



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1341 OF 2016

GLORIA CHEPKOECH RONO.....CLAIMANT

- VERSUS -

SAURUS NETWORKS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 21st June, 2019)

JUDGMENT

The claimant filed the statement of claim on 12.07.2016 through Kimathi Wanjohi Muli Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration be issued that the summary dismissal of the claimant from the respondent's employment amounted to gross violation of the claimant's constitutional rights in particular Articles 27(4) and 41 (1) of the Constitution of Kenya 2010, and her statutory and contractual rights thus amounting to unfair and unlawful dismissal.
- b. An order of declaration that the claimant's dismissal on account of pregnancy amounted to discrimination thus a gross violation of her rights under section 5(3) of the Employment Act, 2007.
- c. Judgment be entered against the respondent for unpaid salary arrears for February and March 2016, balance of leave days, maternity leave earned but not taken and other terminal dues amounting to Kshs. 1, 271, 767.00 (being one month salary in lieu of notice Kshs. 101, 103.43; salary arrears for February 2016 Kshs. 15, 000.00; unpaid salary for March 2016 Kshs. 101, 103.43; 7.25 earned but untaken annual leave Kshs.28, 192.00; maternity leave earned but not taken Kshs.303, 310.29; house allowance for 16 months at 15% of monthly pay Kshs.242, 648.00; deducted and unremitted PAYE Kshs.405, 840.00; and service pay for 1year 4 months Kshs.74, 570.00)
- d. 12 months' compensation in damages for unfair and unlawful summary dismissal Kshs. 101, 103.43 x12 =Kshs.1, 213, 241.16.
- e. An order for award of general damages to the claimant for discrimination on account of pregnancy.
- f. A mandatory order be issued compelling the respondent to furnish the claimant with a certificate of service and a P9 Form evidencing PAYE paid on her behalf to Kenya Revenue Authority (KRA).
- g. An order compelling the respondent to pay KRA's deducted and unremitted PAYE tax together with interest and penalties thereon.
- h. Costs of the suit.
- i. Interest on (c) above at commercial rate from the day of filing the claim herein until payment in full.
- j. Any other and further relief that the Court may deem just and fit to grant in the circumstances.

The response to the statement of claim was filed on 01.08.2016 through P.M. Muchiri & Company Advocates. The respondent urged that the Court had jurisdiction but the claimant had no reasonable cause of action against the respondent.

There is no dispute that the parties were in a contract of service. The respondent employed the claimant in the position of a Senior

Accountant effective 03.12.2014 as per the letter of offer dated 25.11.2014. The claimant served until 01.04.2016 when she was terminated from employment. The letter stated that the termination was as a result of gross negligence in performing the assigned duties which had cost the respondent. The last working date was to be 01.04.2016.

The parties filed consent on 16.04.2019 and which was adopted by Court on 30.04.2019 thus:

- a. Pursuant to Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the claim/suit herein be determined on the basis of pleadings, affidavits, documents filed and submissions of the parties.
- b. The claimant do file and serve her submissions within fourteen (14) days from the date of adoption of this consent as an order of court, and the respondent to file and serve its submissions within fourteen(14) days from the date of service.
- c. This suit be listed before the trial Court at the earliest mention date available to take further directions.

The parties filed their respective submissions and the Court has considered the material on record.

The **1st issue** for determination is to establish the reason for termination. The claimant's case as per the letter dated 05.04.2016 to the Labour Officer, Nairobi Area was stated thus, **"...I would like to state categorically without fear of contradiction that all this allegations are malicious and not founded on any basis but the reason for my dismissal is as a result of my current situation since I am expectant and I was due to proceed to my maternity leave sometimes in May 2016 hence they thought that paying me while on leave will be unnecessary cost to the Organisation."**

The respondent has pleaded that the claimant's employment was terminated on account of her failure to adhere to respondent's guideline to migrate to a progressive system of accounting as had been introduced by the respondent. That the claimant practically refused and declined to adapt to the new system which was to run concurrently with the out-going system. Further the claimant prepared botched accounts and financial statements hence failing to do her duties as was expected. It is further alleged that she failed on her duties by not keeping proper books of accounts. That on 15.03.2015 she sent out wrong details of accounts to the respondent's client on fees due from the client. The response to the claim enumerates many other instances of the claimant's failure to perform her duties. Nowhere in the response to the claim did the respondent state that prior to the termination the claimant was accorded due process of a notice and a hearing as per section 41 of the Employment Act, 2007. On that account the procedure for termination was unfair. At the same time the respondent has failed to show that the reason for termination was genuine as stated in the letter of termination and as envisaged in section 43 of the Act – as no evidence was provided in that regard and the allegations remained bare. The Court returns that the procedure for termination was unfair and the alleged reasons for termination were not established at all; and the termination was unfair in view of sections 41, 43, and 45 of the Act.

The Claimant has prayed for 12 months compensation. The respondent has admitted that the claimant was due to go for maternity leave. In so far as the termination letter did not state that the looming maternity leave was the reason for termination and the claimant offered no evidence to substantiate such a reason, the allegations of discrimination on that account will fail. However the admission by the respondent that the claimant was about to go for maternity leave is a factor the Court returns to have aggravated the circumstances of the termination. The Court has considered that the claimant desired to continue in employment but had served for slightly over one year. In view of the factors considered as against provisions of section 49 of the Act, the claimant is awarded 6 months' pay at Kshs. 101, 103.43 x 6 making **Kshs.606, 620.58**.

The **2nd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court finds as follows:

- a. The Court has already found that upon the material on record there was no evidence that the termination was on account of pregnancy and the allegations of discrimination will fail. The general damages claimed will therefore fail as unjustified.
- b. The Court returns that there was no evidence that the claimant was deducted PAYE and the money not remitted to the KRA. In such circumstances the prayers with respect to PAYE will fail.
- c. The claimant was abruptly terminated and is awarded one month pay in lieu of notice **Kshs. 101, 103.43** per section 35 of the Act.
- d. The parties agreed on a monthly basic pay and there appears to have been no grievance about house allowance during performance of the contract. The Court returns that in absence of any other material parties agreed on a consolidated pay and the claim and prayer for house allowance throughout the service is unfounded.
- e. The claimant is awarded salaries for February 2016 **Kshs.15, 000.00** and March 2016 **Kshs. 101, 103.43** as prayed for because there was no evidence that she had been paid at all. She is also awarded leave pay as prayed and under contract and section 28 of the Act **Kshs. 28, 192.00**. The claimant was a member of the NSSF and service pay is declined in view of the provisions of section 35 of the Act. In particular the Court returns that the pay slips on record show that the claimant was deducted NSSF and the deduction was not in dispute at all.
- f. The maternity leave pay is declined because it never accrued after the termination took effect.

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

- a. The declaration that the sudden termination on account of alleged gross misconduct was unfair.

b. The respondent to pay the claimant a sum of **Kshs.852, 019.44** by 01.08.2019 failing interest to be payable thereon from the date of this judgment till full payment.

c. The respondent to deliver to the claimant a certificate of service per section 51 of the Act by 01.07.2019.

d. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 21st June, 2019**.

BYRAM ONGAYA

JUDGE