



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1823 OF 2014

PASCALIA MWENDE MATHEKA.....CLAIMANT

VERSUS

SILVERBIRD TRAVEL PLUS LIMITED.....1ST RESPONDENT

CAROLINE MALINDA.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 10th April, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 17.10.2014 through S.K. Opiyo & Company Advocates. She prayed for judgment against the respondent for:

- a) Accrued sum of the terminal dues of Kshs. 1, 416, 000.00 being:
 - One month pay in lieu of notice Kshs. 60, 000.00.
 - House allowance for 5 years Kshs. 216, 000.00.
 - Unpaid salary for 5 months worked Kshs.300, 000.00.
 - Unpaid leave for 2 years Kshs.120, 000.00.
 - 12 months salary for wrongful termination Kshs.720, 000.00.
- b) General damages for breach of contract and loss of employment.
- c) A certificate of service.
- d) Costs of the suit.
- e) Interest in (a), (b) and (c) above.
- f) Any other relief the Court may deem just.

The respondent filed the memorandum of response on 29.11.2014 through Aming'a Opiyo Masese & Company Advocates. The respondent prayed that the suit be dismissed with costs to the respondent.

There is no dispute that the parties were in a contract of service. The 1st respondent employed the claimant to the position of a Sales and Marketing Executive as per the letter of appointment dated 16. 08.2012. The employment was effective 27.08.2012 initially on 6 months' probation service subject to overall performance and the gains that the claimant's debt collection activities would bring to the respondent. The letter stated that the claimant's retention on the job and further enhancement of her remuneration package would be performance driven.

The 1st issue in dispute is the monthly pay of the claimant as at termination. The claimant testified that at employment she was paid Kshs.30, 000.00 per month and was terminated in September 2014 at a time she was earning Kshs. 60, 000.00. The respondents' witness (RW) was the 2nd respondent and the managing director for the 1st respondent. RW testified that sometimes the claimant earned 60, 000.00 per month if

she met the targets for the pay band of Kshs.50, 000.00 to Kshs.60, 000.00 being a target of a baseline for Kshs.6.6 Million and above per month; collecting 60% of totals due from previous month's sales by 26th of every month; and all sales being supported by LPOs issued within 14 days of the invoice date. The target schedule was annexed on the letter of appointment. RW confirmed that the claimant earned Kshs.60, 000.00 only once but she had not filed the relevant records on the payments.

As submitted for the claimant, section 74 of the Employment Act, 2007 required the respondents to maintain employment records. Further the Court considers that the burden of proving or disproving the monthly payment as at termination was placed upon the respondents under section 10(7) of the Act. Under section 20 of the Act, the respondents were obligated to issue an itemised statement of pay or commonly known as a pay slip. The Court returns that the respondents failed to discharge the burdens and obligations as imposed by statute. As submitted for the respondents, parties agreed on targets to be maintained but RW gave no documented and coherent evidence on the targets as achieved by the claimant during the tenure of her service. RW admitted in her evidence that the claimant was once paid Kshs. 60,000.00 per month. The Court returns that she could be so paid only if she had sustained the agreed targets. On a balance of probability the Court returns that the claimant achieved the targets and her last monthly pay was Kshs. 60, 000.00. In any event the claimant testified that she met the targets and her full sales from July were on record and they showed she had met the targets consistently.

The **2nd issue** for determination is whether the claimant's contract of service was terminated unfairly. The claimant testified that on 09.09.2014 she left when she had sought and obtained permission. The emails on record show that on 08.09.2014 the claimant wrote to the 2nd respondent stating that the 2nd respondent had verbally told the claimant that claimant would not be paid for the 5 months and the claimant had therefore decided to take leave for 7 days starting 09.09.2014 to 17.09.2014. In the email of 05.09.2014 the claimant informed the respondents that she'd not be at work until the issue of unpaid salary was resolved. In the email of 08.09.2014 the 2nd respondent wrote to the claimant thus, "**You are free to do what you want. In the meantime you need to understand that we will not break our company policy so as to accommodate your non performance attitude. You very well know what is expected of you under the terms of your employment. The requirement still stands and will not change now or in future.**"

The claimant's case was that her contract of service was essentially terminated when the 2nd respondent told her that she would not pay the 5 months' outstanding salaries.

The Court returns that the claimant's employment was terminated orally on 08.09.2014 when the claimant raised the valid grievance about her outstanding salaries for 5 months. The Court further returns that the termination was unfair because the reason for termination was the claimant's valid grievance about the unpaid salaries. The Court returns that under section 46 (h) of the Employment Act, 2007 it amounts to an unfair reason to terminate a contract of service on account of an employee's initiation of a reasonable and well founded complaint. Thus the termination was unfair because it was based upon an unfair reason.

The **3rd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes returns as follows:

- a) The claimant had served for 2 years and she desired to continue in employment. The Court has considered the aggravating factor that the respondent breached a fundamental term of the contract by failing to pay the salaries for 5 months. RW stated that she did not know if the claimant had been paid as was claimed. Balancing justice in the case the claimant is awarded **Kshs. 360, 000.00** being 6 months' salaries in compensation for unfair termination under section 49 of the Act. While making that award the Court has considered that undisputedly the claimant had not clocked in for 49 days but RW had also admitted in her evidence that sometimes she assigned the claimant duties that made it difficult for the claimant to check in prior to going to the field and further, that the claimant was paid based on targets achieved. The claimant is further awarded **Kshs. 300,000.00** being the unpaid salaries for 5 months as claimed for. The evidence was that the termination was abrupt without due notice and she is awarded **Kshs. 60, 000.00** pay in lieu of the termination notice.
- b) RW and the claimant confirmed in their testimony that parties never agreed on payment of house allowance and the Court returns that a consolidated pay inclusive of reasonable element for rent was agreed upon.
- c) The claimant prays for annual leave pay for 2 years of service. The Court has considered that parties agreed on pay structure based on targets and the claimant admitted the 49 days she did not check in at the office. To balance justice for parties, the prayer for pay in lieu of annual leave will therefore fail.
- d) The claimant is entitled to a certificate of service per section 51 of the Act.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of Kshs. 720, 000.00 by 01.06.2019 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- 2) The respondent to deliver to the claimant a certificate of service by 01.05.2019.
- 3) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Wednesday 10th April, 2019.**

BYRAM ONGAYA

JUDGE