



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 300 OF 2015

(Before Hon. Justice Mathews N. Nduma)

NURWIN FOZIA RAJAB.....CLAIMANT

VERSUS

NZOIA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant was employed by the Respondent on 25th October 2011 following advertisement of the position and interviews conducted on 24th October 2011 in the position of Purchasing Manager. The claimant was confirmed to the position of Purchasing Manager by a letter dated 5th June 2012, following “successful completion of” probation period.

2. By a letter dated 3rd November 2013, more than two years from date of appointment the Managing Director Mr. Saul Wasilwa wrote a show cause letter to the claimant indicating to her that in her application dated 14th February 2011, under employment history, the claimant had indicated that she had been working at Moi University, Eldoret as a Senior Assistant Procurement Officer between October 2005 and February 2011 and that subsequent enquiries had revealed that for five years up to 22nd November 2011, the claimant had worked as a Public Relations Assistant and assisted with administrative duties contrary to the assertion that she was Senior Assistant Procurement Officer.

3. The claimant responded to the notice to show cause by a letter dated 3rd May 2013 in which she stated that:

“I wish to reiterate that my CV did not specify time I did procurement but the time I was working in Moi University”

The claimant added that she was in any case in-charge of procuring all non-book and book reading materials and all items required for the libraries in Moi University as stipulated by her immediate supervisor.

4. The claimant also invoked the 33.3% gender rule to be considered in the employment of women candidates to bring about gender balance in public institutions such as the respondent.

5. The claimant was placed under suspension on half salary by a letter dated 8th May 2013 written by the Managing Director Mr. Saul Wasilwa.

6. The Managing Director wrote a letter terminating the employment of the clamant dated 28th February 2014 on behalf of the Company board.

7. The claimant states that she was not given opportunity to be heard before the termination nor was the Board of Directors fully constituted as at 8th May 2014, to give it mandate to terminate her employment.

8. The claimant prays for declaration that the termination of her employment was unconstitutional, unlawful and unfair and that she be reinstated to her job without loss of salary or benefits and in the alternative she be granted maximum compensation for the unlawful termination and payment of all benefits withheld by the respondent.

9. At the time of termination, the claimant was paid two (2) months salary in lieu of notice and other benefits less any indebtedness as per the letter of termination.

Response

10. The respondent filed a memorandum of response on 8th December 2015 in which all the particulars of employment of the claimant are admitted. The claimant testified in support of her case as CW1 and the Respondent called RW1 Lucas Alwalva Otehe, head of Internal Audit from 2011 and RW2 Shadrack Nyongesa Masinde Acting Human Resource Manager of the Respondent. The respondent testified that the employment of the claimant was terminated for lack of integrity in that she had misrepresented her work experience when she applied to be employed. That the job requirement was 7 years experience in procurement work but the claimant was an Assistant Public Relations Manager up to the year 2011 and only was appointed to position of Senior Assistant Procurement Manager in the year 2011. That she had therefore misrepresented to the respondent her true work experience. She therefore lacked integrity and was lawfully terminated. Neither RW1 nor RW2 were involved in the disciplinary process that led to the termination of the employment of the claimant.

11. RW2 stated that the Board of Directors met on 27th February 2014. Only three members were present including the Managing Director who was the Secretary to the Board. The Board made a decision to terminate the employment of the claimant at that meeting for the reason service no longer required. The Board had earlier on 25th January 2013, recommended that the claimant be asked to resign and if she failed for the matter to be reported back to the Board which happened on 27th February 2014. RW2 testified that she was not aware how many members of the Board constituted quorum. That only two (2) members had been gazetted then. RW1 testified that the claimant was not called to appear in any of the Board meetings and she was also not represented in those meetings.

Determination

12. The issues for determination are:

- (a) Whether the termination of the employment of the claimant was for a valid reason and if a fair procedure was followed to that end.
- (b) Whether the claimant is entitled to the reliefs sought.

Issue (a)

13. Upon a careful consideration of the testimony by the claimant and that by RW1 and RW2. Having also considered the documentary evidence before court and the submissions by the parties, the court has arrived at the following findings of fact.

- (a) The respondent had on 11th February 2011 advertised for the position of Purchasing Manager. The advertisement in the job specification titled 'essential knowledge, skills and experience' had provided for a minimum of 7 years experience in a large and busy manufacturing concern and have good knowledge in tendering procedures and systems inter alia.

14. In her response to the advertisement, the claimant attached a curriculum vitae which under title 'employment history' read:

"October 2005 to date: Moi University Eldoret Senior Assistant Procurement Officer"

15. The claimant was the successful candidate upon interview and was employed under probation and later confirmed to the position of Purchasing Manager. The respondent did not raise any issue regarding her performance in the two year period she served the respondent.

16. By a letter dated 7th November 2011 the Human Resource Manager then, Mr. P.W. Murambi had requested for reference of the claimant by the Principal Administrator Human Resources Moi University, the previous employer of the claimant. This was a month after appointment of the claimant.

17. On 22nd November 2011, one Mr. P.C. Barmane, Principal Administrative Officer (HR) of Moi University had responded to the request for reference by the respondent in which he gave the employment history of the claimant at Moi University. On 5th June 2012, the claimant was confirmed to her position upon completion of probation.

18. The letter from Moi University recommended the claimant to the post of Purchasing Manager of the respondent upon disclosing her work history to comprise Public Relations Assistant which included administrative duties up to the time of leaving Moi University. The letter also indicated that the claimant had shown exemplary performance and was a conscientious officer. The letter however did not indicate that the claimant had been appointed in the position of Senior Assistant Procurement Officer at the Moi University as she had indicated in her Curriculum Vitae employment history and in the paragraph showing her duties and responsibilities to have included "Senior Assistant Procurement Officer"

This is the issue that was raised by the Managing Director Mr. Saul Wasilwa in the notice to show cause dated 2nd May 2013, almost a year from the date the claimant was confirmed to her job on 5th June 2012; and more than two years from the date of appointment.

19. The issue raised by the claimant was why it took the respondent that long to raise this issue from the date the reference was sent to the respondent by the Moi University.

20. The claimant suggested that this was maliciously done by Mr. Saul Wasilwa upon her refusal to sanction irregular transactions requested by Mr. Saul Wasilwa.

21. The bottom line in this matter regardless of the passage of time is that the claimant had consciously and repeatedly described her work history, experience and responsibilities in a manner that was not only inaccurate, but also had wrongly described the position she had

substantively held at the Moi University from the year 2005 up to the time of her recruitment in October 2011.

22. Clearly, the intention of the claimant as discerned from a plain reading of her curriculum vitae submitted to the respondent in support of her application for the job of Procurement Manager was to depict herself as a former holder of the position of “Senior Assistant Procurement Officer” for a period of about six (6) years from 2005 up to 14th February 2011, when she submitted the application to the respondent.

23. This in the court’s view and finding was fraudulent misrepresentation meant to place herself in better stead in procurement matters than she had actually performed in the six (6) year period. The court agrees with the testimony by the respondent that this misrepresentation weighed much in determining the claimant as the successful candidate as compared to other applicants.

24. That the respondent considered this to be a serious dent on the integrity of the claimant and therefore the relationship between the claimant and the respondent had become untenable.

25. The claimant did not provide a reasonable explanation to Mr. Saul Wasilwa in her response to the notice to show cause. It is the court’s finding that the misrepresentation by the claimant was a valid reason to cause her suspension on half pay and the eventual termination of employment by the respondent.

26. The claimant was given opportunity to explain in writing the reason why her employment ought not to be terminated. This explanation by itself was sufficient to constitute a fair hearing in the circumstances of this case since documentary evidence held by the respondent at the time which has also been placed before court spoke for itself and needed no further explanation. The Board of the Respondent at the time had not been fully constituted. However, the Managing Director of the respondent and weighed on this matter carefully and the two (2) Board members of the respondent who had been Gazetted at the time also considered the matter and made appropriate recommendations in the court’s view in the circumstances prevailing at the time.

27. In the final analysis and in answer to all the three issues raised herein, the court finds that the termination of the employment of the claimant was for a valid reason and the respondent followed a fair procedure in effecting the termination.

28. The claimant was offered two (2) months’ salary in lieu of notice in terms of the letter of appointment. The claimant has not made any specific prayer for payment of terminal benefits. The letter of confirmation of the claimant shows that she had been placed under the company’s Retirement Benefit Scheme.

29. Accordingly, the suit has failed in all respects and is dismissed. The respondent had slept on its right by raising these issues two years from the date the reference was sent to them. The claimant suffered prejudice due to that delay on the part of the respondent.

30. This is an appropriate case for each party to bear their costs of the suit.

Judgment Dated, Signed and delivered this 4th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Gachuba for the claimant.

M/S Kariuki for Respondent

Chrispo – Court Clerk