



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 287 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 23rd May, 2019)

HELLEN MUTHONI NGARE.....CLAIMANT

VERSUS

FRED K. ATHUOK

ALI R. HAJI

T/A IBRAHIM, ISSACK &

COMPANY ADVOCATES.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 27th February, 2014, seeking damages for unfair and unlawful dismissal and non-payment of terminal dues and damages.
2. The Claimant states that she was employed by the Respondent (Mohammed Ibrahim & Associates Advocates) on 1st September, 1994 as a Secretary with a starting salary of Kshs. 17,500/- per month subject to a review once a year.
3. She further averred that she was employed by the Respondent firm prior to the change in name to Ibrahim, Isaack & Company Advocates as well as a change in the composition of partners.
4. The Claimant further stated that she worked for Respondent herein for a total period of 19 years until her services were unlawfully and wrongfully terminated on 22nd October, 2013 without prior notice or reasons for termination given to her. She further contended that at the time of separation she was earning a net salary of Kshs. 89,916/- after all statutory deductions.
5. The Claimant contends that the 1st Respondent herein did write to the Claimant undertaking on behalf of the 2nd Respondent to pay the Claimant a commission of 10% over and above the set target of Kshs. 400,000/- on aggregate on conveyancing matters, which amount was also subject to review and renewal annually.
6. She further contends that as at December, 2011 she had surpassed her set target and made the law firm a total of 15,112,332.00/- and was entitled to 10% of the amount, which was not paid out to her.
7. The Claimant avers that her termination was unjustified and wrongful and was in total disregard to the provisions of Section 35, 41 and 45 of the Employment Act, 2007 and the Rule of Natural Justice and the ILO Convention No. 158.
8. In his Memorandum of Claim the Claimant prays that the Court finds her termination by the Respondent(s) was wrongful and proceed to make the following orders:-

- a) *Salary for October, 2013* **Kshs. 88,916.00**
- b) *Two Months Salary in lieu of notice* **Kshs. 177,832.00**
- c) *Accumulated leave Two (2) years* **Kshs. 177,832.00**

d) Severance packages for 19 years **Kshs. 1,689,404.00**

e) 12 Months Salary compensation for wrongful

Termination as provided under Section 49 (1)

(c) of the Employment Act 2007 **Kshs. 1,066,992.00**

f) 10% Commission on conveyancing as at

December 2010 based on 15,112,323/- **Kshs. 1,511,233.20**

Total **Kshs. 4,712,209.20**

g) 10% accrued commission from 1st January 2011 up to 22nd October 2013(to be assessed by the Court upon production of receipts by the Respondents)

h) Any other award or benefit that this Honourable deems fit and proper to grant in the circumstance of the case.

i) The Respondents to pay costs of this suit.

9. The 1st Respondent in its Defence to the Claimant's Memorandum of Claim dated 10th April, 2014 and filed in Court on 15th April, 2014, in which they state that the Claimant was engaged by the firm of Mohammed Ibrahim & Associates as a Secretary from 1st September, 1994 with a monthly salary of 17,500/-.

10. The 1st Respondent further avers that there was no change of name from Mohammed Ibrahim & Associates Advocates to Mohammed, Ibrahim, Isaack Advocates as alleged and instead averred that the said law firm ceased to exist in the year 1997 and that the Claimant's employment with the said firm was automatically by law terminated.

11. The 1st Respondent avers that the Claimant did not have an employment contract with the firm of Ibrahim, Isaack & Company Advocates. It is further the 1st Respondent's averment that the Claimant's salary of Kshs. 89,916/- was paid on account of commission and her meeting of set targets.

12. The 1st Respondent further avers that the Claimant failed to meet the targets to justify her monthly payments. It is further contended that the Claimant did not solicit any clients to make the firm the sum of Kshs. 15,112,332/- as alleged by the Claimant.

13. The 1st Respondent contends that the Claimant is guilty of gross misconduct and engaged in gross theft and collusion with others and was a ripe candidate for summary dismissal.

14. The 1st Respondent urged this Honourable Court to find that the instant Claim is grossly misconceived and has no basis neither in law nor in fact and prayed that the same be dismissed with costs.

15. The 2nd Respondent on the other hand filed a Response to the Memorandum of Claim dated 10th April, 2014 and filed in Court on 15th April, 2014, in which he avers that he has never employed and/or assumed responsibility of the Claimant at any time upon becoming a partner on 27th August, 2013. He further averred that the Claimant's services were none the less lawfully terminated and was part of re-organisation within the law firm.

16. The 2nd Respondent avers that he is not aware of the commission payable as alleged by the Claimant herein and further avers that the same is illegal and therefore not enforceable in law as it amounts to sharing profits with an unqualified person contrary to the provisions of the Advocates Act.

17. The 2nd Respondent contends that the Claimant is not entitled to the reliefs as sought in the Memorandum of Claim and that the instant Claim be dismissed with costs.

Evidence

18. On 17th July, 2018, the Claimant (CW1) in her testimony stated that she was employed by the Respondent from 1st September, 1994 as a Secretary. CW1 further testified that her services were terminated by the Respondent on 22nd October, 2013 and that her termination letter was signed by Fred K. Athuok and Ali Haji (The Respondents herein).

19. CW1 testified that she was neither given any reasons for termination nor was she subjected to any disciplinary hearing prior to her termination. She further testified that her termination letter indicated that the Respondent would calculate her terminal dues and that the same would be forwarded to her. She however stated that she is yet to receive any payments as terminal dues from the Respondents herein.

20. CW1 stated that the Respondents vide a letter dated 10th November, 2010 duly signed by both Respondent's herein was informed that she

would be eligible to receiving a commission of 10% on conveyancing matters if she met her target of Kshs. 400,000/-. It was her further testimony that she was not paid the commission as communicated despite surpassing her set target.

21. CW1 further stated prior to her termination she was not issued with any notice and that she did not receive her salary in lieu of such notice. She further confirmed that her salary at the time of separation was Kshs. 88,916/-.

22. It was CW1's contention that she did work for the Respondent firm and that the Cheque paid out to her at the time of separation was duly signed by the 1st Respondent.

23. On cross-examination CW1 confirmed that she was first employed by the firm of Mohammed Ibrahim & Associates in the year 1994 as a secretary and was earning a monthly salary of Kshs. 17,500/.

24. CW1 further stated that she was issued with an employment contract that did not have a termination clause. Further that Mohammed Ibrahim is not one of the Respondents herein.

25. CW1 further testified that the firm changed names from Mohammed Ibrahim & Associates to Ibrahim, Isaack & Company Advocates following departure of Ibrahim J who joined the Judiciary leaving the firm to Adhuok and Haji the Respondents herein. She further testified that she continued working in the firm after the change and that she was not issued with a fresh appointment letter to that effect.

26. On further cross examination CW1 confirmed that her contract of employment did not provide for 2 months payment in lieu of notice despite the fact that she claims for the same. She further testified that she did not proceed on leave the year 2012 and 2013.

27. CW1 urged the Court to allow her Claim as drawn.

28. The Respondents on the other hand both testified on 28th February, 2019. RW1 (Ali Haji) testified that he joined the law firm of Ibrahim Isaack & Company Advocates in the year 2009 and was made partner on 13th September, 2013.

29. RW1 further testified that he did not employ the Claimant and that the Claimant's services were lawfully terminated 1 month following the formation of the partnership between himself and the 1st Respondent herein.

30. RW2 (Fred Athuok, 1st Respondent) testified that he was employed in the firm of Mohammed Ibrahim & Associates as an associate. He further testified that he later became partner on 13th September, 2013 following his partnership with Ali Haji.

31. It was RW2's further testimony that the Claimant's services were lawfully terminated following exit of her boss and following a disciplinary issue with the Claimant. It was his further evidence that the issue raised in the disciplinary hearing are yet to be resolved to date.

32. RW2 testified that the firm made deductions for NSSF for the Claimant and remitted the same as required by law during the subsistence of her employment with the previous partner.

33. RW2 urged the Court to dismiss the instant Claim with costs.

Submissions

34. The Claimant submitted that he was employed by the Respondents herein as evidenced by the existence of the Contract of employment between the Respondents and the Claimant herein.

35. It was further submitted that the Claimant was an employee as defined under both the Black's Law Dictionary and Section 2 of the Employment Act. The Claimant therefore urged the Court to find that there existed an employer-employee relationship between the Claimant herein and the Respondents and relied on the case of **Krystalline Salt Limited Vs Kwekwe Mwakele & 67 Others (2017) eKLR** for emphasis.

36. It is further submitted that there existed an employer-employee relationship as the Claimant was expected to report to work from 8.00 am to 5 .00 pm with an exception of lunch break and would further be required to work on Saturdays when need arises clearly showing that she was duly under the Respondents employment.

37. The Claimant further submitted that she did honour all rights and obligations under the Contract, the Respondent on the other hand reneged on its obligations and cited the case of **William Muthae Muthami Vs Bank of Baroda (2014) eKLR** where the Court observed:-

“In the law of contract, the aggrieved party to an agreement must, in addition to, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

38. The Claimant averred that she did through documentary evidence as well as her oral testimony prove that there existed a contact between herself and the Respondents herein and urged the Court to find as such.

39. The Claimant contended that she is entitled to the commission as agreed under the Law of Contract and that the Court ought to interpret

the same as was intended by the parties and grant the Claimant commission as agreed between herself and the Respondents herein. For emphasis the Claimant cited the Authorities of **Hassan Zubeidi Vs Patrick Mwangangi Kibanya & Another (2014) eKLR** and **Michael Njenga Vs Rajmuk Investments Limited & 4 Others (2014) eKLR**.

40. The Claimant further relied on the Provisions of Section 49 of the Employment Act, 2007 and urged the Court to award her Kshs. 1,511,232.20 as pleaded.

41. It was the Claimant's submission that her termination from the Respondent's employment was procedurally unfair and unlawful. She further submitted that the Respondents failed to comply with the provisions of the Employment Act, 2007 with regards to procedure, fair hearing and due process for termination. The Claimant for emphasis cited the case of **Caliph O. Ogega Vs National Social Security Fund Cause No. 280 of 2013** where the Court held as follows:-

“Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is as per Section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on Section 35 and 41 of the Employment Act. ... due process must be followed.”

42. The Claimant therefore submitted that she is entitled to all the remedies available in law for termination of her employment which was unprocedural and thus unfair.

43. The Claimant further urged the Court to allow the remedies as sought in her Claim as filed as the same are available to her by virtue of Section 49 of the Employment Act, 2007. For emphasis the Claimant relied on the case of **D.K Marete Vs Teachers Service Commission (2013) eKLR**.

44. In conclusion the Claimant urged the Court to allow the instant Claim in the best interest of justice and guided by Article 159 of the Constitution of Kenya, 2010.

Respondents' Submissions.

45. It was submitted on behalf of the Respondents that there has never been an employer-employee relationship existing between itself and the Claimant herein as there has never been a contract of employment whether oral or written existing between them and the Claimant. It is further submitted that the firm only came into existence on 27th August, 2013 as indicated in the partnership deed produced by the Respondents.

46. The 1st Respondent further submitted that the Claimant was a party to fraudulent activities which led to the collapse of the previous partnership and thus was justified not to employ her in the new partnership between the 1st and 2nd Respondent herein.

47. It is the Respondent's submission that the Claimant is not entitled to compensation for unfair termination as pleaded as there was no employer-employee relationship between the Claimant and the Respondents.

48. On the issue of payment of commission, it was the Respondent's submission that the same must fail as it is illegal to share profits with a person who is not qualified as a legal practitioner and placed emphasis on the provision of Section 37 of the Employment Act, 2007. The Respondent also cited and relied on the Authority of **Godfrey Makindu Vs Trans Business Machines Limited (2013) eKLR** for emphasis.

49. It is further the Respondents submissions that the Claimant is not entitled to Severance Pay as his termination was not on account of redundancy, whereby such terminations are subject to payment of Severance Pay as provided by Section 40 (1) (g) of the Employment Act, 2007. The Respondent further cited the case of **Elizabeth Washeke & 62 Others Vs Airtel Networks (K) Ltd & Another (2013) eKLR**.

50. In conclusion, the Respondents submitted that the instant Claim lacks merit and ought to be dismissed with costs to the Respondent.

51. I have examined all the evidence and submissions of both parties. The issues for this Court's determination are as follows:-

1. Whether there was an employment contract between the Claimant and the Respondent.

2. If yes, if the said contract was procedurally and lawfully terminated.

3. Whether the Claimant is entitled to the remedies sought.

52. On the 1st issue, the Claimant was indeed initially employed on 1/1/1994 as per the offer of employment letter Appendix 1 by the firm of Mohamed Ibrahim & Associates.

53. The Respondent further relied on her Appendix 3 which is a letter addressed to her signed by Fred K. Athuok & Sospeter Njoroge on behalf of Ibrahim, Issack & Company Advocates dated 18/11/2010 offering to pay her a commission of 10% subject to meeting a set monthly target of 400,000/=.

54. Mr. Sospeter Magua Njoroge seemed to have existed this firm as per the notice of 27th September 2013 (Appendix 2).

55. It is not clear how the firm of Mohamed Ibrahim and Associates became Ibrahim, Issack & Company Advocates but the 1st Respondent herein was indeed part and parcel of Ibrahim Issack & Company Advocates as he is the one who signed the letter offering the Claimant commission of 10% on meeting her targets.

56. The Respondent sought to rely on the Registration of Business Names Act (their Appendix 1(a) to show there was a change in respect of business name of Ibrahim, Issack and Company to include particulars of the Respondent. This is dated 13.11.2013.

57. This change was to supersede the previous change dated 7.7.2008, which moved Ibrahim, Issack & Company Advocates to include names of 3 other partners (Appendix 2).

58. It is apparent that as at 7/7/2008, the firm of Ibrahim Isaack & Company Advocates was in existence and the Respondents herein were partners and that is why the 1st Respondent wrote to the Claimant on the issue of commission on conveyancing matters which the 1st Respondent did not deny as per the letter dated 10.11.2010.

59. The Claimant indicated that the firm of Mohamed Ibrahim & Associates changed their name to Ibrahim, Issack and Company. This is indeed the position as evidenced from the Respondent's own document number 2 on their list of documents dated 8/12/1997.

60. The Partnership particulars also changed again with new directors coming in who are the Respondents herein with one Sospeter Magua Njoroge (Document No.3).

61. Under the new Partnership, the Claimant continued serving in the firm of Ibrahim, Issack and Company Advocates and was even terminated on 22.10.2013 after the new partnership deed came in force while employed by the Respondent herein.

62. The contention by the Respondents that the Claimant was never their employee is therefore not true. The Claimant was ever usually paid by the Respondent and this is also evidenced by the cheque dated 25/9/2013 before her termination.

63. I therefore find that there was an employment relationship between the Claimant and the Respondent.

64. The Claimant was indeed terminated by the Respondents on 22.10.2013 as per the termination letter (Appendix 5). There are no reasons given for the termination nor is there any indication that the Claimant was subjected to due process. This is contrary to Section 43 of Employment Act which states as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

65. And Section 41 of Employment Act which provides as follows:-

1) “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

66. Given that the Claimant did not cite any valid reasons for the termination nor subject Claimant to due process, I find the Claimant's termination unfair and unjustified as provided for under Section 45(2) which states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

67. In terms of remedies, having found as above, I find for the Claimant and award her as follows:-

1. 1 month salary in lieu of notice = 88,916/=.

2. Salary for 22 days earned in October 2013 = $22/31 \times 88,916 = 63,101/=$.

3. Leave pay for 1 year = 88,916/=

4. 8 months salary as compensation for unlawful termination = $8 \times 88,916 = 711,328$

Total = 952,261/= less statutory deductions

5. Claim for severance pay is rejected as there was no redundancy situation.

6. The claim for commission is also not payable as it is not proved.

7. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 23rd day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyamwaya holding brief Muchemi for Claimant – Present

Anyoka holding brief Roble for the Respondent – Present