



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1996 OF 2014

I K CLAIMANT

VERSUS

D LIMITED 1ST RESPONDENT

K M 2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 10.11.2014 alleging that she was employed by the respondent as a sales person from April 2010 till 18.8.2014 when she was wrongfully and unlawfully dismissed after reporting to the police a case of sexual harassment against second Respondent. It is the claimants case that the termination was unlawful, unfair and/or illegal because it was done without following the procedure laid down in the Employment Act 2007. She therefore prayed for terminal dues plus compensation for the unfair termination totaling to Kshs.622,194.00.

2. The respondents deny ever employing the claimant from April 2010 to 18.8.2014 as alleged. They however contend that in July 2011 they accepted a request for an internship by the claimant as she was in need of some work experience to enhance her chances of getting a job. It is the defence case that the claimant never stayed in the office continuously and did not report to the office even for months but because she was on internship, and the fact that she was a cousin to the second respondent, she was still accommodated back to the office whenever she showed up. The respondents further deny the alleged sexual harassment of the claimant by the second respondent and averred that the claimant was never dismissed from the internship but she left on her own violation. They therefore prayed for the suit to be dismissed with costs, adding that the alleged sexual harassment is falsehood well calculated to exploit the law to her benefit and take advantage of the respondent's generosity. They also objected to the joinder of the second respondent as defendant.

3. The main issue for determination is whether there existed employment relationship between the parties from April 2010 till 18.8.2014. The suit was heard on 11.5.2016 and 23.4.2018 when the claimant testified and called one witness while the respondents called three witnesses. Thereafter both parties filed written submissions.

Claimant's Case

4. The claimant testified that she was employed by the first respondent in April 2010 as a Sales Rep and Receptionist at a salary of Kshs.10,000 which was to be paid once the company picked up. She denied ever being intern from 2011 but an employee starting 2010. She further testified that on one Friday in August 2014, the second respondent, her cousin and the Director of the first respondent, asked her to work until 8.00 p.m because there was a lot of work and just before leaving the office, he sexually harassed her by touching her body everywhere, and when she resisted, he threatened to end her employment. That, in the following day, he sent her colleague, Mr. W M (Technician) to pick the phone from her house. She then reported the harassment at Parklands Police Station after which the second Respondent called and told her not to report back to work again.

5. The claimant further testified that the no reason for the dismissal was given to her and no opportunity was given to her to defend herself before the dismissal. She was also not given certificate of service and prayed for the reliefs set out in her claim. She ended by stating that from April 2010 – April 2013 she was not paid any salary but thereafter she was paid after the company picked.

6. On cross examination the claimant stated that she held a Diploma in Procurement. She could not remember the exact date when she commenced her employment at the first respondent but maintained that she was employed as a Sales Rep and Receptionist. She contended that she was selling Fina Pack Accounting System which had been developed by the first respondent. She however confirmed that no contract of employment was even given to her. She admitted that she had an Aunt called S K who died in 2010 but contended that she knew

the second respondent long before the death of aunt S K.

7. On further cross examination the claimant stated that she was harassed on Friday and never reported to work the following day because it was on Saturday which was not a working day for her. She further stated that she reported the harassment to the police on the following Monday and left her telephone contact but ever since, she was never called back by the police after they spoke with the second respondent. She called the officer she reported to, but she was told to wait until she was called back. She contended that she felt bad and cried the whole night after the sexual harassment.

8. No. 234950 Inspector Susan Sawoyo is attached at the Parklands Police Station as the officer in charge of investigation. She produced a copy of extract of OB No. 71 of 5.8.2014. She testified that the report concerned a case of sexual harassment and refusal to pay salary on 1.8.2014 and the complainant reported on 5.8.2014. She further testified that the matter was allocated to PC Halakhe at the Gender desk but during her investigations she tried calling the complainant but she never turned up to record a statement but the accused recorded his statement. She concluded by stating that the claimant reported to the police after she found her computer password changed.

Defence Case

9. Mr. T M M testified as Rw1. He stated that he joined the first respondent in January 2011 as an intern after graduating from JKUAT on 29.7.2010. In February 2011, F W N and her boss Mr. P O of Ujuzi Soko Limited went to share offices with the first respondent. He further stated that between May 2011 and July 2011, Mr. D M, a student at Africa Nazarene University joined the first respondents also for internship. Rw1 concluded by stating that by the time he left the first respondent in July 2011, the claimant had not joined the company.

10. On cross exam, Rw1 stated that he did his internship in HR at the company and during the period (January to July 2011) the company developed a Point of Sale Software. He contended that he is the one who developed it and trained the second respondent. He however admitted that he could not testify on matters which occurred before joining or after leaving the company. He concluded by stating that during his stint at the company he never saw the claimant there.

11. The second respondent testified as Rw2. He stated that he is one of the Directors of the first Respondent which deals with ICT, computer repairs and Networking. He testified that Rw1 joined him as an intern in the first respondent from January to July 2011. Together they developed point of sale Software starting February 2011 after RW1 trained him on how to work with C#. He further stated that from January to August 2014, the first respondent shared office with Ujuzi Soko Limited.

12. On 30.7.2011, he gave lift to the claimant to Meru to attend burial of their aunt S K and during the voyage, claimant request him for attachment in the first respondent as an intern. In August 2011, he accepted the claimant on humanitarian grounds as a family relative but there was no employment contract made. Her first assignment was at the respondent client Kabiria Supermarket at Riruta Satellite where she was doing data entry for the supermarket stock and prices. She was however restless moving about to live with different relatives until mid 2013 when he encouraged her to settle down and even assisted her with money for rent and household items. He contended that, although she was not his employee he kept on giving her some handout to meet her day to day expenses. He however stated that the handouts were not fixed sum as the claimant was never in the office consistently.

13. Rw2 testified that on 30.7.2014, he told the claimant that she would not be able to help her beyond 31.7.2014. However, she reported to the office on Friday 1.8.2014 and 4.8.2014 forcing him to change the passwords for all the office computers so that he claimant could not use them. As a result the claimant filed complaint against him on Tuesday 5.8.2014 at 4.25 p.m. alleging that he had sexually abused her on Friday 1.8.2014. She however never recorded any statement thereafter and efforts by the police to reach was futile. He denied the truth in the claimant's allegations and prayed for the suit to be dismissed with costs.

14. On cross examination, Rw2 confirmed that Rw1 was his nephew and that the first Respondent started operation in 2007. He maintained that he started developing a point of Sale Software for shops and Supermarkets, in February 2011. He denied that the claimant was an employee and maintained that she was an intern. He contended that the claimant was not being paid any salary but inconsistent subsistence for rent and other expenses. He further contended that the company policy disallows employment of relatives and that is why he never employed the claimant. He however admitted that she was in the company from August 2011 but she had no IT training. He maintained that when he was summoned to the police and recorded statement, the claimant disappeared.

15. Mr. W M testified as Rw3. He stated that he has worked for the respondent as a Technician since 1.8.2012. He confirmed that he met the claimant at the respondent's office where she was introduced as cousin to the Rw2. He stated that the claimant was staying at different places with different relatives until 2013 when he and Mr. G A assisted her to get a house at Kagemi. He further testified that the claimant never used to go the office consistently because sometimes she used to assist her mother to buy goods for sale in Uganda. He maintained that the claimant was never employed by the respondents. He concluded by stating that he accompanied Rw2 to the police to meet the claimant but she never showed up.

16. On cross examination, Rw3 confirmed that on 4.8.2014 he was in the office but left to work outside. He further stated that the claimant was reporting to the office and then go out to do sales. He admitted that he never knew the agreement between the claimant and the Rw2. He further stated that there were two Directors office but there was no secretary. He stated that the office was small and partitioned so that the Director had private chamber but the rest of the staff shared the open space. He further stated that the claimant used to sit on his desk when he was away.

Analysis and Determination

17. The issues for determination are:

- (a) Whether the claimant was employed by the first respondent under a contract of service.

(b) Whether the contract of service was unfairly terminated

Contract of Service

18. The claimant contends that she was employed by the first respondent as a Sales Rep and Receptionist earning Kshs.10,000 per month but Rw2 has denied the alleged employment relationship and maintained that she was only an intern to gain work experience and there was no written contract or payment of salary but occasional handouts. Under section 2 of the Employment Act, contract of service and employee are defined as follows:

“Contract of service means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which part XI of this Act applies; Employee means a person employed for wages or a salary and includes an apprentice and an indentured learner.”

19. From the foregoing provision, it is clear that an intern is an employee under a contract of service. However, the terms of employment cannot, in my view, be governed by the minimum terms of service under the statutes of labour law that govern the contracts of service for employees under a wage or salary. The terms of service for an intern is therefore governed by the express contract between the parties or it is implied from the conduct of the parties. In this case, there is sufficient evidence to show that the claimant was not only an intern at the first respondent without a desk but also a cousin to the company Director (Rw2). There is also evidence to prove that she never worked continuously and she was not earning any regular salary or wages but mere handouts for her subsistence. She never called any former or current employees of the first respondent to contradict the evidence by the defence witnesses that she was an intern serving under an oral agreement between her and Rw2. Consequently, I find and hold that the claimant has failed to prove on a balance of probability that she was regular employee of the first respondent for salary or wages and not a mere intern under an oral contract.

Unfair termination

20. Under section 45(2) of the Employment Act, termination of employee’s contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason cited was company policy that the company does not employ relatives. That relationship has been confirmed by both the claimant and the defence witnesses and the said policy has not been challenged by the claimant.

21. As regards the procedure followed, the claimant was verbally given one day notice. The termination was not on account of redundancy or misconduct, poor performance or physical capacity and as such, the mandatory procedure provided by section 40 and 41 of the Act were not applicable. In addition, the provision of section 35 of the Act was also not applicable because the claimant was not earning any wages or salary at the end of each day or after regular intervals. Section 35 of the Act provides for prior notice commensurate with the employees pay interval. Consequently, I return that the claimant has failed to prove that she was unfairly terminated as required by section 47(5) of the Act. On the other hand, I find that the respondent has proved on a balance of probability that he acted with justice and equity by giving the claimant a chance to learn and gain experience until it was not possible to continue supporting her as an intern.

Reliefs

22. In view of the fact that the claimant was not employed as a regular employee and that, there was no written contract upon which to verify her rights, I find and hold that the claimant has no remedy in this suit.

Disposition

23. The suit lacks merits and it is dismissed with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE