



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.2514 OF 2016

KEZIAH WANGECHI NDIRANGU.....CLAIMANT

VERSUS

SOUTHWELL SOLUTIONS AFRICA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant is an adult female and the respondent a limited liability company.
2. On 6th June, 2016 the claimant was employed by the respondent as the Business Manager and was in charge of Account, project and operational management of the company. The claimant was supervised by the head of Customer Development. The salary payable was Kshs.166, 268.00 per month which was subject to statutory deductions. The claimant was paid a net salary of Kshs.120, 000.00 after withholding statutory deductions. The salary was paid through the claimant, bank account.
3. The claimant was registered with NSSF and NHIF and it was expected all statutory dues payable therefrom would be deducted and paid together with PAYE to Kenya Revenue Authority. During the course of her employment, such deductions were effected but not remitted.
4. On 28th November, 2016, Andrew Aligula and head of Customer Development and one of the respondent directors called the claimant to a meeting with information that the respondent board had met on 26th November, 2016 and decided to terminate the claimant from her employment on the grounds that she was too expensive to maintain and the position he was holding would be taken over by someone else after a proposed merger between the respondent and Roamtech Solutions limited. The employment was subsequently terminated by word of mouth without notice or without regard to the employment contract.
5. The claimant was directed to vacate her office with immediate effect and was also denied access to her office and personal effects. The claimant was humiliated before her colleagues and then cut off emails communications.
6. The termination of employment was discriminatory, unfair and unlawful. The respondent by failing to pay the statutory deduction acted unlawfully and with malice. The claimant was never issued with an itemised pay statement.
7. The claimant was not given a hearing before termination of her employment by the respondent. the claims are for a declaration that the termination was unfair and unlawful; an order directing the respondent to account for deduction dues not remitted and to refund the same; compensation for unfair

termination of employment; a declaration that the respondent engaged in unfair labour practice and payment of exemplary damages; damages for subjecting the claimant to unfair labour practice amounting to kshs.15 million; interests on the awards and costs of the suit.

8. In evidence the claimant testified in support of her claims. The claimant was employed on 6th June, 2016 with a written contract of one year renewable. She worked diligently until 28th November, 2016 when her supervisor, Andrew called her to a meeting and verbally terminated her employment. There was no notice, agenda or minutes taken for the meeting. Andrew informed the claimant that she was being discussed by her work colleagues; she had become too expensive to maintain. That the respondent was going to merge with another company and her position was to go to an employee of the new company. Andrew was not able to explain what would happen to the other employees of the respondent.

9. The claimant requested to talk to other employees but Andrew was emphatic that a decision had already been taken and the claimant had to leave.

10. Later the claimant got a text message from her work colleague requesting to have her computer password and also made a comment that she had been terminated from her employment.

11. The other director and Chief Executive Officer (CEO) of the respondent was Mr Chris. The claimant wrote to him seeking his assistance. He replied to the effect that Andrew was under pressure from his wife to terminate the claimant from her employment with the respondent. The claimant had had problems before instigated by Andrew's wife, when she hired Ms Alaa to work under her, Andrew shouted at her and directed the claimant to dismiss her. The wife came to the office to harass the claimant on allegations that she was close to the CEO. The claimant later learnt that the Andrew was acting under instructions from his wife and now the wife wanted the claimant to leave the respondent company.

12. The claimant held a conversation with a work colleague Ms Alice Katheu who intimated that Andrew needs to separate his private life form office work. Following events of 28th November, 2016 the claimant's work emails were disabled. She was not able to tell her clients that she had left the respondent.

13. The claimant also testified that on 29th November, 2016 the claimant did not report to work as she had been fired. On 5th December, 2016 the claimant wrote to the respondent with her demands noting the unfair termination of her employment. She filed suit on 6th December, 2016.

14. In defence, the respondents allege that the claimant absconded duty but this is not correct. When the court ordered the claimant to report back to work on 21st December, 2016, she was at the office by 8.00am but her email account was deactivated at 3.16pm and thus could not stay in the office and her work was dependent on computer and internet access.

15. Upon reporting on duty, Ms Katheu gave the claimant a new password, but this was deactivated and there is a log trail to show the respondent deactivated it. The claimant thus remained at work until her email account was disabled. The claimant wrote to Ms Katheu about her disabled email from her private email address.

16. The claimant also testified that at 1pm she noticed that all other employees were leaving the office. When the claimant asked what was going on she was told there was an end of year strategy meeting but she had not been made aware or invited.

17. By 2pm, the claimant was all alone in the office. She asked Alice for directions. She was informed that she had not been invited to the office party taking place that afternoon and would remain in the office alone as she would be paid for the full month following the court orders.

18. As Christmas holidays were approaching, the claimant wrote to ask when the office would close and the opening date. The reply was that she would have to be at work unless it was a public holiday.

19. The claimant could not understand why she was being treated differently from other employees. She had not been invited to the office end year party and now had to work all alone when others were on a Christmas break. She felt humiliated and discriminated against.

20. On 22nd December, 2016 the claimant reported to work but the office was not open. She made an enquiry from Ms Katheu by email. The reply was that the respondent office would not close and the claimant had a key. However, the office was locked and the claimant had no key.

21. the claim is also that Andrew made changes and directed her to report to Ms Katheu and not to him as was the earlier practice. Ms Katheu was below the claimant in rank. He directed another employee, Mutai not to seat next to her. While talking to the claimant he kept on shouting at her. This was done in front of other employees to humiliate and lower her dignity. The claimant was also directed to show cause why she was not in the office for 21 days otherwise she would not be paid.

22. Communications between advocates had the respondent confirm that the office closed for the period from 22nd December, 2016 to 4th January, 2017 and had the claimant been at work she would have known these facts.

23. The claimant also testified in support of the claims made. The claimant is seeking reinstatement and damages for discriminatory and unfair labour practices.

There was no reason given for termination of employment and thus compensation is due.

Defence

24. In response the respondent admit the employment of the claimant as set out in the Memorandum of claim save that all allegations with regard to claims made are denied. The claimant's employment commenced on 6th June, 2016 and was issued with a written contract of employment. The deducted statutory dues from the paid salary were remitted to the relevant government departments.

25. The respondent denies ever terminating the employment of the claimant and the terminal dues and damages alleged arising are not justified. Since 28th November, 2016 the claimant deserted her duties and failed to report to work. The claimant only reported back on 21st December, 2016 as directed by the court and after receiving her salary failed to report back to work.

The claimant issued a 24 hour demand and despite a reply that there was no termination of employment, the claimant proceeded on to file the current claim. The suit is premature and the prayers sought not justified.

27. In evidence the respondent called two witnesses, Andrew Aligula Kwisero and Alice Katheu Mulinge.

28. Mr Aligula testified that as the Operations Director of the respondent the company is young and has been in operation for only two years. The respondent runs a small number of staff and on 28th November, 2016 there was an offer for a merger. The offer was for a give and take and from the same he needed to touch base with the employees. He called the claimant and informed her that her position was going to be rendered redundant and would be at risk of termination of employment unless she was willing to work in a different capacity. There was no termination of employment at all.

29. From the next day, 29th November, 2016 the claimant refused to report at work. On 1st December, 2016 her access to the office account was suspended to protect clients' information and the respondent from professional negligence.

30. On 5th December, 2016 the claimant sent a demand letter to the respondent. The claimant was demanding for reinstatement, compensation, notice pay, general damages of Kshs.15 million, exemplary damages, and the deducted statutory dues. There was an immediate response in soft copy but the claimant

proceeded and filed suit the next day and on 6th December, 2016. The allegations that the statutory deductions were not remitted is not correct as this has been done by the respondent.

31. These demands by the claimant were confusing as the claimant appeared to be in a fighting mode. A hard copy was later sent to the claimant through her advocate.

32. The court directed the claimant to report to work on 21st December, 2016 and when she arrived she got a new password but she proceeded to change it and then left for work. On 22nd the claimant reported at 7am and then sent text to the respondent that she had no access to the office and thus left. There were other employees on duty and not correct that the office was locked.

33. On 4th January, 2017 the claimant reported to work at 7.30am and found the customer service executive, but she did not stay and claimed her email account was not working. The claimant had been invited to a meeting but did not show up.

34. Mr Aligula also testified that the claimant was not willing for a reinstatement but to be paid and get a financial benefit. There was no termination and question of reinstatement does not arise. The respondent is tax compliant and the claims made are not correct. From December, 2016 the claimant's salary was paid in full. Following court directions, the respondent called the claimant back to work and she is welcome back to work.

35. Ms Mulinge also testified that as the current general manager of the respondent she worked with the claimant as the Business Development Manager. She changed positions in December, 2016. The claimant told her that she had been terminated from her employment as she had not been aware of this development. She called Mr Aligula to confirm but he denied ever terminating the claimant from her employment. The claimant did not report to work.

36. By a court order, the claimant reported back to the office on 21st December, 2016 and her emails reactivated. After 28th the claimant did not report back to work. The respondent has day and night shift employee and the claimant cannot claim the office was closed. She had an office key and failed to use it. In December the respondent did not have an office party as claimed and the witness was at work. There was no discrimination against the claimant, all employees got a telephone allowance and one had to requisition.

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

After hearing both parties in the evidence, analysing the pleadings and the written submissions, the following issues emerge for determination;

Whether the claimant was terminated from her employment with the respondent;

Whether there is a case for unfair termination;

Whether there is a case of discrimination against the claimant; Whether the remedies sought are due.

38. Before addressing the issues set out above, I need to revisit the orders issued when the claimant moved the court on 7th December, 2016 under Certificate of Urgency. The claimant was seeking for orders to restrain the respondent from filling her position held with the respondent. also seeking an order for reinstatement back to her position. The application was based on the grounds that on 28th November, 2016 the claimant was verbally terminated from her employment with the respondent on the reasons that she was too expensive to maintain and there was a proposed merger of the respondent and a third party company thus affecting her position.

39. The court certified the claimant's application urgent.

40. On 20th December, 2016 parties appeared for *inter parties* hearing and the respondent's advocate made submissions that the case before court was premature, the allegation that the claimant was terminated from her employment was not correct and that an order for reinstatement cannot issue where there is no termination of employment.

41. On the above submissions, the court directed the claimant to report back to work on 21st December, 2016 at 8.30 hours for allocation of work by the respondent and where she was not allocated any duties by 12 noon and noting the matters now before court, the claimant was to remain out of the respondent premises and continue to receive her monthly salaries until the matter was heard *inter parties*.

42. Hearing was scheduled for 19th January, 2017.

43. It is common ground therefore that as at 20th December, 2016 the claimant was returned back to her employment and the respondent made a commitment to ensure compliance with the court orders and directions. The act of any perceived or alleged or actual termination of employment was thus addressed. The acts complained of as having occurred on 28th November, 2016 were addressed.

44. On this note, I return to the evidence of Mr Aligula who testified that on 28th November, 2016 he called the claimant with information that there was a likely merger with another company. He testified as follows;

...on 28th November, 2016 the respondent runs a small company and looking at the best interests of the employees, we got an offer for a merger. It was a give and take, there were demands and I needed to touch base with the staff. I called the claimant and made her privy to the same. Her position was to be redundant and she would work in a different capacity. The claimant had a contract and had the proposed changes taken place, there would have been a written notice to have followed. ...a merger did not take place. We were forced to recall another employee to fill in for the claimant who came to court but we never terminated the claimant. At the time we needed the claimant's services. ...

45. I take it that the claimant must have been alarmed with the information from her supervisor and Mr Aligula that her position would be rendered redundant. It is an expected perception. However, the claimant concentrated on this aspect only but failed to address the other part of the communication that she was going to be considered for another position.

46. To the events taking place on 28th November, 2016 the claimant testified as follows;

....on 28th November, 2016 Andrew came to the office and called me for a meeting at 4.30pm... the meeting was for the two of us. I was not aware of the agenda. Andrew had no document... There was no taking of minutes or any resolution made. Andrew terminated my contract verbally. I only got a message from a colleague asking me for my password to my computer on 1st December, 2016. ...

47. From this evidence, and noting the terms and conditions of the claimant's employment with the respondent, by the respondent asserting that the claimant had not been terminated from her employment, such was taken into account and addressed appropriately.

48. The anxiety and cause for concern to the claimant as of 28th November, 2016 was thus addressed with her reporting back to work. Even in a case of redundancy, which did not take effect herein, section 40 of the Employment Act, 2007 procedures had not taken effect and thus the respondent cannot be said to have terminated the claimant through redundancy. Such is addressed with the claimant going back to her position as of 21st December, 2016.

49. The claimant admitted that her supervisor at work was Mr Aligula. Therefore, the conversation

between Ms Mulinge and the claimant about her termination of employment and taking place outside work hours I take it to be a social call between peers. As of 28th November, 2016 Ms Mulinge was not supervising the claimant to have the authority to confirm as to whether she had been terminated from her employment or not. Any evidence in this regard must be ignored. Clear and well founded instructions came from Mr Aligula who spoke to the claimant on the possibility of a merger and the possibility of the claimant position been lost but also the possibility of her taking a different position. this never came to be, there was no merger and the claimant was not terminated from her position. the case referred to by the claimant of **Jane I Khalechi versus Oxford University Press E>A. Ltd [2013] eKLR** does not apply. A clear distinction with this case is that in the cited case the employer went ahead to terminate the claimant from her employment and separated her from all others and clearly engaged in unfair labour practice therefrom. The claimant in this case did not lose her employment and was able to report back on 21st December, 2016 and was paid her due salary.

50. Indeed the communication between the claimant and Mr Chris Mwirigi via text message was to the effect that the respondent board had not discussed the termination of the claimant and that where such a decision had been taken, it was of a personal nature. This thus reaffirms that the possibilities discussed by Mr Aligula to the claimant remained as such, possibilities. They never came to fruition.

51. It is the duty of an employer to allocate work to an employee. Where an employee is at work but her work allocated to another employee, the loss is to the employer unlike to the employee. In the case of **Crispus M. Gisemba versus Tausi Assurance Company Limited, Cause No.2264 of 2014** the court held as follows;

.....It is the prerogative of an employer to allocate work. Where the respondent found it necessary that certain functions were best addressed by a given officer, and thus proceeded to remove such from the claimant, where the claimant was left without work, with his background and qualifications on the job, the only loss due is to the respondent as the employer. Failure to use the claimant in any given task where he was the best qualified to the task, the loss only arise to the employer for failure to utilise the best resource in their midst.

52. Thus a diligent employee, upon failure to be allocated work by the employer should confer with her supervisor and ensure such work in allocated. Where no work is allocated despite reporting and seeking for the same, then the employee has all reasons to raise complaint and or escalate the matter to a higher officer.

53. In this case, the claimant reported back to work on 21st December, 2016 following court orders. I take it all else were apprehensive noting her move to file suit and assert her rights at work. As Mr Aligula and Ms Mulinge testified, the claimant's account had been deactivated on 1st December so as to protect the respondent property.

55. Upon reporting to work, the claimant did not have a smooth day. Her supervisor had also been changed from Mr Aligula to Ms Mulinge. I take it this was not easy for the claimant to be supervised by somebody previously her peer and due to events taking place within the month; changes meant she was now under her supervision. It is also not clear as to whether these administrative changes were communication to the claimant in good time. The apprehension in thus talking to Ms Mulinge about her work concerns are appreciated.

56. However, when the claimant was allocated a password, she was able to work until 3.16pm when it failed. The claimant diligently informed Ms Mulinge but there was no feedback. Noting the circumstances under which the claimant resumed duty, fair labour practice demanded that she be given guidance to settle down in her duties. Failure to allocate work, the disablement of her emails thus impaired her duties performance. Thus the failure to give feedback when requested only added to frustration. This does not encourage industrial peace.

58. The other issue that arise is that the claimant was discriminated against and also there were unfair labour practices against her. These are serious issues to be raised by an employee against the employer.

Section 5 of the Employment Act, 2007 places the burden on an employer to disprove such allegations once made by an employee. It is therefore not sufficient for the respondent to assert that there was no discrimination against the claimant and leave it at that. The law as section 5(7) provides as follows;

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

59. The rationale is that discrimination against an employee in the work place can take various forms which are direct or indirect and the court thus must firmly deal to discourage the same where there is evidence of such a practice. The basis is that discrimination against an employee removes the confidence and takes away the dignity of such an employee and thus affects their work performance which then becomes a ground for termination of employment. To thus allow discriminatory practices however minute would be to give an employer material for unfair labour practices and in essence encourage a practice specifically prohibited under the constitution, 2010 and the Employment Act, 2007. See **Jane Achieng & Another versus university of Nairobi [2015] eKLR** where the court held as follows;

Employment and Labour rights are well secured as part of the Bill of Rights under Article 41 of the Constitution. It follows therefore that discrimination in the employment sphere is outlawed in terms of Article 27 set out above. Moreover, Section 5 of the Employment Act, 2007 prohibits discrimination. Specifically Section 5(1) (2) and (3) provides as follows:

5.(1) It shall be the duty of the Minister, labour officers and the Industrial Court-

(a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and

...

...an employer against whom an allegation of unfair discrimination is made by an employee is required to prove that the action complained of was in fact fair.

This is one of the unique features of employment and labour law where the burden of proof shifts from the employee to the employer. The reason for this is that in an employment arrangement, the employer possesses information that would not ordinarily be within the reach of the employee. The employer is therefore under a duty to produce all information within its possession that would aid the Court to arrive at a just and fair determination of the dispute before it. [underline added].

60. In this case, the claimant testified that upon resuming duty on 21st December, 2016 she found her duties replaced; she was made to remain at work alone while others left for the staff Christmas party; and that she was not informed that the office was closing from 22nd December, 2016 to 4th January, 2017. The respondent asserted that there was no office party or a Christmas party as alleged but Ms Mulinge testified that the office closed on 22nd December, 2016 but the claimant had to remain at the office because she was being paid and had not been at work. It is also part of the respondent's record, a letter was sent to the claimant's advocate noting that the office would close on 22nd December, 2016 to 4th January, 2017 and the claimant was to take note. There is the addition that the claimant was thus not at work for her not to have noticed the office would close. In dealing with a similar matter of discriminatory work place practices, the court in the case of **V M K versus C U E A [2013] eKLR** held that;

The definition of discrimination under Article I of Convention 111 well fits into the pattern of treatment the Claimant was subjected to. The conduct of the employer had the effect or nullifying or impairing equality of opportunity with respect to the Claimant and the treatment meted on her systematically and completely killed any of her employment chance with the Respondent...

61. The employer carries various prerogatives. Such include allocation of work and also closure of office

for a holiday or as a special gift to the employees especially during the Christmas period. Where all other employees had notice and information that the office was closing for the festive season from 22nd December, 2016 to 4th January, 2017 to have the claimant seat in the office all alone on the grounds that she had filed suit and had not been at work and thus should work to earn her salary is inhuman, degrading, discriminatory and contrary to fair labour practice. The dignity of the person is eroded where one is set aside and treated differentially from others for no apparent reasons other than for filing suit as herein or for raising concern from the workplace.

62. The practice of punishing an employee, frustrating the employee or in any manner dealing with the claimant in a manner different and separate from other employee similarly situated is apparent in this case and this is outlawed under article 27 of the constitution, 2010 and section 5 of the Employment Act, 2007. Section 46(h) of the Employment Act, 2007 is more categorical in this regard and provides that;

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

...

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or

63. The assertion that there was no Christmas party for the respondent thus confirmed not to have taken place, the events requiring the claimant to remain and work at the office all alone while all others were off duty is not explained. Even where the claimant had not been at work from 29th November, 2016 to 20th December, 2016, this was a matter before court and clear orders and directions had issued. The parties had been allocated a hearing date for the 19th January, 2017. To thus treat the claimant differently and separately from her workmates by requiring her to be in the office when all others were absent was punitive and stripped her of the peace of mind required for her work performance. As noted above, this is an act that is discriminatory and devoid of dignity of the person. The notice by the respondent's advocate and email dated 22nd December, 2016 at 3:55pm to the effect that;

.....she was allocated duties and despite being away for over 21 days she was paid her full salary though not entitled now that she had deserted her duties. On her reporting to work today was out of ignorance for had she attended the last 21 days of work she should have been aware that the office was closing for holidays until 4th of January, 2017 when she will be expected to report to duty as directed by the court.

64. On this basis therefore the evidence of Ms Mulinge contradicts what Counsel intimated in his email to the claimants Advocates. She testified that;

....in December the claimant was paid in full. On 22nd December, 2016 I told the claimant to attend a meeting at Noon on her KPI as I was out of office that morning. At 7.45am I got a text message from the claimant that she was at the door and had no access. At 10am I got another call from the claimant that she was still at the door without access. There was a campaign on-going in the respondent office and the same remained open all along. The claimant was never at the office. I asked customer Care who work for 24 hours but none saw the claimant.

65. Was the claimant then supposed to remain at the office after the 22nd or the afternoon of 21st December, 2016 when all other employees left for the holidays? The meetings organised by Ms mulinge with the claimant at noon on 22nd were they meant to keep the claimant engaged and all alone in the office?

66. These disparities in the treatment of the claimant, however indirect do not speak well of the respondent in the context of the claim made that there were unfair labour practice and discriminatory

practices against the claimant. Despite denial that there was an office party, employees on the shop floor exchange information and where there was an apparent party mode, the claimant cannot have missed this out. Even where there was no such party, the requirement for the claimant to attend work on 22nd December, 2016 while her peers and colleagues were on holiday is exceptional and without justification. The assertion that the claimant was being paid for the full month salary is not a fair reason to justify a discriminatory practice against her. such discrimination and unfair labour practice is apparent and shall be redressed.

Remedies

67. The court having addressed the issue of reinstatement on 20th December, 2016 this was dealt. It shall not be revisited as the claim was not amended after this date.

69. The claim for compensation for unfair termination of employment also go with the reinstatement of the claimant. The remedy cannot stand with the order of reinstatement thus addressed as above.

70. The claimant is seeking notice pay. This is premised on the alleged termination of employment. As noted above and the order of reinstatement on 20th December, 2016, notice pay should not arise.

71. On the finding that the respondent acted in a discriminatory manner and engaged in unfair labour practices which is contrary to articles 27 and 41 of the constitution, 2010 and also contrary to sections 5 and 46(h) of the Employment Act, 2007 damages are due to redress the same. It is common knowledge as of December, 2016 the claimant had been in the respondent business for slightly over six (6) months. She was paid for her full salary in December, 2016 and the respondent was willing and ready to abide the court orders.

72. Putting all matters herein into perspective, and the claim for damages at Kshs.15 million, such I find to be harsh on the respondent. a payment equivalent to one (1) months' salary in damages is hereby found sufficient and appropriate. The claimant was nearing Kshs.166,000.00 gross and is hereby awarded damages equivalent to kshs.166,000.00 all inclusive for the constitutional and statutory violations against her.

73. The claims with regard to statutory deductions and failure to issue a pay statement, such have since been addressed by the respondent. such dues are not payable to the claimant and where there is no remittance, the Kenya Revenue Authority (KRA) is able to address. As the non-remittances alleged not to have been done did not go on for over a year, the threshold for the court to address in payment of service pay does not arise.

74. The demand for the issuance of a Certificate of Service by the claimant closes her employment with the respondent. Such demand for a certificate of service on the evidence that the respondent is ready and willing to keep the claimant is apparent that the claimant is not keen on her employment with the respondent. To force the claimant back to the respondent employment will be servitude. Such is specifically prohibited and the court shall not order an illegality save that, for the period of service, the claimant shall be unconditionally issued with her certificate of service within 14 days hereof.

Accordingly, judgment is hereby entered for the claimant for the sum of Kshs.166, 000.00 subject to the provisions of section 49(2) of the Employment Act, 2007 in damages for her constitutional and statutory labour violations. Each party shall bear own costs.

Delivered in open court at Nairobi this 31st day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: David Muturi & Nancy Bor

.....

.....