



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 626 OF 2010
STELLA MUHORO.....CLAIMANT
VERSUS
BAMBURI CEMENT LIMITED.....RESPONDENT
JUDGMENT

Introduction

1. This action is brought by Stella Muhoro against her former employer, Bamburi Cement Limited. The claim is contained in a Memorandum of Claim dated 3rd June 2010 and filed in Court on 4th June 2010. The Respondent filed a defence on 12th August 2010, to which the Claimant responded on 17th November 2010.

2. By the time the matter came up for hearing, the parties had settled the issue of compensation and agreed at 11 months' salary as the tabulation factor. There was however disagreement on the items making up the Claimant's salary and therefore the actual amount payable to the Claimant. Counsel for the parties agreed to dispense with this issue by way of written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 14th June 2002, as a Sales Representative. She was promoted to the position of Customer Service Manager from 25th July 2007.

4. On 27th February 2009, the Claimant was called to a meeting with the Respondent's Managing Director and other senior officers. At this meeting, the Acting Sales Director stated that the Respondent had made a decision to change the discount structure, increase cement prices by withdrawing transport subsidy and to withhold cement supplies to the depots mainly in Western Kenya.

5. The Respondent's sales team was directed to notify customers of the change in the discount structure and withdrawal of transport subsidy, starting 1st March 2009. The decision to withhold deliveries was not to be disclosed to customers.

6. Meanwhile, the Customer Service Department, which was under the Claimant, was required to continue with its operations as usual as the measures discussed at the meeting were not to be implemented by the Department. This was duly communicated to the Department.

7. On 19th March 2009, the Claimant received a letter from the Respondent suspending her from employment on the following allegations:

- a. Processing customer orders wrongly with intent to favour specific customer(s) and causing loss to the Company;
- b. Negligence in issuing ATS's to customers, without ascertaining stock levels at depots, and exposing the Company to liability after price changes;
- c. Substantial and frequent mistakes in documentation of delivered invoices by CSC staff, leading to serious inconvenience and financial loss to customers. Also causing loss of reputation to the Company, and time and effort in processing customer claims;
- d. Delay in reconciliation of customer accounts and handling of their complaints/claims.

8. The Claimant was thereafter called by the Respondent's Internal Auditor who claimed that a company known as *Nakuru Cement Supplies* had been favoured by the Customer Service Department, by transferring large amounts of cement to Nakuru Depot, a claim the Claimant denied as the matter was no under her portfolio.

9. The Claimant denies all the aforesaid allegations, which she terms as false, malicious, unjustified and unfair.

10. Upon suspension, the Claimant's access to the Respondent's IT system was disabled. The Respondent further confiscated the Claimant's computer thereby denying her information material to her defence against the accusations leveled against her.

11. On 8th April 2009, the Claimant was called to meet the Respondent's Finance Director, Acting Sales Director and Human Resource Director, during which meeting the Claimant was informed that the Respondent had reached a decision to terminate her services. She states that during this meeting, which lasted less than 5 minutes, she was not given any reason for the decision to terminate her employment.

12. On 9th April 2009, the Claimant collected a termination letter of the same date from the Respondent's Human Resource Director. The letter made the following accusations against the Claimant:

- a. Processing customer orders wrongly with intent to favour specific customer(s) and causing loss to the Company;
- b. Negligence in issuing ATS's to customers, without ascertaining stock levels at depots, and exposing the Company to liability after price changes;
- c. Substantial and frequent mistakes in documentation of delivered invoices by CSC staff, leading to serious inconvenience and financial loss to customers. Also causing loss of reputation to the Company, and time and effort in processing customer claims;
- d. Delay in reconciliation of customer accounts and handling of their complaints/claims.

13. The Claimant states that the matters raised in the letter of termination never arose and were not the reason for her suspension. Her appeal against the termination was rejected.

14. It is the Claimant's case that the Respondent's actions contravened the Respondent's *Employees Handbook* which entitled the Claimant to disclosure of information and an opportunity to defend herself. She adds that the termination of her employment was in violation of the Employment Act, 2007. She seeks the following remedies:

- a. A declaration that the termination of her employment was unlawful;
- b. Reinstatement or in the alternative:
 - i. Salary from the date of termination until statutory retirement date;
 - ii. Compensation for loss incurred as a consequence of the termination;
 - iii. Costs plus interest.

The Respondent's Case

15. In its defence dated 11th August 2010 and filed in Court on 12th August 2010, the Respondent admits having employed the Claimant from 14th June 2002.

16. The Respondent states that in effecting the termination of the Claimant's employment, all the legal requirements were complied with. Specifically, the Respondent wrote to the Claimant on 19th March 2009, suspending her, pending investigations and giving reasons as to why termination of employment was being considered.

17. The Respondent further states that investigations commenced on 24th March 2009 and the Claimant was given an opportunity to make her representations, on the issues under investigation. Upon conclusion of the said investigations, the Respondent wrote to the Claimant on 9th April 2009 communicating its decision to terminate her employment.

Findings and Determination

18. As stated in the introductory part of this judgment, the matter of compensation to the Claimant is no longer in contest. What is in issue is the makeup of the Claimant's salary for purposes of tabulating the amount payable to her. On her part, the Claimant submits that her monthly salary was inclusive of the following:

- a. Meal allowance @ Kshs. 6,000 per month
- b. Mobile phone allowance @ Kshs. 10,450 per month;
- c. School fees allowance @ Kshs. 732,000;
- d. Mortgage interest @ Kshs. 100,870.

19. The Respondent on the other hand maintains that these allowances did not form part of the Claimant's salary and cannot therefore be applied towards the agreed compensation.

20. In considering a similar matter in *Caroline Wanjiru Luzze v Nestle Equatorial African Region Limited [2016] eKLR* this Court held that for purposes of tabulating a claim under Section 49 of the Employment Act, 2007, the monthly salary of an employee is deemed to include remunerative allowances paid on a monthly basis. Top on the list would be house allowance which is by law, payable as a component of the monthly salary.

21. Facilitative payments made to an employee in the course of duty, would however be excluded. The test is whether the allowance is intended to support the employee while they are actively engaged in the employer's business. To my mind, the meal allowance and mobile phone allowance now claimed by the Claimant are such facilitative payments.

22. As regards the school fees allowance and mortgage interest, my considered view is that these are

anticipatory in nature and cannot therefore survive beyond the employment contract. Once the employment relationship comes to an end, they lapse automatically and cannot therefore be deemed as part of monthly salary under Section 49 of the Employment Act.

23. For the foregoing reasons, the Court finds that the tabulation of the compensation payable to the Claimant was properly done and there is no claim pending before the Court.

24. Each party will bear their own costs.

25. Orders accordingly

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017

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JUDGE

Appearance:

Mr. K'Bahati for the Claimant

Mr. Oyatsi for the Respondent