REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2184 OF 2015

PRAXIDES AKOTH ODUOR.....CLAIMANT

- VERSUS -

LIBERTY EAGLE LIMITED.....1ST RESPONDENT

PEOPLE INSIGHTS LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th October, 2019)

JUDGMENT

There is no dispute that the claimant was employed by the 1st respondent as a sandwich artist effective 15.11.2013. The 2nd respondent was engaged by the 1st respondent as a human resource consultant responsible for maintaining staff files, preparing the staff payroll, recruitment of staff, binding and printing subway manuals and consultation on human resource.

The claimant filed the memorandum of claim on 09.12.2015 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

a. A declaration that the dismissal of the claimant from employment was unlawful and unfair and the claimant is entitled to payment of her terminal dues and compensatory damages.

b. An order for the respondent to pay the claimant her due terminal benefits and compensatory damages totalling to Kshs.403, 500.00 being:

i. A month's salary in lieu of notice Kshs.25, 000.00.

ii. Unpaid salary for April and May 2015 Kshs.41, 000.00.

iii. Pay in lieu of untaken and unpaid leave for the period 18.11.2013 to 11.06.2015 Kshs. 37, 500.00.

iv. 12 months' salaries in compensation for unfair termination Kshs. 25, 000.00 x 12 making Kshs. 300, 000.00

c. Costs of the suit plus interest thereon.

The 1st respondent filed the response to claim on 20.01.2016 through Namachanja and Mbugua Advocates. The 1st respondent prayed that the suit be dismissed with costs.

The 2nd respondent filed the statement of response on 08.02.2016 through Simba & Simba Advocates and prayed that the claimant's suit be dismissed with costs to the 2nd respondent.

The **1st issue** for determination is whether the claimant's suit against the 2nd respondent is sustainable. The 2nd respondent's case is that it was not privy to the contract of service in so far as the 1st respondent was the principal and the 2nd respondent was an agent of the 1st respondent engaged as a human resource consultant. The evidence is that the contract of service was between the claimant as the employee and the 1st respondent as the employer. To that extent the Court returns that it was clear to the parties that the 2nd respondent was not the employer. The Court finds that the 2nd respondent was not privy to the contract of service and is not liable for any of the prayers as made for the claimant. However, there was no dispute that as a consultant, the 2nd respondent was involved in the conclusion of the contract of service

and was involved in the human resource management on behalf of the 1st respondent and the Court returns that the 2nd respondent was a necessary party for effectual and complete determination of the matters in dispute and to that extent, each party shall bear own costs of the suit as between the claimant and the 2nd respondent.

To answer the **2nd issue** for determination the Court returns that that there was no dispute between the claimant and the 1st respondent that they were in a contract of service as per the contract of service effective 15.11.2013 and subsequently confirmed in permanent service.

To answer the **3rd issue** for determination, the Court returns that there is no dispute that the 1st respondent summarily dismissed the claimant from employment by the letter dated 05.05.2015 on account of:

a. Taking money from the till.

b. Under-ringing sandwiches and ancillary items and not recording the cash received in the official point of sale system.

c. Knowingly misrepresenting store inventory reports to cover up product shorts.

The letter stated that as a shift leader the claimant was fully responsible and accountable for all transactions at his work station and the accurate maintenance and preservation of stocks at the outlet. The letter further stated that the reported weekly inventory figures at the Thika Road Mall outlet had been found to be completely fabricated and divorced from reality and the claimant had failed to prove her innocence hence the immediate dismissal. The letter concluded that the 1st respondent would deduct Kshs.13, 000.00 from the claimant's wages as per the terms of service and as attributable to the claimant's share of the shorts at the Thika Road Mall.

The **4th issue** for determination is whether the summary dismissal was unfair. The evidence is that by email dated 29.04.2015 the claimant was summoned to a hearing on 04.05.2015 at 11.00am about reasons behind shortages of products at the respondent's premises. The claimant attended the hearing and was subsequently suspended from duty. On 12.05.2015 the claimant wrote about her unpaid salary for April 2015 and the reply was that investigations had not been completed. By the email of 09.06.2015 the claimant was asked to report at the office on 11.06.2015 and when she complied, she was asked to handover the uniform, medical card and staff identity card and was paid Kshs.9, 000.00. The claimant testified that on 11.06.2015, the 1st respondent handed to her the letter of summary dismissal dated 05.05.2019. The claimant testified that she had not been given a show cause notice prior to the hearing and she was asked questions at the hearing and which she answered. She testified that after the hearing on 04.05.2015 she was verbally suspended from duty. It was the claimant's case that the termination letter was delivered on 11.06.2015 and she was paid Kshs.9, 000.00 instead of Kshs.25, 000.00 for April 2015 salary and, May 2015 salary had not been paid at all. The claimant lamented that the 1st paragraph of the letter of summary dismissal referred to theft whereas she had not stolen at all.

The Court has considered the evidence. The claimant testified that she knew she had been summoned for a hearing on 04.05.2015 about the shorts and variances in issue. In the email dated 22.04.2015 the claimant confirmed that they had been having variances for a while and she had raised her concerns with Ivy as her Manager and Ivy had said that she had handled it but the claimant knew that Ivy had failed to handle it so far. For her part in the issue, she stated in that email that she apologised and was sorry for what she had done (having noted the failure to accurately document and post the variances from the physical count and failing to report the matter to authorities beyond her immediate manager).

The claimant confirmed that she knew the agenda at the hearing of 04.05.2015 and the Court returns that taking that evidence into account and the correspondence between the parties prior to the hearing, the 1st respondent substantially complied with the need for a notice and a hearing as per section 41 of the Employment Act, 2007.

While making that finding the Court has considered the claimant's case that she was not convicted of theft, it was not mentioned at the disciplinary hearing and the issue of taking money from the till was not raised at the hearing. There is no reason to doubt the claimant. There was no evidence of a conviction on a charge of theft. The claimant's apology and being sorry as conveyed in the email dated 22.04.2015 has been considered and the Court returns that there is no reason to doubt that the claimant apologised and was sorry for failure to report the shortages and variances beyond her immediate manager as per her evidence. The witness for 1st respondent confirmed that he had not produced the accounts on the shortages and the variances and had not filed the CCTV clips which he alleged showed the claimant taking cash from the till. The minutes of the disciplinary hearing had not been filed and taking the evidence into account the Court returns that the respondent has failed to establish that as at the termination there existed valid reasons to justify the summary dismissal upon the alleged reasons as per the dismissal letter and as envisaged in section 43 of the Employment Act, 2007.

The Court returns that the termination was unfair for want of valid reasons as at the time of termination. The Court has considered the period the claimant had served, the claimant's apology which appeared to contribute to the summary dismissal and the claimant's admitted failure to report to higher management beyond her immediate supervisor. The Court finds that the claimant was entitled to report to her immediate supervisor as per prevailing protocols. The respondents failed to establish basis that she was bound to report beyond Ivy who was her immediate supervisor and the responsible manager. The Court puts the claimant's contribution at 50 % and awards the claimant 6 months' salaries under section 49 of the Act at Kshs. 25, 000.00 per month making **Kshs. 150, 000.00.**

The **5th issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

a. The 1st respondent's witness confirmed that the leave applied for was a refund of public holidays worked and not annual leave and the claimant is awarded **Kshs. 37, 500.00** as prayed for in lieu of annual leave for 1.5 years and under section 28 of the Act.

b. As the termination was unfair and without due notice the claimant is awarded **Kshs. 25, 000.00** notice pay in lieu of the contractual one month notice.

c. The termination letter was delivered on 11.06.2015. The salary for May 2015 was not paid and Kshs. 13, 000.00 for April salary was withheld without evidence of accounts attributing the alleged shorts and variances to the claimant and the Court awards the claimant **Kshs. 41, 000.00** in withheld pay for the two months. In any event there was no contractual basis for suspension without pay and the Court has found that the summary dismissal was unfair so that the claimant is entitled to pay throughout the period of suspension.

In conclusion judgment is entered for the claimant against the 1st respondent for:

1. The declaration that the termination of the contract of service was unfair for want of a genuine reason for the summary dismissal.

2. The respondent to pay the claimant a sum of **Kshs.253, 500.00** (less due tax) by 01.12.2019 failing interest to be payable thereon at Court rates from the date of the judgment till full payment.

3. The 1st respondent to pay the claimant's costs of the suit.

4. As between the claimant and the 2nd respondent, each party to bear own costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 18th October, 2019.**

BYRAM ONGAYA

JUDGE