



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2611 OF 2016

PATRICIA S. MUMO.....CLAIMANT

VERSUS

ISIS AFRICA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 31st July, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 21.12.2016 through Guandaru Thuita & Company Advocates. The claimant prayed for judgment against the respondent for:

a) Payment of Kshs. 1, 309, 000.00 being:

i. Salary for 25 days worked in May 2014 Kshs.75, 000.00.

ii. Millage allowance for May 2014 (16 days) Kshs.57, 600.00.

iii. Airtime allowance for May 2014 Kshs.3, 000.00.

iv. Parking allowance for May 2014 Kshs.1, 000.00.

v. Lunch allowance for 16 days Kshs.2, 400.00.

vi. One month salary in lieu of notice Kshs.90, 000.00.

vii. 12 months' salaries compensation for loss of employment Kshs. 1, 080, 000.00.

b) Payment of Kshs.57, 600.00 mileage allowance for May to be accounted for by the respondent.

c) An order compelling the respondent to accept payment of the balance of the purchase price for the vehicle which amount shall be set off from the claimant's dues from the respondent or paid by the claimant whichever the Court finds appropriate and upon payment the respondent to transfer the vehicle to the claimant.

d) An order for the respondent to pay the costs of the suit plus interests thereon.

The respondent filed on 22.02.2017 the memorandum of defence and counterclaim through Mungai Kalande & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs and prayed for:

e) A mandatory injunction be issued compelling the claimant to immediately surrender the motor vehicle registration No. KBQ 725 N to the respondent.

f) An order for damages against the claimant for the illegal and unlawful use of the motor vehicle from the date of resignation from employment with the respondent until the date of surrender or return of the motor vehicle back to the respondent.

g) Special damages for loss of use of the said motor vehicle registration No.KBQ 725N to be tabulated from the date of resignation being 19.05.2014 to the date of the judgment herein.

The parties are in agreement that they were in a contract of service. The respondent is in the business of marketing and selling of various prescription drugs across Kenya. Effective 01.01.2012 the respondent employed the claimant as a Medical Sales Representative. The terms of the contract were spelt out in a written contract of service. To assist the claimant effectively and efficiently perform her duties the parties agreed on 01.03.2012 that the respondent would sell to the claimant its Toyota Corolla car KBQ 725 N at a cost of Kshs.1, 400, 000.00 being a loan which attracted interest rate at 18% per annum. The claimant was required to repay the loan at Kshs.29, 375.00 per month offset from her accumulated monthly mileage allowance. The car was to be registered in the claimant's name upon completion of repayment of the loan. The claimant says she was dissatisfied with the respondent's conditions of service and on 19.05.2014 or thereabouts she submitted her one month resignation notice. The resignation letter addressed to the respondent's General Manager stated as follows:

“Dear Sir,

Please accept this letter as my formal notice of resignation from Isis Africa with effect from today 19th May 2014. I have enjoyed my employment here and appreciate all I have learned. I would like to thank you for having me as part of your team.

While I believe that I am moving for good reasons, I am sorry to leave, and I thank you for your support during my time with the company, which I have found enjoyable and fulfilling.

I wish you all the best and God bless Isis Africa.

Yours faithfully,

Signed

Patricia Mumo”

By the letter dated 26.05.2014, the respondent's Sales Manager one Partrick Maina conveyed to the claimant that she had given the resignation letter of 19.05.2014 as per the rules but it had been noted that on Friday 23.05.2014 she had not started to work by 10.00am and on Monday 26.05.2014 she had reported at the office at midday. The letter continued that in view of the instances it had been decided that the best thing was to release the claimant immediately as she was not able to carry out her duties as expected by the organisation. It was stated that for 2014 she was not entitled to any leave days and the 8 extra leave days she had taken would be deducted from her May monthly salary so that she would be paid for only 9 working days for May 2014. She was to settle her outstanding loans and motor vehicle schedule by June 2014.

At the hearing on 26.06.2019 the parties recorded consent order thus, **“By consent the claimant to pay the respondent the outstanding price of the car in issue being Kshs. 904, 475.00 and as may be the case, to be set off from the amount of money that may be found payable to the claimant by the respondent in the present suit; and accordingly, the respondent hereby abandons prayer (a) in the counterclaim on return of the car.”** Further, by consent and with respect to the counterclaim, it was ordered, **“By consent the prayer on general damages is surrendered.”**

First, the Court has considered the consent orders as recorded. It is clear that the parties have agreed that the claimant would have the motor vehicle in issue subject to paying the outstanding price. Looking at the prayers in the counterclaim, the Court returns that the same are fully compromised. It was urged for the respondent that the claimant should pay interest on the outstanding price from the date of separation to the date of full repayment and she should also pay costs of the suit. The Court will make findings on the issues later in this judgment.

Second, it has been submitted for the claimant that the only issue for determination on her part of the case is whether the termination was unfair. The termination letter is clear that after the resignation notice of 19.05.2014, the respondent expected the claimant to continue at work for 30 days until 18.06.2014. The resignation letter may have been ambiguous in a way but the parties' subsequent conduct is clear that it was understood that the claimant was to serve for one month from 19.05.2014 and thereafter leave the employment. The claimant's submission that the employment had lapsed effective 19.05.2019 was clearly misconceived because then the respondent could not have issued the letter of 26.05.2014 lamenting about how the claimant may have failed to be punctual at work on the 2 days stated in that letter of 26.05.2014.

Accordingly the Court returns that the claimant's termination was by the respondent's letter of 26.05.2014. Was the termination unfair? The Court has considered all the circumstances of the case. The claimant had already decided to leave and as at 26.05.2014 she had scheduled to work only up 18.06.2014. In terms of the days she expected to work with the respondent, she would only work and get paid until 18.06.2014. It is true that the respondent failed to accord the claimant a notice and a hearing as per section 41 of the Employment Act, 2007 and as submitted for the claimant. The claimant testified that in June or July 2014 she had got an alternative employment. Thus, the claimant must have substantially mitigated her loss for the days she'd have worked for the respondent from 27.05.2014 to 18.06.2014. The Court returns that the claimant, on a balance of probability, effectively moved from the respondent's employment to another employment by her new employer. Though the termination was without notice and a hearing, the Court returns that in view of the circumstances of the separation, the claimant is not entitled to any compensation under section 49 of the Employment Act, 2007 because she had already made up her decision to leave the respondent's service, she immediately got employed by another employer, and she moved away with the car the respondent had provided specifically to assist the claimant deliver on her assignments while in the respondent's service. Further, it was an empty claimant's allegation that she resigned due to intolerable working conditions because the resignation letter never mentioned such conditions, no evidence was provided in that regard, and it was clear that the claimant moved to a new employer.

Third, there appear no submissions made for the respondent to guide the court on the interest as was urged for the respondent. The interest was not specifically prayed for. The court will allow the claimant to pay the principal some by 01.12.2019 failing interest will run thereon from date of this judgment till full payment. The Court has considered that in any event the claimant had designed to leave employment and she was liable to pay the interest under the contract relating the use of the car.

Taking the parties' margins of success into account, each party to bear own costs of the suit.

In conclusion the claimant's suit and the respondent's counterclaim are hereby determined with orders:

- a) The claimant to pay the respondent the sum of **Kshs. 904, 475.00** by 01.12.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- b) Each party to bear costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Wednesday 31st July, 2019.**

BYRAM ONGAYA

JUDGE