



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1068 OF 2014

STELLA MUTUNGA MWENDA.....CLAIMANT

-VERSUS-

SAMEER AGRICULTURAL & LIVESTOCK (KENYA) LIMITED....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 26.6.2014 alleging that her employment contract was unfairly terminated by the respondent on 4.11.2013. She therefore prayed for the following reliefs:

- a. Special damages in sum of Kshs.4,780,952.00/=.
- b. Costs of this suit and interest
- c. Interest on (a) and (b) above at court rates
- d. Any further relief deemed fit by the court.

2. The respondent filed its defence on 5.8.2014 denying the alleged unfair termination and averred that she summarily dismissed the claimant for gross misconduct after according her a fair hearing. She therefore denied owing the claimant the reliefs sought and prayed for the suit to be dismissed with costs.

3. The suit was heard on 15.3.2016 and 26.10.2018 when the claimant testified on her behalf and the respondent was represented by her HR consultant Mr. Kennedy Efetha who testified as Rw1. Thereafter both parties filed written submissions.

Claimant's case

4. The claimant testified that she was employed by the respondent as HR manager for a period of 15 months from 8.2.2013. Her salary per month was Kshs.250,000 plus transport allowance of upto Kshs.100,000 and she was reporting to the respondents MD and HR Director.

5. She further testified that on 18.10.2013, she was summoned to an impromptu meeting the office of the MD where she also found the CEO HR Director Mr. Praason and HR Consultant (Rw1). That at the meeting she was told that there was plan to reduce manpower in the HR Department and she was therefore give the option to chose between resigning or termination. That when she declined to chose either of the options she was verbally suspended pending further communication in due course. That upon inquiry as to the reason for suspension, non was given.

6. She further testified the at on 22.10.2013, she instructed her lawyer to serve a demand letter for the lifting of the termination but the respondent responded through her lawyer denying that the contract of employment was terminated and accused the claimant of absenting herself from work without explanation. She however maintained that she was verbally suspended from 18.10.2013 to 4.11.2013 when she was terminated.

7. She admitted that she was served with a show cause letter via email but failed to respond because she received it too late after the time given to respond, and also because she had already instructed a lawyer. She contended that the termination was signed by the HR consultant

(Rw1) who was not an employee of the respondent. She further contended that her salary for the days worked in October was not paid.

8. In cross examination she admitted that she had some challenges with some of the Heads of Departments (HODs). She however denied that issues were raised regarding her relationship with other employees. She contended that there were no issues or warnings against her performance. She denied ever asking for time to improve her performance, during the meeting of 18.10.2013. She admitted that no suspension letter was given to her.

Defence case

9. Rw1 admitted that the claimant was employed by the respondent on 1.1.2013 as HR Manager for a period of 15 months and a monthly salary of Kshs.250,000. That her duties involved giving support to the managers and HODs and also to relate harmoniously with other members of staff.

10. Rw1 further testified that between September and early October, the relationship between the claimant, HODs and other staff members was very poor and her performance very low. That as a result she was invited to a performance review meeting on 18.10.2013 which was also attended by the HR Director Mr. Praason, CEO Mr. Anup and himself (Rw1).

11. Rw1 further testified that the claimant admitted that she had performance issues and problem with relating to other employees and HODs and agreed that she would give a written commitment to improve the following day and meet her on 25.10.2013 for assistance on how to bridge the gap between her and the HODs. However she never wrote the commitment to improve as promised and failed to report to work until 22.10.2013 when she served a demand letter through her lawyer alleging that she had been told to resign.

12. He further testified that on 30.10.2013, he served the claimant a show cause letter requiring her to explain her absence from work from 19th to 30th October but she failed to respond and as a result a decision was reached to terminate her services by the letter dated 4.11.2013.

13. On cross examination, Rw1 produced no evidence that the claimant had problems with HODs. He further produced no minutes to prove that there was a performance review meeting on 18.10.2013. He further produced no warning letter or other written evidence to prove that the claimant had failed to perform or discharge her duties. He contended that he had mandate from the respondent to issue show cause letters and termination letters on behalf of the company.

14. Rw1 admitted that he served the show cause letter on the claimant after her lawyer served a demand letter. He however contended the termination of the claimant's services was justified because she absconded duty from 19.10.2013 to 4.11.2013 and the effort to reach her by phone and letters was in vain . He denied that the claimant was forced to resign and refused.

Analysis and determination

15. There is no dispute that the claimant was employed by the respondent under a fixed term contract running from 1.2.2013 to 30.4.2014. There is further no dispute that the contract was prematurely terminated by the respondent by her letter dated 4.11.2013. The issues for determination are:

- a. Whether the termination was unfair.
- b. Whether the reliefs sought should be granted.

Unfair termination

16. 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(s) related to the employees conduct, capacity and compatibility or based on the employer's operational requirement; and that a fair procedure was followed.

Reason for termination

17. The reasons cited for the termination in the termination letter dated 4.11.2013 was absence from duty without permission and refusal to respond to the show cause letter dated 30.10.2013. The claimant admitted that she never responded to the show cause letter because she received it after the date given for her to respond and also because she had already handed over the matter to her lawyer. She further admitted that she was never served with any suspension letter by the employer during or after the meeting held on 18.10.2013. She further admitted that her poor relationship with other HODs which was discussed at the said meeting was true. Considering the said admissions, I find that on a preponderance of evidence the respondent has discharged her burden of proving a valid and fair reason for terminating the claimant's services.

Procedure followed

18. Section 41 of the Employment Act requires that before terminating the services of an employee for misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language he understands and in the presence of another employee or shop floor union official, the reason for which termination is contemplated and thereafter accord the employee and his/her chosen companion a chance to air the representations which must be considered before the termination is decided.

19. In this case the respondent commenced the disciplinary process by serving the claimant with a show cause letter on 30.10.2013 inviting her to respond in writing by 1.11.2013 and explain why disciplinary action should not be taken against her for the six(6) charges set out in the letter. The letter warned her that if she defaulted in making her response as required the respondent would take appropriate action against her.

20. There is no dispute that the claimant failed to respond to the show cause letter and her services were terminated on 4.11.2013. In the circumstances of this case, I would only say that the employer showed the willingness to accord the claimant a hearing but that was cut short by the claimant when she failed to respond to the show cause letter which expressly warned that her failure to respond would be treated as an admission that she had no defence to offer.

21. Having found that the respondent has proved that there were valid reasons for terminating the claimant's services and that she followed a fair procedure, I return that the termination was fair and lawful within the meaning of section 45 of the Employment Act.

Reliefs

22. In view of the foregoing finding, I dismiss the claims for salary for the remainder of the claimant's contract, and compensation for unfair termination.

23. I however award her the claim for salary upto 4.11.2013 when she was terminated being **35 days x Kshs.250,000 = Kshs.366,538.46**

26. days

24. I further grant the prayer for 11 leave days because it was not disproved by leave records by the employer. The award is **Kshs.250,000 x 11/26**

=Kshs.105,769.23.

Conclusion and disposition

25. I have found that the termination of the claimant was substantively and procedurally fair. I however enter judgment for the claimant for accrued employment dues in the sum of **Kshs.442,307.70** plus costs and interest at court rates from the date of filing the suit. The award of terminal dues will however be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 5th day of April, 2019

ONESMUS N. MAKAU

JUDGE