



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2039 OF 2015

RUTH NDEGWA.....CLAIMANT

-VERSUS-

DEVELOPMENT ALTERNATIVES INCORPORATED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

JUDGMENT

The claimant filed a memorandum of claim on 13.11.2015 through Ameli Inyangu & Partners Advocates. The claimant prayed for judgment against the respondent for, and the respondent has admitted and paid terminal dues including salary up to the date of termination Kshs.383, 373.00; pay for due and untaken leave Kshs.21, 964.00; and 30 days' pay in lieu of notice Kshs. 562, 281.00. The claimant also claimed and prayed for the following orders and which are in dispute:

- a) 13th month bonus accrued Kshs.553, 762.50.
- b) 12 months' pay as compensation for unlawful termination Kshs.6, 645, 150.00.
- c) Exemplary damages.
- d) Costs of the suit and such other relief as the Court shall deem proper.

The memorandum of response to the claim was filed on 21.12.2013 through Daly & Figgs Advocates.

There is no dispute that the respondent employed the claimant in 2013 as the Finance and Operations Director.

There is no dispute that the claimant's employment was terminated by the letter dated 18.09.2015. The contract of employment was terminated based on the respondent's operational requirements pursuant to section 45 of the Employment Act, 2007.

The **1st issue** for determination is whether the termination was unfair because the reason for termination was not valid and the procedure was unfair for want of a notice and hearing. The respondent's case is that the claimant's employment was terminated for the reason set out in the termination letter and in particular, the productivity of the project was adversely affected due to de-motivated and dissatisfied employees under the claimant's supervision.

The claimant testified that she received the termination letter on the afternoon of 16.09.2015. She requested to hand over the following day and when she reported, the IT Officer had taken away all the assigned IT equipment and machines. Thus she was unable to handover. Thereafter she left the handover process to her lawyer. She admitted receiving the email being a warning about her performance. The warning was a summary and follow-up of the meeting of 26.06.2015 between the claimant and Steve Smith. The substance of the warning was as follows:

- a) The claimant's management style was an obstacle to teamwork and project results in view of complaints by staff who worked under the claimant that the claimant chastised them both privately and in presence of others. The staff felt that they could not learn, grow, or succeed under such management approach.
- b) On communication complaints were that the claimant lacked clear and timely communication such as not responding to urgent emails or phone calls and thus staff felt the claimant as their boss did not care or support their activities. In another complaint the claimant was reported not to speak to her staff for extended periods of time.

c) The claimant had failed to develop a relationship of trust with most of her colleagues including Steve Smith, her boss. She had identified serious issues she believed were caused by her colleagues but failed to address the issues directly with them. Instances of insubordination were observed like informing a candidate for hire that the candidate was successful contrary to clear instructions not to inform the candidate until instructed to do so. She could file complaints against staff without demonstrating managerial maturity to confront the staff about the complaints.

d) The warning stated that the issues identified created an atmosphere of anxiety and fear with adverse impact to respondent's effectiveness and efficiency so that the claimant was to make immediate improvement by managing her staff by guiding, mentoring and supporting them instead of criticising them; to have regular meetings with her staff to strengthen communication; and demonstrate a sincere commitment to building trust with her project colleagues through open, honest and respectful communications.

e) The warning concluded by stating that if the claimant had any questions she was free to contact Steve Smith, Acting Regional Director Erica Berkenpas; or Chief of Party David Tardif-Douglin and at the claimant's own convenience.

The claimant testified that she received the warning and the respondent had raised the concerns as set out in the warning. She confirmed that the matters raised would impact on staff working under her. She also confirmed that prior to the email her supervisor had a face to face discussion with her.

The respondent's witness (RW) was Steve Smith, the respondent's Regional Program Director for the respondent at the material time. He confirmed that he discussed with the claimant the staff grievances and issued the warning asking the claimant to improve. The claimant never denied the grievances as were raised by the staff but she acknowledged the depth of the issues and the warning was valid as served. RW testified that the claimant undermined the working system of teamwork which was crucial for the respondent's delivery.

The Court has considered the material on record. It is true that the termination was abrupt, without notice and a hearing as envisaged in section 41 of the Employment Act, 2007. To that extent it was unfair. However the Court finds that in view of the matters in the warning and which the evidence is that the staff grievances against the claimant were valid as established, the Court returns that the claimant contributed to her termination 100% and she is undeserving of any compensation under section 49 of the Act. The Court finds accordingly.

The **2nd issue** is whether the claimant is entitled to bonus pay as prayed for. The 13th bonus was contractually payable based on the employee's overall performance as determined by the Team Leader per policies and procedures described in personnel manual. The 13th bonus, by contract, was to be paid at the end of the calendar year prorated from the employee's first day of employment. The Court returns that the 13th bonus was at the employer's discretion based on the policy. Under the policy performance appraisal was a necessary precondition and the evidence is that it had not been undertaken. Further bonus was due at the end of the calendar year. Accordingly, the claimant has failed to establish that it was due and in absence of the performance appraisal, the Court finds that the prayer will fail.

The Court has considered the parties' margins of success including the terminal dues already paid and returns that each party shall bear own costs.

In conclusion the claimant's suit is hereby dismissed with orders each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 1st November, 2019**.

BYRAM ONGAYA

JUDGE