



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 432 OF 2014

SWK.....CLAIMANT

VERSUS

DIAKONIE KATASTROPHENHILFE..... RESPONDENT

JUDGMENT

Introduction

1. The claimant filed this suit on 20.3.2014 alleging that her contract of service was unfairly terminated by the respondent on 31.12.2013. She further averred that during her employment by the respondent she was discriminated and sexually harassed by the respondent's Director. She therefore prayed for the following reliefs:-

- a. Difference in salary from 1st January to 31st December, 2013 being Kshs.240,000/=
- b. Pension payment for the month of April, 2012 amounting to Kshs.20,000/=
- c. Exemplary damages for discrimination
- d. Terminal dues as particularized in paragraph 36 above. (Kshs.1,250,000.00)
- e. Damages for unfair termination
- f. Order that the Respondent compensates the claimant for violating the Claimant's right to fair labour practices under Article 41(1) of the constitution.
- g. Costs of the Suit
- h. Interest in (a), (b) and (d) above.
- i. Any other relief as this Honourable Court may deem fit and just to grant.

2. The respondent filed defence on 14.5.2014 denying the alleged unfair termination of the claimant's employment and averred that the contract of service expired automatically by effluxion of time. She further denied the alleged discrimination and sexual harassment of the claimant and demanded strict proof. Finally, she denied the reliefs sought by the claimant and prayed for the suit to be dismissed with costs.

3. The issues arising from the pleading are whether the claimant's contract was unfairly terminated by the respondent or it lapsed automatically by effluxion of time; whether the claimant suffered discrimination and sexual harassment while in employment, and finally whether the reliefs sought should be granted.

4. The suit was heard on 21.11.2018 when the claimant testified as Cw1 and the respondent called Mr. Mathew Kubebea Masinde who testified as Rw1. Thereafter only the claimant filed written submissions.

Evidence

5. Cw1 testified that she was employed by the claimant on 1.4.2012 as Tea Assistant/Receptionist under one year contract earning

Kshs.84,000 per month. In August 2012 she was promoted to Administrative officer earning a gross pay of Kshs.100,000 per month. She however contended that her predecessor in that office who left before her appointment was earning Kshs.120,000 per month for the same job.

6. She further testified that due to her stellar performance, she was promoted to Administrative/Logistics Officer in January 2013 but her cry for salary review was ignored while the pay for the other staff was significantly increased. She contended that as a result of the claim for pay increase, she was discriminated in the issue of salary and also by being denied opportunity to attend meetings, seminars and workshops like the other employees. That she was frustrated and humiliated but failed to report the matter to the respondent's

7. Cw1 further contended that the respondents Director used sexual innuendos on several occasion with the aim of embarrassing and humiliating her in the presence of her colleagues and also occasionally described her as too old to be moulded or as a single lady who could not represent the interest of the respondent in meetings. She attributed the said discrimination, sexual harassment and termination of her employment to her clamour for equal pay for equal work. She therefore prayed for the reliefs sought in the suit.

8. In cross examination, Cw1 admitted that she signed the contract of service running from 1.4.2012 to 31.12.2012 and the second one running from 1.1.2013 to 31.12.2013. She further admitted the clause 14 of the last contract provided termination by a notice of one month; end of contract by 7 days' notice; and through dismissal for misconduct. She also admitted that she was terminated under the second option of expiry of the contract term. She however contended that she was given one month notice and not 7 days that the contract would not be renewed. She further contended that the said notice was given in circumstances of discrimination.

9. Cw1 maintained that the respondent's Director harassed her using insults like "if your continue eating that cake your ass will become big".

She further contended that she was discriminated by being denied opportunity to represent the organization in workshops and seminars but she produced no letter that invited her to any of the said functions. She however admitted that after the termination she was paid salary for December 2013 plus bonus of 13th month salary like all the other employees.

10. Rw1 is now a consultant but from 2012 to December 2013, he was employed as the operations Manager by the respondent and later rose to become the Deputy Regional Director. He confirmed that the claimant was employed by the respondent under one year contracts the last one running from January to December 2013. He stated that the claimant was appointed as Administrative and Logistics Officer until her contract term lapsed. He denied that the contract was terminated by the respondent and maintained that it ended by effluxion of time. He testified that the claimant was given more than 7 days notice that her contract would not be renewed.

11. Rw1 further contended that after the lapse of the contract the claimant was paid salary for December 2013 plus bonus of 13th salary. He denied the reliefs sought by the claimant and contended that the claimant can pursue her pension from the pension scheme.

12. Rw1 admitted that the staff regularly ate cakes in the office but contended that no insults were made. He contended that if such insults were made, which he denied, the claimant should have raised the matter with the Director or report to his seniors on the region or Headquarters. He termed the alleged sexual harassment as an afterthought since the claimant never raised them before the end of her contract. As regards the claim for unequal pay between the claimant and her predecessor, Rw1 contended that they could not earn the same salary because they were serving under separate contracts.

13. In cross examination, Rw1 admitted that it was possible that the alleged insults were made in his absence because he was not always in the office. He however maintained that the claimant had the opportunity to raise a complaint against the Director at the Head Quarters through her supervisor or Rw1 or just report directly to the Headquarters.

Analysis and Determination

14. After careful consideration of the pleadings, evidence and submissions presented to the court, there is no dispute that the claimant was employed by the respondent in various capacities under fixed term

contracts. There is further no dispute that her last contract ran from 1.1.2013 to 31.12.2013 and it was not renewed. The issues for determination have already been framed herein above and I will now answer them.

(a) Unfair termination or the contract lapsed

15. Cw1 admitted that her contract was to expire on 31.12.2013 provided the employer served 7 days notice for non renewal. She admitted that she was served with a one month notice indicating that the contract was not going to be renewed. In her view the notice was served in the circumstances of discrimination. I however see no merits in that contention and find that the contract of service was not unfairly terminated by the respondent but rather ended automatically by effluxion of time.

(b) Sexual harassment, insults and discrimination

16. The claimant alleged that she was insulted by the respondent's director using sexual innuendoes and further discriminated in terms of her gross pay, salary increments and also in relation to attending workshops and seminars. Rw1 denied the alleged harassment and described the same as after thought because none had been report by the claimant before the end of her contract. He further denied the alleged discrimination and started that the claimant was not entitled to the same salary as her predecessor because they served under separate contracts.

17. After careful consideration, I find no merits in the claimants allegation of sexual harassment, insults and discrimination. The alleged insults were said to have been verbally done in the presence of colleagues and none of them was called as witnesses. Secondly, the allegations are being made after the separation and as such, I agree with Rw1 that they are after thoughts. As regards discrimination, the claimant has not proved that the other staff got salary increment and she was denied. She has also not proved that, indeed, her predecessor was earning Kshs.120,000 per month for the same job she was doing and being paid Kshs.100,000. She further did not prove that she had the same expertise and experience with the said predecessor. She also did not produce any evidence to show that she had indeed written to the employer seeking for her salary to be increased from Ksh.100,000 to Kshs.120,000 per month. Finally she did not produce any letter inviting her to any seminar or workshop and the Director denied her permission. Consequently, I return that the claimant has failed to prove on balance of probabilities that she was sexually harassed, insulted and discriminated against.

Reliefs

18. In view of the finding herein above that the claimant's contract of service was not unfairly terminated but rather ended automatically by effluxion of time , and that she was not harassed or discriminated against by the employer, I dismiss the prayers sought save for the claim for pension which I direct her to pursue through the pensions scheme under the relevant rules.

Conclusion and Disposition

19. I have found that the contract of serve herein ended automatically after the expiry of the contract term. I have further found that the claimant has not proved that she was sexually harassed, insulted or discriminated against during her employment by the respondent. Finally I have found that the relief sought by the claimant are not warranted save for the claim for pension which I have directed the claimant to pursue the same from the pension scheme under the scheme's rules. Consequently, the suit herein stands dismissed save for the direction on the pension. Each party to bear her own costs.

Dated, Signed and Delivered in Open Court at Nairobi this 17th day of May 2019

ONESMUS N. MAKAU

JUDGE