. In this case, the claimant was never accorded any oral hearing in the presence of a fellow employee. Instead, he was served with a show cause memo stating the reason for the intended termination and inviting her to defend herself. The claimant has not denied that she understood the reason cited in the show cause memo. In fact by her written statement, she admitted that she understood the consequences of the show cause memo and she panicked to an extend of losing sleep.

26. It is common knowledge that she tendered her written defence, which, as I have observed herein above, she admitted that she never met her performance targets. The question that arises is whether in the face of the said admission of poor performance, there was any value to be added by an oral hearing in the presence of another employee. In my considered opinion, the answer is no. I therefore hold that where an employee admits in writing his own misconduct or poor performance in his/her response to a show cause letter from the employer, oral disciplinary hearing as required by section 41 of the Employment Act is unnecessary and an exercise in futility.

27. In view of the finding herein above that, the respondent has proved that the claimant poorly performed her duties as a Sales Executive, and that oral hearing was not necessary after her written admission of failure to met her sales targets, I return that her employment was lawfully terminated by the respondent. She was therefore to blame for the termination through poor performance. Flowing from the foregoing, the allegation that she was discriminated on ground of pregnancy is without merits and it is dismissed.

Reliefs

28. In view of the foregoing finding, I decline to make declaration that the termination of the claimant's services was unlawful. I further

decline to order re engagement or reinstatement of the claimant because the termination was justified.

29. I also decline to award the claim alternative for salary in lieu of notice because it was paid after the separation while the claim for compensation for unlawful termination is dismissed because the termination was lawful.

30. The claim for 90 days leave is granted less 10 days paid after separation. The respondent failed to produce leave records to disprove the said claim. Under section 74 of the Employment Act, the employer is the custodian of employment records and failure to produce records to disprove the claim for accrued leave leads to the inference that the employee is right in alleging that she had not utilized all her earned leave days. Under the appointment letter, she was entitled to 21 days leave per year. **Hence 80/26 days x 21,800 = Kshs.67,076.92.**

31. The claim for 15 off days lacks particulars and it is dismissed. Likewise, the claim for service pay is dismissed because she was a member of NSSF and under section 35(6) of the Employment Act she was disqualified from benefiting from service pay.

Conclusion and disposition

32. I have found that the claimant was lawfully terminated and as such, she is not entitled to compensation for unlawful termination. She is however entitled cash in lieu of the accrued leave of 80 days, which has not been disproved by employment records.

Consequently, I enter judgment for the claimant in the sum of Kshs.67,076.92 plus cost and interest at court rates from the date of filing suit. The award shall be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March 2019

ONESMUS N. MAKAU

JUDGE