



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 552 OF 2016

BETWEEN

JULIET NDINDA KITAVI.....CLAIMANT

VERSUS

NATION MEDIA GROUP LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Jacqueline Kariuki & Associates, Company Advocates for the Claimant.

Cootow & Associates, Advocates for the Respondent

JUDGMENT

1. Leading Media House, the Respondent herein, has been brought before this Court by its former Solution Architect and Business Executive in digital department, Juliet Ndinda Kitavi, in a Kshs. 32.4 million Claim.
2. The Claimant states she was first employed by the Respondent on 1st June 2013. She was confirmed through a letter dated 17th June 2013.
3. Her contract was terminated by the Respondent with effect from 16th September 2015, on the allegation that her performance was poor.
4. Her last gross monthly salary was Kshs. 86,500, comprising basic salary at Kshs. 61,200 and transport allowance at Kshs. 25,300.
5. Her grade was changed from A3 to C-Lower through a letter received by her from the Respondent, on 19th May 2015. She was placed on Performance Improvement Plan [PIP]. She received a letter dated 10th September 2015, asking her to show cause why, she should not be sacked for poor performance. She responded on 11th September 2015, stating she had made every effort to attain the PIP objectives.
6. Without any reason or notice, the Claimant pleads that, the Respondent terminated her contract through a letter dated 16th September 2015.
7. She prays for Judgment against the Respondent as follows:-
 - a) Declaration that termination was unfair and unlawful.
 - b) 2 months' salary in lieu of notice at Kshs. 173,000.
 - c) Full salary for September 2015 at Kshs. 86,500.
 - d) Maximum compensation for breach of contract up to the age of retirement [60 years] at Kshs. 32,177,940

Total Kshs. 32,437,440

- e) Costs.
- f) Interest.
- g) Any other suitable relief.

8. The Respondent filed its Statement of Reply on 27th November 2017. It is not denied that the Claimant was employed by the Respondent. She failed to meet performance targets, and was dismissed fairly and lawfully, in accordance with her terms and conditions of employment. She was a member of the N.S.S.F and Respondent's Group Defined Contribution Retirement Benefits Scheme. Her claim for compensation up to the retirement age of 60 years is without foundation. The prayer for compensation exceeds the maximum allowed under the Employment Act 2007.

9. Kitavi gave evidence, and rested her case, on the 11th February 2019. The Respondent called its Head of Legal Department, Sekou Owino, who gave evidence on 15th July 2019, closing the hearing. The Claim was last mentioned in Court on 23rd September 2019, when Parties confirmed the filing of their Final Arguments.

Claimant's Evidence.

10. The Claimant restated in her oral evidence, her employment history, the terms and conditions of her employment, and the circumstances leading to termination of her contract, as contained in her Pleadings and Witness Statement on record.

11. She was first employed by the Respondent as a freelance Business Executive, in October 2009. She was taken in on permanent and pensionable terms, in June 2013.

12. Clause [f] of her contract set the retirement age at 60 years, unless she was prevented from working by an illness. Her last monthly salary was Kshs. 86,500 as shown in her pay slip.

13. On 5th February 2015, she was moved to advertising department as Business Executive. She understood her terms and conditions of employment to have been preserved. The Respondent expressed confidence in the Claimant upon appraisal.

14. She worked under the Branch Manager Irene. Irene would team up with other Employees and undercut the Claimant, so that the Claimant did not make sales. Irene went behind the Claimant's back to ensure the Claimant was perceived as a poor performer. The Claimant complained in writing to her Line Manager.

15. The Claimant was placed on PIP. She proposed to the Respondent steps that could be adopted, to improve her performance, including allowing the Claimant to sell both digital and printed products. She was restricted to selling digital. Other Employees were selling both. She made concrete proposal to the Respondent on how her performance could be improved.

16. She attained 20% of her performance targets. It was not possible to attain better results, as she was working in an environment in which the Branch Manager and other Staff had conspired to take business from the Claimant.

17. She received the letter to show cause dated 10th September 2015, and replied the following day, 11th September 2015. 5 days later, on 16th September 2015, her contract was terminated. PIP did not justify termination.

18. She did not receive notice pay. Her contract was breached. She seeks compensation up to the age of 60 years. Digital was new. Irene would steal Claimant's sales and assign them to her team. The Claimant was not given any chance after the letter to show cause to explain. She was not issued her Certificate of Service.

19. Cross-examined, the Claimant stated she was employed under the contract dated 17th June 2013 as a Solution Architect, digital department. Clause [f] of the contract on service to the age of 60 years, was subject to clause 8, which allowed the Parties to terminate their relationship through written notice of 30 days, or payment of 30 days' salary in lieu of such notice. She was paid 1 month salary but could not recall when this happened. She was graded at 0% in January 2015. She sold nothing. This resulted in PIP. PIP was for 3 months. She sold from February to June 2015. She did not meet the targets. There was no support from her Mombasa Branch Management or the Head Office at Nairobi. She did not recall how much she achieved between June and September 2015. She gave various reasons in explaining her poor performance: she worked with hostile colleagues; digital was new; and she was the only one selling a single product. The Branch Manager was her supervisor. The Claimant however reported to Mr. Chege based at the Head Office. Redirected, the Claimant told the Court she did not seek special treatment from the Respondent; she only wished to be treated equally as the other Employees. She did not receive all her dues on termination.

Respondent's Evidence.

20. Learned Counsel Sekou Owino similarly anchored his oral evidence on his Witness Statement on record. He confirmed that the Claimant was an Employee of the Respondent.

21. There were concerns about her performance. She was placed on PIP for 3 months – June, July and August 2015. She managed 20% of the targets in June, 21% in July and 18% in August.

22. Notice to show cause why there was no improvement issued on 10th September 2015. She replied saying she had made an effort. She said digital advertisement was relatively new. She complained she was assigned digital advertisements solely.

23. This was not entirely true. Everybody sold in accordance with specific sections. Her letter of employment assigned her digital advertisements. Her target was 80%. 20 % was way below this target. The Respondent decided to terminate the contract. She was paid net terminal dues at Kshs. 25,000. Clause 8 [c] of the contract gave a notice period of 1 month. She was paid notice. She received salary for 16 days worked in September 2015. The contract provided for employment up to the age of 60 years, subject to the termination clause. Termination was fair.

24. Cross-examined, Sekou confirmed that the Claimant was an Employee of the Respondent. He was not aware if she first worked for the Respondent in 2009. He serves as Head of Legal and Training, not as the Human Resource Manager. He did not take part in her employment and departure. She was placed on PIP. He did not know who complained against her leading to PIP.

25. She initially worked in Nairobi. The Respondent had expressed its confidence in the Claimant. The Claimant was first at solutions department, later transferred laterally to digital department. She became Business Executive, Digital. It was a lateral transfer. She came to the Coast Region. Transfer was based on the confidence the Respondent reposed in the Claimant, based on her past performance. The letter of transfer, through which the Respondent expressed its confidence in the Claimant, is dated 5th February 2015.

26. Her performance went south after transfer. Head of Digital was Shelmith. The Claimant wrote to her about a Client at the Coast - Pwani University - complaining that business from this Client was causing conflict at the Mombasa Branch. This was an excuse, not a reason for poor performance.

27. Sekou explained the excuse could not sell, because the Respondent is multimedia. Everyone approaches a Client and offers the media one is selling. Employees compete internally and externally. He agreed there would be challenges to a new Employee settling in a new office. She was given an opportunity to state her position fully. Staff Benefits Scheme Form states the Claimant left on resignation. Sekou confirmed, the Claimant did not resign. 3 months' notice applied where termination was related to illness or injury. Redirected, Sekou told the Court, the Claimant had time to improve. If she had any queries, she was free to contact her Line Manager. She did not do so.

The Court Finds:-

28. The Claimant testified she worked for the Respondent at first, as a freelance Business Executive, in October 2009.

29. Her uncontested letter of appointment shows she was formally employed by the Respondent in the position of Solution Architect in the Digital Division, of the Respondent. The letter is dated 17th June 2013, but was signed on 1st June 2013 by the Claimant and her Witness. The effective date is not stated. It can fairly be assumed to be 1st June 2013, when the Claimant signed the contract. She was based at Nairobi. Her beginning monthly basic salary was Kshs. 80,000.

30. Her pay slip for August 2015 shows her salary was adjusted to comprise basic at Kshs. 61,200 and transport allowance at Kshs. 25,300, giving her a monthly gross salary of Kshs. 86,500. This is the rate she earned at the time of termination on 16th September 2015.

31. On 21st November 2014, the Respondent wrote to the Claimant, informing her she would be entitled to transport reimbursement of Kshs. 25,300. This was stated to be based on the confidence the Respondent had in the Claimant, owing to her past performance.

32. On 5th February 2015, a letter titled 'Departmental Transfer' issued to the Claimant. It advised the Claimant that she had been transferred to Advertising Department. She would hence hold the position of Business Executive- Digital. It was explained that this was a lateral transfer. The Claimant was also transferred from Nairobi to Respondent's Coast Region based at Mombasa. Transfer either way was said to be informed by the confidence the Respondent had in the Claimant.

33. It is after the Claimant came to Mombasa, that her problems with the Respondent started.

34. In June 2015, 4 months after the Claimant was transferred to Mombasa, she was placed on Performance Improvement Plan. It was stated that in January 2015, the Claimant did not achieve her target. It is not clear if this was with regard to targets set while she was at Nairobi. The letter of transfer is dated 5th February 2015. In June, July and August 2015, while under PIP, the Claimant achieved 20%, 21% and 18% respectively, of her targets.

35. She was asked to explain her poor performance to the Respondent by the Respondent, through a letter dated 10th September 2015. The explanation was to be given on or before 14th September 2015.

36. The Claimant wrote on 12th September 2015, explaining that: she worked in a harsh environment, created by her Business Manager at Mombasa; she did not have any support at Mombasa; digital advertising was relatively new in Mombasa; and she was the only one allocated digital advertising, while her colleagues had both digital and print advertising. Her request to do both was not accepted. In her evidence before the Court, she expounded that there was conspiracy against her at Mombasa, where the Branch Manager ganged up with other Staff to take away business from the Claimant.

37. The Respondent terminated the Claimant's contract through a letter dated 16th September 2015, having found the explanation given by the Claimant to have been unacceptable.

38. Was termination based on valid and fair reason under Sections 43 and 45 of the Employment Act? Was the procedure fair under Sections 41 and 45 of this Law? Does the Claimant merit the remedies sought?

39. There is some persuasion in the explanation offered by the Claimant on her dip in performance. She was new in Mombasa. She does not seem to have fitted well with her new workmates. She alleged, and was not significantly disproved, that the Branch Manager offered her no support. Instead, the Branch Manager worked with other Employees, to divert work from the Claimant. Sekou agreed on cross-examination, that it was not unusual for a new Employee, to have a problem settling down in her new office. Why was the Claimant not having issues of performance at Nairobi? She had worked for 2 years at Nairobi, or 6 years if it is true she had a stint as a freelancer, from 2009. The Respondent repeatedly expressed its confidence in the Claimant, based on her good performance, before transfer to Mombasa. It is unusual that an Employee, who performs well in one station, over a number of years, would suddenly fall short, while at another station. There is some resonance in the Claimant's explanation. She was not given adequate time to settle in her new station; she did not have the support of those she found at Mombasa; and/or digital advertising was a fresh product which had not caught up well at the Claimant's new workplace. The Court has formed the view that the Respondent was impatient with the Claimant, and ended up taking a course of action, that did not result in fair and valid termination reason.

40. The Claimant was not heard after the notice to show cause stage. Section 41 requires that before an Employer terminates an Employee's contract, on among other grounds, poor performance, the Employer shall explain to the Employee, in a language understood by the Employee, the reason the Employer is contemplating termination. The Employee must be heard, in the company of another Employee or Shop Floor Union Representative of his choice. The Employer must hear and consider any representations made by the Employee or his Representative. This calls for a physical hearing. It is not possible to fulfill the requirement for physical presence of another Employee or Shop Floor Union Representative, if all the Parties do is exchange correspondence. The Respondent ought to have convened a panel to hear the Claimant, after receiving her reply to the letter to show cause. There was no such hearing as is contemplated by Section 41 of the Employment Act.

41. Termination fell short of the substantive and procedure standards of fairness, under the Employment Act 2007.

42. Clause 8 [c] of the contract gave a termination notice period of 1 month. Clause 8 [a] [ii] is not relevant to the Claimant. She was paid notice based on basic salary, at Kshs. 61, 200. Notice is paid under Section 36 of the Employment Act, based on remuneration which would have been earned by the receiving Party. Remuneration under Section 2 of the Employment Act means the total value of all payments made or owing to an Employee. Basic salary is not the totality of remuneration. Notice pay ought to have been for 1 month, based on the gross salary of Kshs. 86, 500. ***Less the amount of Kshs. 61,200 paid to the Claimant, the Court grants the balance of notice pay at Kshs. 25,300.***

43. The Claimant's contract was terminated on 16th September 2015. She was paid salary for 16 days worked. There is no reason for her demand for full salary for September 2015. The demand is rejected.

44. The Respondent was not compelled to retain the Claimant in its employment, until she reached the age of 60 years. The operative word in clause 1 [e] of the contract is 'may.' It is also clear from clause 1 [e] that Parties were not limited in opting out of their relationship, under clause 8 which regulated termination. The Claimant's pursuit of compensation based on anticipatory salaries is out of order. As stated in other decisions of Superior Courts cited by the Respondent, the Claimant had an obligation to move on after termination, and make an effort at mitigating her loss of employment.

45. The retirement clause can only be helpful in considering the assessment of compensation to be availed to the Claimant, within the statutory ceiling of the equivalent of 12 months' salary, prescribed under Section 49 of the Employment Act. Section 49 [4] [f] requires the Court to consider among other things, " *the reasonable expectation of the Employee as to the length of time for which his employment with the Employer might have continued, but for the termination.*" Her Deferred Employer Benefit Certificate on record shows she was born in 1984, placing her at the age of 31 years, at the time of termination. She expected to work until the age of 60. It was not an unreasonable expectation, having been expressed in the contract. She could possibly have served for another 29 years. She had worked for 2 years and 3 months. She had a good record for the better part of that period. ***The Court grants her equivalent of 9 months' gross salary in compensation for unfair termination at Kshs. 778,500.***

46. ***Costs to the Claimant.***

47. ***Interest allowed at 14% per annum from the date of Judgment, till payment is completed.***

IN SUM, IT IS ORDERED: -

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant: balance of notice pay at Kshs. 25,300, and equivalent of 9 months' salary in compensation for unfair termination at Kshs. 778,500 – total Kshs. 803,800.

c) Costs to the Claimant.

d) Interest allowed at 14% per annum from the date of Judgment till payment is completed.

Dated and delivered at Mombasa this 29th day of November 2019.

James Rika

Judge