



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1164 OF 2015

JANET ASAMBA OMODI.....CLAIMANT

VERSUS

FAIRMONT HOTELS & RESORTS (E. A) LTD.....RESPONDENT

J U D G E M E N T

1. By a Plaintiff filed on 23rd July, 2008 the plaintiff pleaded in the main that she was in Octobe,2006 employed by the respondent on permanent basis as Director of Sales and Marketing (East Africa).
2. It was a term of her contract that she would be in charge of all operations and functions in the Sales and Marketing departments and that she would perform such duties without undue interference.
3. The defendant in breach of the said term of contract through it's managing director, unprocedurally and unlawfully undermined the plaintiff and usurped her functions without her knowledge and consent and subsequently unlawfully terminated her services. That is to say the respondent's Managing Director employed staff in the plaintiff's department without her knowledge, employing foreign citizens into her department using her name without knowledge and without complying with immigration rules.
4. Aggrieved by the breaches, the plaintiff lodged a complaint to the MD on 21st May, 2008 but the grievances were not addressed.
5. In response to the complaint the respondent's MD without justifiable cause or explanation, on 27th May, 2008, sent the plaintiff home and immediately replaced her with another employee. The defendant's MD further withdrew the plaintiff's use of office, computers and telephone and her things were unceremoniously sent to her house. On or about 9th June,2008 the defendant issued her with a termination letter terminating her services without any justifiable cause. The Claimant further averred that the termination of her service was unlawful, un procedural and in blatant disrespect to rules of natural justice.
6. The plaintiff as a result sought a declaration that the termination of her employment was illegal and therefore null and void, an order for unconditional reinstatement to her position on the same terms and benefits alternatively the sum of Kshs. 14,108,167/= being loss of income, maternity, medical, vacation and car allowances, salary for Zanzibar duties and pay in lieu of notice together with salary arrears.
7. The defendant on its part pleaded that the plaintiff was 14th September,2006 employed to serve as Director of Sales and Marketing. It was an express term of the agreement that the plaintiff would be answerable and reporting to the defendant's Managing Director and Regional Director of Sales and Marketing.
8. The defendant denied that it's Managing Director undermined and usurped the plaintiff's functions as alleged or at all.
9. Further, the defendant stated that on 3rd April, 2008 the plaintiff and the defendant's Managing Director held a meeting to discuss certain matter or concern to the defendant relating to Sales and Marketing Department and in particular relating to the deteriorating relationship between the plaintiff and other employees in her department, the sales structure and mapping out an action plan for the coming months. It was agreed that the plaintiff would as the head of Sales and Marketing Department implement the action plan set in motion at the meeting and to address issue raised at the meeting. The plaintiff however did not implement the action plan.
10. On 21st May,2008 the plaintiff sent a protest letter to the defendant's Managing Director and Director of Human Resources. On 27th May, 2008, a meeting was held between the plaintiff the defendant's Managing Director and Director of Human Resources to discuss the contents of the plaintiffs' protest letter and to review the action plan set in motion at the meeting held on 3rd April, 2008. At this meeting the defendant discovered that the plaintiff had in violation of the defendants' policy discussed the contents of her protest letter with other employees without prior discussion with the defendants' Managing Director and Director of Human Resources.

11. After the discussion in the meeting of 27th May, 2008, it was mutually agreed that there was lack of confidence and trust between the plaintiff and the defendant whereupon it was mutually agreed that an amicable exist for the plaintiff would be explored and agreed.
12. Shortly after the meeting of 27th May, 2008 and contrary to the agreement reached at the said meeting the plaintiff alleged and informed other employees in her department that her services had been terminated. The plaintiff also instructed her assistant to pack her belongings and thereafter left the defendant's offices.
13. Following the plaintiff's conduct, immediately after the meeting of 27th May,2008, the defendant was compelled to look for a replacement so as to keep the department running and withdrew the plaintiffs use of offer facilities.
14. By a letter dated 23rd May, 2008 the defendant confirmed the matters discussed and agreed at the meeting of the same date and offered a without prejudice separation package to the plaintiff which the plaintiff did not accept.
15. By a letter dated 28th May, 2008 the defendant informed the plaintiff that it intended to terminate the plaintiff's services and invited her to defendant's offices on 29th May,2008 at 10.30 am for a discussion and hearing of the intended termination of her attendance, the plaintiff did not attend the hearing on 29th May, 2008.
16. By a letter dated 4th June, 2008 the defendant invited the plaintiff for another hearing on 5th June, 2008 which she attended and made her representations to the defendant reiterating her lack of confidence in working with defendant's senior members of staff. By a letter dated 9th July, 2008 the defendant regretted that it was not possible for the plaintiff to continue working for the defendant and informed her that her employment would be terminated immediately in accordance with clause 5.3 of her employment contract.
17. By consent of the parties, the oral evidence was disposed with and the parties proceeded to file submissions.
18. Mr. Olewe for the Claimant submitted that the termination of the Claimant's service was unlawful, malicious and was intended to humiliate and embarrass her reputation in the industry.
19. According to the plaintiff, the respondent without any lawful cause deducted Kshs. 630,000/= from her monthly salary and failed to pay the plaintiff additional salary for additional duties as Director of Sales and marketing, Zanzibar.
20. Counsel further submitted that section 43 of the Employment Act demands that the employer proves reasons for the termination while section 45(2)(9) and (b) require an employer to prove that the reasons for termination were valid and fair reasons. In case of a summary dismissal the employer is obliged to hear and consider any representation which the employee may wish to make.
21. Concerning leave counsel submitted that the plaintiff's contract provided for vacation a period of 28 days. Counsel therefore urged the Court to award the Claimant Kshs. 563,661/= being one month's salary in lieu of accrued leave. Counsel further urged an award of Kshs. 30,000/= being car expenses allowances for the month of June.
22. On the issue of salary reduction counsel submitted that no employer was allowed to reduce salary of an employee. Such reduction is tantamount to reuniting of a new contract. According to Counsel, the plaintiff was coerced into accepting new reduced salary. The salary packaged was a product of negotiated agreement. This respondent had an option of terminating the existing contract and issuing a new contract providing for a reduced salary.
23. Regarding pay for Zanzibar duties, counsel submitted that contrary to respondent's assertions, the Claimant was not a group director. Her contract clearly stipulated that she was only a director of Sales and marketing for the region. At the material time the region comprised only units spread around Kenya. It was only in October 2007 that all directors' roles including that of the Managing Directors were enlarged and entranced to included Zanzibar with the exception of the Claimant. They enjoyed corresponding increases in remuneration. The Counsel therefore urged for an award of ½ the monthly salary for the nine months the plaintiff held the additional role. That is to say Kshs. 2,536,474/50.
24. Mr. Muthui for the respondent on the other hand submitted that the Claimant as evidenced in the pleadings and the attached documents was not sent home as claimed. The respondent was compelled to look for a replacement to run the Claimant's department following her abscondment on 27th May, 2008. The Director of Operations Mr. Abid Khawaja was appointed interim director sales and marketing and the Claimants remaining items were thus cleared by her personal assistant to make room for Mr. Khawaja.
25. Counsel further submitted that the Claimant was on 29th May, 2008 invited for a disciplinary hearing to discuss her exit but she informed the respondent that one needed to consult with her lawyer, Ministry of Labour and department of Immigration first. The hearing was therefore rescheduled to 5th June, 2008 and a notice to attend issued to the Claimant with a witness of any. At the meeting the plaintiff accused the respondent's management of which hunting and insisted she was being undermined by other Senior colleagues yet she has no evidence to support these claims.
26. Concerns over appointment raised by the Claimant were addressed and it became evidence that the Claimant had indeed been consulted or notified of the personnel who were hired. It was also noted that the Claimant had not commercial the action plan for 3rd April, 2008 and failed to provide any reasons in this regard. At the meeting the Claimant insisted she would not go back to work if her direct supervisor was there.
27. After careful consideration of the Claimant's representations and correspondence with the respondents together with the fact that she told

her team members that she did not consider it prudent to continue working for the respondent, the respondent's management was left with no resolve but to terminate the Claimant's employment with immediate effect. The Claimant was therefore issued with termination.

28. Letter dated 9th June, 2008 which explained in detail the reasons that led to her terminations. The Claimant was also informed that she would be given 3 months' pay in lieu of notice, salary for the period between 1st June, to 9th, June, 2008 and her accrued leave/vacation pay upon clearance. The Claimant was also informed that the respondent would continue to pay her medical expense premiums up to 9th September, 2008.

29. The Claimant however, failed and or refused to clear with the respondent and collect her cheque.

30. According to Counsel the respondent in the circumstances denied the Claimant claims and further that she was entitled to the orders sought. Regarding salary reduction the respondent submitted that the Claimant agreed to pay cut of following economic down turn in the hotel industry as a result of the post-election violence of 2007-2008. The Claimant should therefore not be allowed to take two contrary positions.

31. Concerning additional duties Counsel submitted that the respondent had 6 units in East Africa and Fairmont Zanzibar was one of them. The Claimants contract provided that she was to be based at the Fairmont Group office located at the Norfolk Hotel in Nairobi and that she would be required to travel to other units in the region to conduct trainings, audits and consultations. The Claimants' contract did not provide that she would be paid additional sums for work carried out in Zanzibar as this fell within the scope of her duties.

32. Employment contract is a contract for personal service. The smooth operation of the contract heavily depends on character of the relationship between the parties at any time given. That is to say any drop-in confidence, trust or mutuality makes the relationship problematic to sustain and most case separation becomes the ultimate option if the required character of the relationship fails to be restored.

33. In this particular case the Claimant and the respondent seemed not to have been synchronizing on how their relationship should work. The Claimant complained that one of the respondent's Senior Managers usurped her roles and hired staff in her department without consulting her. The respondent on the other hand accused the Claimant of discussing her concerns with other staff before she could set down and seek their resolution with Senior Management. The respondent further complained that the Claimant was guilty of using inappropriate and or rude language while addressing her seniors.

34. As reviewed earlier in the judgement there were attempts to meet and solve the fractities relationship between the Claimant and the respondent but these never succeeded. This led to the Claimant walking out on her employer claiming her services had been terminated while the respondent on the other had accused her of absconding duty and therefore had to get her replacement. The Claimant was eventually terminated on 9th June, 2008 and in the letter of termination the respondent offered the Claimant a termination package which was contained in the termination letter. The Claimant however rejected the offer and filed the current suit.

35. In her prayers the Claimant sought a declaration that the termination of her employment was illegal and therefore null and void. She thus sought reinstatement to her position as Director of Sales and Marketing in the Defendant and the sum of Kshs. 14,108,267/= being loss of income, maternity, medical vacation and car allowances. Salary for Zanzibar duties and pay no lieu of notice.

36. The dispute herein started under the regime of the repealed Employment Act, under that Act unlike the current one, there was no compensation for unfair termination of employment. A compensation for unlawful termination or dismissal under the old Act was limited to the amount of pay in lieu of notice payable if the contract was terminated normally. To that extent, the Claimant's claim for loss of income could not in law be awarded.

37. Regarding reinstatement the Court is of the view that considering the lapse of time since the suit was filed, such an order if were capable of being granted, would not be appropriate. In any event as reviewed in the evidence above the Claimant herself stated that she had got to a point where she could not work with the respondent's Senior management

38. In conclusion the Court is of the view that despite the fact that under the Old Employment Act unless stipulated in the contract document itself, there was no obligation on an employer to hear or assign any reason for terminating the services of an employee. The respondent however, walked with the Claimant through her grievances and eventually a decision to terminate her services was made. The Court therefore finds this Claim without merit and disallows the same save that the Claimant be paid her exit package as contained in her termination letter dated 9th June, 2008 upon compliance with conditions set therein if not already. There will be no order as to costs.

39. It is so ordered.

Dated at Nairobi this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

Delivered this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge