



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 2239 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JEROTICH SEII HOULDING.....CLAIMANT

VERSUS

INTERNATIONAL RESCUE COMMITTEE (IRC).....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent as a Country Director on 10th September 2014 and worked until 24th July 2014 when her employment was terminated. on grounds of poor performance. She avers that she was summoned to a hearing on 22nd July 2018 when she was on sick leave. She further avers that the termination was malicious for reasons that she did not receive any adequate notice of her intended termination, she was not given a fair hearing and she was humiliated as she was not given full details to support her poor performance.

She seeks the following reliefs in her Memorandum of Claim filed on 18th December 2014:

1. A declaration that the Claimant suffered unfair and unlawful termination by the Respondent.
2. An order for reinstatement to her previous position without any loss of benefits.
3. Damages for the mental stress, harassment and discrimination.
4. Payment of all lawful terminal dues set out in the Claim.
5. Maximum 12 months' compensation for wrongful termination.
6. Costs of the suit.

The Respondent filed its Memorandum of Defence on 10th March 2015. It avers that the termination of the Claimant's employment on grounds relating to her poor performance was procedural, warranted and lawful. It further avers that the Claimant was notified of the concerns relating to her performance. It denies the allegations relating to malice, harassment, intimidation and/or discrimination. It further avers that the process of the Claimant's termination was initiated after her sick leave ended as she had confirmed that she was not on sick leave but on administrative leave at the time she was issued with the show cause notice. It further avers that the Claimant's terminal dues were paid to her.

Claimant's Case

The Claimant testified that she was employed by the Respondent on 10th September 2012 as a Country Director. She worked until 24th July 2014. She testified that prior to 24th July 2014 she enjoyed good relations with the Respondent. However on 24th July 2014 she noticed a change in attitude from her supervisor and resultant actions against her.

She testified that she received her performance appraisal in early February 2014, which showed that there was unacceptable performance on her part. She testified that this was contrary to the 2013 appraisal thus she declined to sign the February 2014 appraisal. She testified that she questioned the reservations given to her which included putting her on a performance improvement plan which also required her to work closely with her supervisor and others.

She testified that in June 2014 she held regular meetings with her supervisor and that on 28th June 2014 she was hospitalised following a meeting on 27th June 2014, which was tense.

She testified that the meeting of 27th June 2014 was to be a usual follow up meeting but at the meeting she was informed by her supervisors that the relationship between the Respondent and herself was not working and that the only option was separation. She testified that on 18th July 2014, which was her last day of sick leave, she received a Notice to Show Cause, which she was required to respond by 22nd July 2014, the date when the show cause meeting was scheduled. She testified that she attended the meeting and gave her response to the allegations. That the issues raised were on fundraising and communication. That she gave a detailed interpretation of her accomplishments in 2013 and also responded to the issue of communication.

In cross-examination, she testified that her termination was abrupt and that she was on an action plan for 4 months with focus on some deliverables. She admitted that the letter issued to her set out the areas of concerns and that she was invited to a show cause meeting. She admitted that there was concern in the delay in meeting targets and deadlines.

She denied that the letter from her doctor was intended to interfere with the disciplinary proceedings against her. She testified that in her response to the show cause letter, she did raise the issue of hostility of her work environment. She further testified that in her meeting she never requested for additional time to respond to the allegations. She denied that she was struggling to meet deliverables in the position she occupied or that targets were imposed on her.

She testified that it is not unreasonable for her to seek reinstatement as she left the Respondent on 25th July 2014 as she has been unemployed, though she had managed to secure short-term contracts.

In re-examination, she testified that her case would have been concluded in 2018 were it not for the delay by the Respondent. That her last appraisal was for the period 2013/2014 which was conducted in January 2014. That she was rated variously as “*Mostly Meets Expectations*” and was also rated as “*Successfully Meets Expectations*” and at one instance “*Exceeds Expectations*”. She testified that there was no parameter in which she was assessed as not meeting expectations and was never accused of not being able to perform. She testified that the show cause letter was proof that the Respondent was determined to terminate her employment and that this was confirmed by her termination letter. She testified that she had a responsibility to implement the global corporate vision which she did.

Respondent’s Case

KURT TJOSEM, (RW1) the Respondent’s Regional Director testified on behalf of the Respondent.

Kurt testified that the Claimant’s contract was terminated for 3 main reasons: fundraising, loss of responsibility and overall communication and supervision of staff. He testified that issues had come up in 2013 and that respondent held a regular performance review meeting in February 2014. He testified that there were issues with the Claimant’s performance and that the respondent designed a performance action for her. He testified that the respondent looked at specific deliverables which were agreed upon with the Claimant. He testified that the respondent were not undermining the Claimant by not copying her in emails.

He testified that a decision on separation with the Claimant had not been made at the time of show cause letter. He denied that the Claimant was harassed or intimidated at the regular check-in progress meetings. He testified that from the check-in meetings he registered the areas of progress. That though he supervised nine Country Directors no such issues had been raised.

He testified that the grounds for the Claimant’s termination were not personal in nature. That the meeting held on 22nd June was never concluded as the Claimant got uncomfortable thus the meeting had to end. He further testified that the Claimant was not intimidated at the meeting.

He testified that after the Claimant attached a Doctor’s letter stating that her work environment was toxic, she went on sick leave for two weeks so that she could not send further conflicting emails. He maintained that throughout the show cause meeting, the Claimant never raised issues of threats, intimidation and toxic workplace.

In cross-examination, RW1 testified that the Claimant’s performance review was done in 2013. It was his testimony that he assessed her as “*Mostly Meets Expectations*” which meant that she was not a good performer though he did not expressly state she was not good. He testified that his rating of the Claimant was that the Claimant was not directly managing the team.

He testified that after the Claimant resumed duty from sick leave she was issued with a show cause letter which she was to respond to and she did make attempts to respond to each of the issues raised. That two days later, after the disciplinary meeting, the claimant was dismissed. He testified that the Claimant refused to be put on performance improvement programme. That as of May 2014, the respondent had not decided if the Claimant was to leave. He testified that the Claimant had an insurance cover but did not know if the doctor’s bills were not paid.

In re-examination, he maintained that the Claimant refused to be put on a Performance Plan and that the Respondent went out of its way to reach a middle ground as illustrated in the action plan.

Claimant’s Submissions

The Claimant submitted that the Respondent failed to give sufficient reasons and evidence to demonstrate that the Claimant’s performance warranted termination. She relied on the decision in *Alex Wainaina Mbugua v Kenya Airways Limited Cause 430 of 2016* and *Kenny*

Kinako v Ringier Africa [2016] eKLR. The Court in the latter case held;

“The rationale is that an employee is hired for being competent for the job upon confirmation, such an employee had been put to the test and passed. Where an employee works for long periods and suddenly declines in their performance the root cause must be established.”

She submitted that she worked as guided by the action plan and carried out her duties while having regular check-ins with her immediate supervisor Mr. Kurt to discuss her progress. She further submitted that the Respondent wanted to let her go and that she had been targeted for removal as exhibited in the emails which excluded her.

She further argued that the Respondent opted to terminate her rather than put her on a performance improvement plan. It was her submission that it is a legal requirement that before termination on the ground of poor performance, there must exist genuine and valid reason for doing so. That the Respondent replicated the reasons in the notice to show cause which she had responded to. She therefore submitted that the Respondent had failed to prove the reason for termination as required under section 45 of the Employment Act.

She submitted that Section 41 of the Employment Act requires that an employer gives the employee audience. She submitted that the Respondent called for a hearing but it is clear that the Respondent had already decided to terminate her employment.

She submitted that the Respondent failed to put her on a Performance Improvement Plan to aid her carry out her duties more satisfactorily but rather frustrated and aggravated the situation until she fell ill due to mental stress and anguish. She further submitted that her immediate supervisor harassed and micromanaged her making it impossible for her to work. She submitted that an employer has a responsibility to ensure that the employee is able to work and perform their best.

She submitted that the Respondent was malicious and unfair in terminating her as it did not act in accordance with justice. She therefore urged the Court to find the Respondent liable for unfair termination and allow the claim.

Respondent’s Submissions

The Respondent submitted that it had proved the validity of the grounds giving rise to the decision to terminate the Claimant’s employment and had discharged its burden to the required standard as provided under Section 43(2) and 45(2) of the Employment Act. It submitted that the Claimant was frequently ranked as “*Mostly meets Expectations*” by her supervisor which was the second last ranking from the bottom of the rating scale. It further submitted that following the Claimant’s rejection of the evaluation process, the Respondent and the Claimant were able to agree on an action plan, which set out the agreed performance areas, the deliverables and various check-in dates with entries in each date for follow up. It submitted that the Claimant’s submission that only a Performance Improvement Plan (PIP) could result to her termination was misadvised.

The Respondent submitted that contrary to the Claimant’s allegations, the Claimant’s termination process commenced after her sick leave ended and that she is the one who directed how she would receive a show cause letter. It is submitted that the Claimant was invited for a hearing to take place on 22nd July 2014; the hearing only proceeded after the Claimant confirmed in writing that she was not on sick leave but on administrative leave between 18th to 25th July 2014 during which time the show cause took place.

The Respondent further submitted that the termination of the Claimant’s employment met the threshold for substantive fairness within the meaning of Section 43 of the Employment Act. In support of this, the respondent relied on the decision in **Timothy Stephen Mbogho v Kenya Safari Lodges and Hotels Ltd [2018] eKLR**. The respondent also relied on the decision in **Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR**.

It submitted that it had followed due process in terminating the Claimant’s employment therefore the termination was procedurally fair within the meaning of section 41 of the Employment Act.

The Respondent submitted that the Claimant had failed to discharge the burden of proof under Section 47(5) of the Employment Act thus she is not entitled to a declaration that her termination was unfair or the 12 months’ compensation for the unfair termination.

It submitted that reinstatement would be detrimental to the respondent’s activities as programs had proceeded for over 4 years and that the Claimant has been replaced. It further relied on Section 12(3)(vii) of the Employment and Labour Relations Court Act which provides that an order for reinstatement should be made only within 3 years of dismissal.

The Respondent submitted that the Claimant failed to prove the claim for damages for mental stress, harassment and intimidation. It urged the Court to consider that it had supported the claimant when she was on sick leave and appointed someone to act in her capacity encouraging her to concentrate on her recuperation.

It submitted that the claims for payment of the incurred doctor’s bills and 7 sick leave days were not proved and that there is no special entitlement or additional payment payable to an employee on leave outside the statutory sick leave which had been fully paid. It submitted that the Claimant’s case is founded on allegations that have not been substantiated or proved. The respondent maintained that the Claimant’s termination on account of poor performance had been proved.

Determination

It is not contested that the Claimant was employed by the Respondent as a Country Director on 10th September 2012 until the termination of

her contract on 24th July 2014 on grounds of poor performance. The issues for determination are;

1. Whether there was substantive reason to terminate the Claimant.
2. Whether the Claimant's termination was unprocedural.
3. Whether the Claimant is entitled to the reliefs sought.

1. Whether there was substantive reason to terminate the claimant's employment

The Claimant contends that she was unfairly terminated without any prior notice or justification. She testified that she opted not to sign her performance appraisals, the Performance Review Planning as it was contrary to her 2013 performance. She testified that she was on an action plan for four months with focus on deliverables. She however submitted that she was never placed on a Performance Improvement Plan before her termination.

The Respondent avers that in the course of the Claimant's employment, her performance including but not limited to her leadership style, unavailability of her reports and lack of responsiveness became a serious concern. RW1 testified that the Claimant refused to be placed on a Performance Plan but the Respondent and the Claimant agreed to have an action plan.

In the 2012-2013 Performance Review & Planning, the Claimant commented that the budget deficit uncovering and subsequent action plan posed the most challenging aspect of her leadership. She further commented that positively forging stronger donor relations kept the Respondent at the front and centre. Her Supervisor, RW1, in the same review stated that the Claimant needed to recognise and utilise the value that each member of her team brought to the table and that her team needed to be managed and not directed.

In her 2013-2014 Performance Review and Planning for the period February 2013 to January 2014 which she contests and declined to sign, her Supervisor's (RW1), overall rating of her performance was that she "*Mostly Meets Expectations*". She testified that there was no parameter for which she was assessed as not meeting expectations and was never accused of not being able to perform. RW1 testified that rating her as "*Mostly Meets Expectations*" meant that she was not a good performer but he did not expressly state she was not good. The rating scale of "*Mostly Meet Expectations*" is described in the Performance review as;

"Performance met expectations of some key areas of responsibility. The employee generally performed at a minimal level and improvement is needed to successfully meet expectations"

The Claimant testified she did not sign the Performance Review as she had reservations on some of the issues. In appreciating her performance concerns, the claimant in her email dated 10th March 2014 stated thus:

"Dear Kurt,

...I could see very clear areas where you would like to see me improve for example:

- *CP-Region-HQ interface – probably part of learning about the institutional culture and how best to navigate it. This is where I need your guidance and support.*
- *Using the two examples of JKS and MMR –how to tighten my responsiveness to Region and HQ requests. Although there are far more times than not when I respond to the region than HQ (therefore unresponsiveness is not a trend), a few incidents can damage my reputation.*
- *My understanding of IRC financial systems going forward.*
- *Delegation of responsibilities to my team 'Scaled up fundraising and partnerships*
- *...*

What has also significantly affected me us the lack of real acknowledgement of hard work that went into 2013...

Finally, I did feel your absence acutely towards the end of last year and especially during the initial weeks of deficit reduction action, I really value our check ins and hope that they can resume."

This communication from the Claimant was an indication that she understood the areas that were of concern to her supervisor and despite stating that he could have been persuaded by her supervisees recommendations about her, she appreciated the check-in meetings.

Part C of the Handbook of Employment Policies and Procedures for Internal Employees provides at page 25 that:

"If an employee does not agree with his/her supervisor's assessment of their work performance, that employee may submit a request, within five (5) days of the written performance appraisal, to meet with his /her supervisor's supervisor with or

without immediate supervisor being present.

While the employee will have the opportunity to present his/her views of his/her performance at this meeting, there is no guarantee that management will accept that viewpoint or that this viewpoint will alter the evaluation. Any challenge to an evaluation may be submitted in writing and will be attached to the employee's evaluation. However, the IRC retains sole discretion to assess an employee's work performance and contribution to the organisation, as well as to determine an employee's compensation and future employment."

In the instant case, the Claimant agreed to a Performance Plan on 18th March 2014 on several deliverables some of which had not been completed by 25th June 2014. It is this delay that led to the issuance of a notice to show cause which the Claimant was to respond to before the meeting that was scheduled for 22nd July 2014. She responded to the Notice to Show Causes, attended the show cause meeting on the 22nd July 2014 and on 24th July 2014 the Respondent terminated her contract on grounds relating to fundraising, her role and responsibilities and her accessibility and supervision of the team.

The Claimant testified that she questioned the reservations given to her, which included putting her on a performance improvement plan. In her written submissions, she argued that the Respondent opted to terminate her as opposed to placing her on a performance improvement plan. Though an employer ought to place an employee on a performance improvement plan prior to termination on poor performance, I do not think that an employer is obligated to place an employee on PIP where the employer and employee have agreed on an alternative means to improve performance. A case in point being the present case, the parties agreed on an action plan as the Claimant had objected to her evaluation. In this instance the agreed action plan was the equivalent of a PIP as the Claimant in her email dated 10th March 2014 acknowledged that check-in meetings would previously assisted her in carrying out her duties.

Handbook of Employment Policies and Procedures for Internal Employees on Termination provides at page 18

"All employment at the IRC is employment-at-will and may be terminated by the employee or the IRC at any time and for any legal reason with or without notice and with or without cause. Nothing in this Handbook or any other document or statement shall limit the right of the IR to terminate employment."

Despite this provision in the Handbook, Section 45 of the Employment is mandatory that the termination of employment must be valid and the lack of a valid reason results to an unfair termination. The Claimant was terminated for poor performance; I find that the Claimant did not improve despite being put on her preferable mode of improvement which set out the performance area, deliverables and the progress in achieving the deliverables.

Pursuant to section 45 of the Employment Act, I find that there was sufficient reason to terminate the Claimant on grounds of poor performance and that this had been explained to her sufficiently in the Notice to show cause dated 18th July 2019.

2. Whether the Claimant's termination was unprocedural

The Claimant received the notice to show cause on 18th July 2014 and she responded on 22nd July 2014 on the very day she attended the disciplinary hearing. On 25th July 2014, she received her termination letter.

The Respondent's Handbook of Employment Policies and Procedures for Internal Employees does not provide for the disciplinary procedure. Section 41 of the Employment Act provides:

(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."

The Notice to Show Cause invited the Claimant to a disciplinary hearing that took place on 22nd July 2014. She was informed that she was entitled to be accompanied by an employee of her choice at the meeting.

The Claimant avers that she was on sick leave when she received the notice to show cause. The Respondent avers that the disciplinary proceedings commenced after the claimant completed her sick leave and was then on administrative leave.

I do not find any proof that the Claimant was on sick leave when the notice to show cause was issued to her on 18th July 2014, the reason being that in her email dated 7th July 2014 the Claimant stated:

"Dear Colleagues,

I hope you are well. I will be on sick leave from 3-17 July. Montassir will be the Acting CD in my absence and will be able to escalate all urgent matters to me if need be ..."

In her email dated 19th July 2014, the Claimant stated thus:

“Dear Kate

I would like to confirm that I have moved out of “sick leave” to administrative leave between 18-25 July during which time the show cause hearing will take place...”

I find that the Claimant was aware that the disciplinary hearing was scheduled to take place. She did not object to it. It is my finding that the Claimant was given sufficient opportunity to respond to the allegations.

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

I find that the Claimant’s termination was procedural. In respect of the Claim for reinstatement pursuant to Section 12(3)(vii) of the Employment and Labour Relations Court Act, this remedy cannot be awarded as 3 years have lapsed from the date of her termination as she was terminated 5 years ago. In any event having found the termination procedural and for valid reason, she is not entitled to reinstatement.

The Claim for medical bills was not proved. As stated by the respondent, the claimant was on a medical scheme. She did not prove when, why or how the medical bill was incurred. The claimant did not also prove that she was entitled to sick pay as she had been on sick leave and on full pay during the sick leave.

For the foregoing reasons the entire claim fails and is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE