



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 87 OF 2014

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

CATHERINE MISIKHU KHATIMBACLAIMANT

-VERSUS-

MT. ELGON ORCHARDS LIMITEDRESPONDENT

J U D G E M E N T

The Claimant instituted this suit vide her Memorandum dated 25th April, 2014. She alleges that her contract of employment was unfairly terminated by the Respondent by letter dated 23rd March, 2012 only 3 months after its renewal on 31st December 2011 and prays for the following remedies -

4.1 **THAT** the court do find that the claimant's contract was wrongfully, prematurely and unprocedurally terminated.

4.2 **THAT** the court do find that the claimant is entitled to payment for the remainder of the period of contract of 9 months.

4.3 **THAT** the court do find that the respondent's action of failing to pay the claimant her full contract period given that her contract was wrongfully terminated is wrong and untenable.

4.4 **THAT** as a result the court do order that the claimant herein be paid as hereunder

(a) $36,060 \times 9 = 324,540$

(b) interest on (a) above

(c) Costs

(d) Any other relief this Honourable court may deem fit to grant

The Respondent denied the averments in the Memorandum of Claim. According to the Respondent the Claimant's contract was terminated on grounds that she sexually harassed another employee against the Respondent's policy of providing a working environment for all its employees that is free from all forms of conduct which can be considered harassing, coercive or disruptive, including sexual harassment. It is further the Respondent's contention that the claimant acted against its sexual harassment policy and that according to the policy, such action is subject to appropriate disciplinary measures including termination of employment. The Respondent avers that upon the complaint being made it moved with speed to investigate the claim and found the claimant culpable. The Claimant however became uncooperative and

refused to defend herself and instead became rude, leading to the decision to terminate her contract.

When this case came up for hearing the parties agreed to proceed by way of written submissions.

In the submissions filed on behalf of the Claimant she states that her contract was terminated on grounds of undesirable behaviour. She states that this is different from the reason given by the Respondent in its reply to the Claimant's memorandum where it is alleged that her employment contract was terminated on grounds of sexual harassment.

The Claimant submits that the name of the employee whom she is alleged to have sexually harassed is not disclosed, that there is no statement recorded by the said person and there was no hearing on the allegation. She states she was never given an opportunity to defend herself on the allegations against her. That there is no proof that such hearing took place or that she was uncooperative as alleged.

The Claimant further submits that there is no warning letter, no minutes of the meeting convened to discuss her conduct, no letter inviting her to such meeting and no evidence that she refused to attend the meeting. She submits that the allegation is an afterthought as she is not guilty of any misconduct.

It is further the Claimant's argument that there is no offence known as undesirable behaviour or sexual harassment under the Respondent's rules of conduct. The claimant submits that the termination of her contract violated section 41 and 44 of the Employment Act. She urges the court to find and declare that the termination of her contract was unprocedural.

For the Respondent it is submitted that the Claimant was given an opportunity to defend herself but squandered the same. It is further submitted that the termination was regular as the Claimant was paid salary for days worked and one months' salary in lieu of notice.

Determination

I have carefully considered the pleadings and the written submissions filed on behalf of the parties. The issues for determination are whether the termination of the claimant's contract was fair and if she is entitled to the remedies sought.

Fair Termination

Fair termination according to section 45(2) of the Employment Act (herein after referred to as "The Act") constitutes both procedural fairness and validity or reason for termination.

In the present case, the Claimant's letter of termination reads as follows -

Ref/Meo/Pr/01267/41

Date: 23/03/2012

To. Ms. Catherine Misikhu Khatimba

Department: Clinic

Dear Catherine,

Termination of Employment Contract

We regret to inform you that the management has decided to terminate your employment contract as per 23rd March, 2012 for undesirable behaviours as a clinician at our clinic making your position untenable.

Consequently your employment contract has been terminated in accordance with the farm rules and

regulations.

Notice and other benefits will be paid as follows:

- 1 month salary in lieu of notice
- days worked in March 2012
- pro rata leave as at 23rd March, 2012

Thereof all company debts will be deducted.

May I take this opportunity to thank you most sincerely for the service you rendered to this company for the last 2 years of service and wish you a prosperous life in your future endeavours thereafter.

Yours faithfully,

R.A. Anderson

Managing Director

CC. Labour Officer

The letter does not refer to sexual harassment. It only refers to undesirable behaviour whose particulars are not given. The letter further does not mention any hearing having taken place, or the claimant's non-cooperation or rudeness. The letter refers to unspecified Farm Rules and Regulations.

From the foregoing I agree with the Claimant that there is no proof that there was any hearing, or that the reasons for termination of her employment was sexual harassment, non-cooperation and rudeness as alleged in the Respondent's response to the claim.

There having not been a valid reason or a hearing in terms of section 43 and 41 of the Act respectively, it is my finding that the termination of the claimant's employment was unfair.

Remedies

The Claimant prayed for the unexpired term of her contract. She relied on the cases of ABRAHAM GUMBA v KENYA MEDICAL SUPPLIES AUTHORITY [2014]eKLR, ALPHONES MAGHANGA MWACHANYA v OPERATION 680 LIMITED [2013]eKLR and CHRISTINA SAGOWA WADULO v SOLIMPEXS AFRICA LIMITED [2016]eKLR. In all three cases the Claimant was awarded compensation for unfair termination of employment.

The Respondent on the other hand submits that there is no provision in law for award of payment for the unexpired term of contract. The Respondent relied on the case of ROBERT KENNEDY MOI v A.G. & ANOTHER [2014]eKLR, LINNET NDOLO v REGISTERED TRUSTEES OF THE NATIONAL COUNCIL OF CHURCHES OF KENYA [2014]eKLR, GABRIEL KARIUKI CHOMBA v TOP IMAGE LIMITED [2004]eKLR and EXPRESS CONNECTIONS LIMITED v EZEKIEL KIARIE KAMANDE.

In the 1st, 2nd and 3rd authorities, the court declined to pay the Claimants for the unexpired term of contract on grounds that it is not provided for by law which only provides for compensation up to a maximum equivalent to 12 months gross salary.

As I have already found above, the Claimant's contract was unfairly terminated. Having found that she cannot claim payment for the unexpired term of contract do we send her home empty handed? I do not

think that would be fair. This would not be substantive justice as envisioned both in the constitution and in the Employment and Labour Relations Court Act.

Under Section 49 of the Act, the court has several alternatives remedies that can be granted to an employee whose employment is unfairly terminated. So as an alternative to payment of 9 months' salary claimed by the employee, I will award her compensation.

Having been in employment of the Respondent on back-on-back renewable contracts from 2009 to March 2012, a period of just over 3 years, and taking into account all the relevant circumstances as provided in section 49(4) it is my considered opinion that 4 months' salary is reasonable compensation in the circumstances of this case. I therefore award the Claimant compensation for unfair termination in the sum of Shs.145,220 based on a salary of Shs.36,305 in her payslip for the month of February 2012. The Respondent shall also pay Claimant's Costs for the suit.

Dated, Signed and Delivered this 30th day of March, 2017

MAUREEN ONYANGO

JUDGE