



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT NAIROBI

CAUSE NUMBER 1766 OF 2014

BETWEEN

AZMINA MOHAMMED AKBAR KHAN.....CLAIMANT

VERSUS

VICTORIA FURNITURES LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

A.I. Onyango & Company Advocates for the Claimant

T.K.Kariba Mbabu & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim, on 9th October 2014. She states she was employed by the Respondent Company as a Sales Lady, on 30th January 2014. Her monthly consolidated salary was Kshs. 77,045. 8 months later, on 31st August 2014, the Respondent terminated Claimant's contract. The Claimant avers termination was for no reason at all. There were no allegations of wrongdoing, no warning, no notice and no hearing. The Claimant asks the Court to find termination was unfair and grant her Judgment against the Respondent on the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 77,045.
- b) 12 months' salary in compensation for unfair termination at Kshs. 924,540.
- c) Unpaid commission at Kshs. 97,037.

Total.....Kshs. 1,098,622

- d) Costs.
- e) Interest.

2. The Claimant relies on the following documents in support of her Claim:-

- i. Letter of appointment dated 30th January 2014.
- ii. Salary voucher dated 27th August 2014.
- iii. Demand letter from her Advocates to the Respondent dated 11th September 2014.

iv. Letter in response from Respondent's Advocates to Claimant's Advocates, dated 12th September 2014.

3. The Respondent filed its Statement of Response on 7th November 2014. It is conceded that the Claimant worked for the Respondent from January 2014 to August 2014. She refused to report back to work in September 2014, after she had received her salary for August 2014. The Respondent did not terminate her contract at all. She deserted, and even before the Respondent could establish her whereabouts, she made demand through her Advocates alleging the Respondent had unfairly terminated her contract. The Respondent prays for dismissal of the Claim.

4. The Respondent exhibits the following documents in support of its position:-

- i. Claimant's employment letter.
- ii. An extract of the muster roll.
- iii. A bundle of Claimant's salary vouchers.

5. Hearing took place at the Court in Nairobi on 19th April 2018, during the Court's Service Week. The Claimant gave evidence, as did Respondent's Sales Manager, Jailesh Kumar Gandecha, bringing hearing to a close. Parties filed and exchanged their Closing Submissions in the month of May 2018. The file was forwarded to the Trial Judge at the Mombasa Station for judgment-writing, on 11th July 2018.

6. The Claimant testified that she is presently working for Vegpro Kenya Limited as the Imports Coordinator. She previously worked for the Respondent as a Sales Lady. She confirmed the terms and conditions of employment contained in the letter of employment.

7. In August 2014, she was told by the Respondent that her contract had been terminated, because her sales were not good. There were no sales targets given to her. It is not true that the Claimant deserted. On dates where the muster roll indicates 'nil,' termination had already taken place.

8. Cross-examined, the Claimant stated she cleared Form 4, and studied computer. She previously worked for a Company called Design Furniture. She joined the Respondent through an acquaintance. She was issued a letter of employment, with specified terms and conditions of employment. She used to sign salary vouchers on receiving her salary. Transactions were recorded.

9. She did not have an issue with her Supervisor, but had an issue with the Director, because the Director terminated her contract. He told her not to report to work. The Director told the Claimant her sales were not good. The Statement of Claim does not say that the Claimant's contract was terminated for poor sales. She only made this allegation in Court. Letter from Respondent's Advocates in response to Claimant's demand letter states the Claimant deserted. She did not respond to this allegation.

10. At paragraph 15 of the Statement of Claim, the Claimant alleges the Respondent offered to settle the Claim, through Respondent's letter dated 12th September 2014. The Claimant conceded the letter does not say the Respondent offered to settle. Termination was unfair, because the Claimant was told not to go to work. The pay slip indicates the Claimant was paid sales commission of Kshs. 29,164. She did not exhibit any document to support her prayer for sales commission. The breakdown of commission sought is not available to the Court. She could not remember how much commission she earned. She worked for a total of 8 months. She did not leave employment to take up another job. Redirected she denied that she left employment to take up another job. Commission was computed from sales records. What is shown in the pay slip is not the full commission.

11. Gandecha told the Court he has worked for the Respondent for 9 years. He oversees sales, and reports to his Director. He worked with the Claimant previously at Design Furniture. He introduced the Claimant to the Respondent. She joined in 2014.

12. She was on probation for 3 months. She worked to the end of August 2014. She was paid her salary and did not return to work. The Respondent always issues a letter of termination, whenever a decision to terminate is made. Verbal termination is unheard of at the Respondent's business. Within 10 days of Claimant's desertion, the Respondent was shocked to receive demand letter from her Advocates, alleging unfair termination. Gandecha testified that the Claimant occasioned the Respondent damages and ought to pay notice to the Respondent. He did not know if the Claimant was owed commissions, but thought she may have been owed some commissions by the time she left. She did not give details of commissions owed in her Claim.

13. On cross-examination, he told the Court that Director Shah signed Claimant's contract. The Director was not one of the Witnesses for the Respondent. Gandecha was not involved in payment of commissions. A lady called Satwinder paid commissions. She was not one of the Witnesses for the Respondent. The Respondent did not present commissions record in Court. Muster roll shows the Claimant was included in N.S.S.F contributions made for the month of September 2014. The Respondent was not sure that the Claimant had left, hence her inclusion. Gandecha reiterated his answer on Claimant's inclusion in the muster roll of September 2014, on redirection.

The Court Finds:-

14. The contract document dated 30th January 2014, shows that the Claimant was employed by the Respondent as a Sales Lady. Her fixed salary was Kshs. 77,045. She was, in addition, eligible for discretionary pay comprising bonuses and commissions. Her effective date of employment was 6th January 2014. She was placed on probation of 3 months.

15. According to the Claimant in her Statement of Claim, her contract was terminated by the Respondent on 31st August 2014, for no reason at all. In her evidence, she states she was told her contract had been terminated because her sales were poor. Cross-examined, she conceded

nowhere in her Claim is it stated that the Respondent terminated her contract because of poor sales. In her letter of demand, she merely states that details of termination are well-within Respondent's knowledge.

16. The Respondent's position is that the Claimant deserted sometime in September 2014, after receiving her August salary. The Respondent did not terminate her contract. The Respondent's policy was to issue letters of termination, whenever termination decision was made. The Claimant made demand a mere 10 days after alleging her contract was unfairly terminated.

17. The Claimant has not shown that termination was instigated by the Respondent for whichever reason. The Respondent included her name in the muster roll for September 2014, because the Respondent was not sure if the Claimant would return. The Claimant would not be included if her contract was terminated at the end of August 2014. Her letter of demand issued a mere 10 days after her departure. She claims that the Respondent offered to settle her Claim, which is not borne out by the documents exhibited before the Court. She did not respond to the allegation by the Respondent, in the letter dated 12th September 2014, that she had deserted. If her contract was terminated by the Respondent, why did she not report to work after 12th September 2014, and continue working since the Respondent had categorically denied terminating Claimant's contract? The Claimant's evidence cannot be believed. The Court is satisfied she deserted.

18. The Respondent states it made several futile attempts to reach the Claimant after she left. There is however no evidence of these futile attempts. Desertion is an employment offence. The Respondent should have made an attempt to institute disciplinary proceedings against the Claimant, for the offence of desertion. Considering the role played by the Claimant in termination of employment, the Court does not think she merits any compensation for this minor procedural defect. She appears to have been determined to leave employment, perhaps because her eyes were set on greener pastures. She immediately, upon desertion made demands on the Respondent for alleged unfair termination. The Respondent holds, and the Court agrees, that the Claimant should have given to the Respondent notice of termination of 1 month, under termination clause [b], contained in the contract of employment. The Respondent did not however make any counterclaim for notice pay.

19. On commissions, there were no details supplied, to the Court to enable the Court uphold the amount of Kshs. 97,037 quoted in the Claim as comprising commissions. The Claimant was not able to state in unequivocal language, the terms of her commission. She did not say what sales made, at what time, gave her commissions at Kshs. 97,037. It was not the obligation of the Respondent to supply commissions' records, as suggested by the Claimant. She made a specific claim. It was her responsibility to substantiate. Although Gandecha testified some commissions could be due, the Court cannot, of its own, grant any commissions in a vacuum. The prayer is rejected.

IN SUM, IT IS ORDERED:-

[a] The Claim is rejected in its entirety.

[b] No order on the costs.

Dated and signed at Mombasa this 19th day of September 2018.

James Rika

Judge

Dated, signed and delivered at Nairobi this 5th day of October 2018.

Jorum Abuodha

Judge