



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.171 OF 2016

ANNE UNICE WANDIA MURIITHI.....CLAIMANT

VERSUS

M-KOPA KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. On 6th April, 2015 the claimant was employed by the respondent and issued with a contract of service ending on 6th October, 2015 a period of 7 months. Under the contract the claimant was paid Ksh.40, 000.00 per month for the position of Service Centre Manager.
2. The claimant had various benefits that of Ksh.3,500.00 weekly allowances, Ksh.200.00 per service centre sales, 20% bonus based on the service centre performance, weekly phone airtime and internet data bundles top up, but these were never paid to the claimant.
3. Under the contract the claimant was to be paid a gross salary of Ksh.40, 000.00 but the pay slips issued indicated such amount to be the basic pay and thus no house allowance was paid. Such is due under section 31 of the Employment Act, at 15% of the basic pay.
4. The claimant's case is that the contract of service was issued contrary to the law where she was denied work benefits and therefore the same is unlawful.
5. The claimant signed a second contract with the respondent dated 7th October, 2015 and ending 6th October, 2016 a period of 12 months. The contract was to be renewed by mutual agreement and in writing. Any changes to the contract were to be in writing.
6. On 7th March, 2016 the respondent terminated the claimant's employment without notice or consultation. The claimant was paid Ksh.58, 780.00 without an indication as to what this consisted of. no reasons were given for termination of employment. The claimant had served in her duties without warning or notice of any disciplinary issue. Her sales had improved.
7. The claim is that the respondent introduced a Performance Improvement Plan (PIP) to the claimant on 8th February, 2016 and the purpose was to define the serious areas of concern, gaps in work performance and respondent's expectations and allow the opportunity for improvement. The PIP required the claimant to self-target of 70% in the month of February, 2016 and where she sold 35 items in February, 2016 meeting 50% of the set target.
8. The PIP did not alter the employment relationship. A meeting was to be held after the issuance of the PIP to discuss performance improvement.
9. The claim is that the PIP was introduced by the respondent to lead to termination of employment contrary to section 41 of the Employment Act. where the PIP was introduced to help the claimant improve on her performance the resulting termination of employment was unlawful and unfair. The terms of the existing contract of employment were not observed and term did not end as agreed.
10. The claimant is seeking the following dues;
 - a) House allowance pay at 15% basis pay all at Ksh.72,000.00;
 - b) Pay for the unexpired term contract of 8 months Ksh.438,856.00;
 - c) Pay for 7 days worked in March, 2016 Ksh.10,769.50;

d) Annual leave for 1 year and 8 months Ksh.29,891.20;

e) Compensation; and

f) Costs.

11. The claimant testified that upon employment by the respondent she worked diligently under a 7 months contract which ended and renewed for a term of one year. During the course of employment, the claimant was issued with a PIP setting out work target ad modalities for review for improvement and stating 8th February, 2016.

12. On 7th March, 2016 the claimant was terminated in her employment without being given notice and on alleged poor performance. where the PIP was to help the claimant improve on her work, it was used to terminate employment contrary to the contract and the law.

13. Upon termination of employment the claimant issued demand to the respondent for the payment of her terminal dues on 10th March, 2016 and on the next day, 11th March, 2016 she received a letter of show cause. By such time employment had terminated and the claimant did not reply to the show cause notice.

14. The claimant then outlined her claims and noted that the respondent has since paid her Ksh.58, 750.00 without a breakdown.

15. In response the defence is that on 6th April, 2015 the claimant was employed by the respondent earning a gross salary of Ksh.40, 000.00 and was paid until the end of the contract.

16. The defence is that there was a justifiable cause to terminate employment based on poor performance of the claimant. The claimant was paid her terminal dues of Ksh.58, 750.00 and an enumeration of terminal dues.

17. From August, 2015 the claimant's work performance deteriorated and the reason employment terminated. The PIP is the respondent's mechanism of assessing an employee's work performance. The claimant did not perform her duties satisfactorily and was placed on a PIP dated 4th February, 2016. Such PIP did not stop the respondent from taking further action in terminating employment in the vent there was no work improvement as the contract of employment provided for termination of employment upon notice or payment in lieu thereof. The respondent followed due process and the termination of employment was justified. The claim should be dismissed.

18. The defence is also that the claimant has since been paid her terminal dues of Ksh.58, 750.00 and nothing remains unpaid.

19. On the process followed, on 7th March, 2016 the respondent issued the claimant with a termination letter and outlined the dues to be paid including notice pay. On 10th March, 2016 the claimant replied complaining about the termination of her employment and on 11th March, 2016 the respondent issued the Notice to Show Cause which required the claimant to attend a meeting on 15th March, 2016 which she failed to do. On 3rd May, 2016 the respondent paid the terminal dues.

20. The claim as filed in in abuse of the court process.

21. In evidence the respondent called Margaret Nyokabi Kiarie the human resource manager and Mr Mackenzie who supervised the claimant and who testified that upon employment, the claimant was issued with a written contract with an all-inclusive gross pay and the pay slips issued had a breakdown of the gross pay

22. The respondent has in place various work place policies to deal with work performance. An employee who is judged by the boss as underperforming is put on a PIP for an agreed period of time which is meant to assist the employee improve. Where there is no improvement the employee is terminated in her employment.

23. Under the contract issued to the claimant she was entitled to take annual leave which she did. The claimant was terminated in her employment following poor performance which was noted as declining from September, 2015 and had failed to meet her work targets. A PIP was introduced and dated 4th February, 2016 setting the areas of improvement but the claimant did not improve and pursuant to the contract of employment which allowed for termination of employment upon notice or payment in lieu thereof, on 7th March, 2016 the respondent issued notice terminating employment. The claimant had the right to appeal and on 10th march, 2016 she contested the same and was issued with a show cause notice to attend on 15th march, 2016 which she failed to attend. Her dues were then paid.

24. At the close of hearing both parties filed written submissions.

25. The claimant has reiterated her claims and evidence.

26. The respondent submits that upon the claimant being paid her terminal dues she signed a declaration of final dues on 3rd May, 2016 the effect of which is that she cannot make any further claims from the respondent. the claimant is estopped from going against her own declaration and seeking any other dues outside of the same as held by the Court of Appeal in **Coastal Bottlers Limited versus Kiamthi Mithika [2018] eKLR** that where parties had agreed that payment of the monies paid under the settlement agreement would absolve the other party from any further claims should be respected.

27. The respondent also submits that the contracts entered into by the parties hold terms and conditions allowing the respondent to terminate

employment upon notice or payment in lieu thereof and which terms were applied with regard to the claimant. The claimant failed to demonstrate that she had improved sales as required under section 107(1) of the Evidence Act as held in **Jennifer Nyambura Kamau versus Humphrey Mbaka [2013] eKLR**. the burden placed upon the claimant under section 43 of the Employment Act was not discharged. The PIP issued to the claimant was signed but she failed to improve work performance and this did not bar termination of employment in accordance with the terms of the contract.

28. The respondent complied to the law and the remedies sought are not due.

From the pleadings, evidence and written submissions, the issues which emerge for the court determination can be summarised as follows;

Whether the respondent is absolved from making further claims upon the declaration of Final Dues being signed;

Whether the remedies sought by the claimant are due.

29. The respondent in the written submissions has introduced and challenged the entire suit and claims made by the claimant on the grounds that there is a

Declaration of Final Dues dated 3rd May, 2016 signed by the claimant in payment of her final dues. The respondent has relied on a recent case by the Court of Appeal in **Coastal Bottlers Limited versus Kiamthi Mithika [2018] eKLR**.

30. The court has addressed itself to the findings by the Court of Appeal in the matters addressed as above. the facts leading to the appeal though different from herein the Court of Appeal noted that each case must be addressed in its merits noting the purpose of the discharge agreement/voucher/declaration absolving the employer from making any further claims.

31. with respect to these findings and noting the facts leading to the decision in **Coastal Bottlers Limited versus Kiamthi Mithika [2018] eKLR** and which arose from a case of alleged redundancy which is foundationally different from herein, this court paying fidelity to the law, Section 35(4) of the Act, provides that;

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or

(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

32. Well aware of the position in law and conscious of the Court of Appeal findings, this court in **Mohamed Kafafa Abduba versus Colour Crops Limited Cause No.139 of 2015** held as follows;

Where a legal right(s) established in law exists, such cannot be negated through any other means. The court plain reading of the provisions cited above [section 34(4) of the Employment Act, 2007] is that a contract of employment must terminate within the law and nothing stops an employee from making claim(s) for any cause recognised by law. Where there is an employment term protected in law, this cannot be invalidated by a discharge clause.

33. The law subsisting before the enactment of the Employment Act, 2007 and use of common law and the law of contract in employment relationships has fundamentally changed and despite parties entering into employment contract spelling out terms and conditions of employment fidelity must be to the applicable law and the provisions of Article 41 of the Constitution, 2010 which has created as part of the Bill of Rights the right to fair labour practices. Such constitutional rights cannot be removed from the workplace by discharge agreements, clauses of declaration.

34. Employment must terminate within the law. the contract of employment is a guide to the terms and conditions of employment which must be addressed within the law and in the context of the Constitution, 2010.

35. Alive to the provisions of the law and the decisions cited by the respondent, the claimant had legitimately moved the court on her claim following termination of employment and the remedies sought shall be assessed on their merits. As noted above, the question of the veracity of the declaration of final dues has only arisen at the submissions stage. It was not pleaded as to allow the claimant to respond thereto and even where it had been, with the assessment above, this is addressed.

36. On 7th March, 2016 the claimant was issued with letter and notice terminating her employment with the respondent on the grounds of;

.....the decision has been reached following your poor sales in January, and continued poor performance as evidenced by the 30 day Performance Improvement Plan (PIP) that you were put in from 9th February, 2016. ...

37. A sanction taken against an employee based on poor performance must be preceded by a capability hearing, within the parameters set out in Section 41 of the Employment Act which provides that;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union

representative of his choice present during this explanation.

38. The Respondent was unable to explain how the Claimant's rating deteriorated from 9th February, 2016 to 10th March, 2016 to justify the summary action taken without a meeting to assess and find out what challenges she faced in addressing targets set out in the PIP. What is clear is that the Claimant was not given an opportunity to defend her performance prior to the adverse verdict that led to the termination of her employment.

39. In **Jane Wairimu Machira versus Mugo Waweru and Associates [2012] eKLR** the Court held that an appraisal of the performance of an employee must of necessity involve the active participation of the employee. The mandatory provisions of section 41 of the Employment Act, 2007 must be followed despite the employee being issued with a targeted PIP with a timeline.

40. in **Kenya Science Research International Technical and Allied Workers Union (KSRTAWU) versus Stanley Kinyanjui and Magnate Ventures Ltd, Cause No. 273 of 2010** the court held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and allow them reasonable time to improve. Where there is no improvement despite the PIP with set timeline the procedure to follow is as under section 41 of the Employment Act, 2007 as held in **Kenya Union of Commercial Food and Allied Workers Versus Meru North Farmers Sacco Limited [2014] eKLR** that section 41 of the Employment Act, 2007 is couched in mandatory terms and where an employer fails to follow the mandatory provisions and an employee is terminated after such flawed process such termination is ultimately unfair.

41. In this case, where the claimant was not reviewed after the PIP and employment terminated before an appraisal, review or subsequent meeting to address any issue noted with regard to work performance, the termination of employment without the respondent following the due process of the law was unfair within the meaning of section 41 read together with section 45 of the Act.

42. On the remedies sought by the claimant for payment of a house allowance, the contracts of employment issued spelt out the gross salary payable which was all inclusive. To claim for any other dues outside of such provisions on the basis that that pay slip set out a basic pay would negate the foundation of the employment terms and conditions.

43. On the claim for the balance of the employment contract, on the finding above that employment terminated unfairly, the remedies under section 49 of the Employment Act, 2007 allow the court to make multiple awards for the payment of the unexpired period of a fixed term contract, compensation and or any other remedy. In this regard it is appropriate for the court to award the claimant for the unexpired term of the contract period which she would have served had there been no unfairness in the termination of her employment. For the period of 8 months at the salary of Ksh.40, 000.00 per month the claimant is hereby awarded Ksh.320, 000.00 and which addresses the unfair termination of employment.

44. For the claim of leave pay due, days worked and notice pay these dues were computed and the claimant has since received the same. Such payment was less the statutory dues. A Certificate of Service has since issued.

Accordingly, judgement is hereby entered for the claimant against the respondent with the award of Ksh.320, 000.00 and costs of the suit.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU

JUDGE

In the presence of: