



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 41 OF 2017

NANCY MUSIMBI.....CLAIMANT

VERSUS

VIBE NAIROBI LIMITED.....RESPONDENT

RULING

1. The Claimant's application brought by Notice of Motion under certificate of urgency dated 12th January 2017, seeks the following:

- a) An order directing the Respondent to reinstate the Claimant to her previous position at News Café, Adlife Plaza;
- b) An order directing the Respondent to supply the Claimant with banking slips for sales made on 14th, 15th, 16th and 17th October 2016.

2. The application, which is supported by the Claimant's affidavit is based on the following grounds:

- a) That the Claimant has been constructively dismissed from her current position by being demoted to the position of House Keeper;
- b) That while arriving at the decision to demote the Claimant, the Respondent did not accord her a fair hearing and further did not consider responses from either the Claimant or her Advocate;
- c) That the Claimant was not involved in making sales on the dates of 14th, 15th, 16th and 17th October 2016 and the reasons for her demotion are false and unfounded and are not backed by any evidence;
- d) That the Claimant has diligently worked for the Respondent for close to two years and has risen through the ranks from a waiter to the position of junior supervisor and her demotion is in bad faith and unreasonable and is intended to cause her to resign, out of frustration;
- e) That it is in the interest of justice that the prayers sought are granted.

3. The Respondent's response is contained in a replying affidavit sworn by its Human Resource Manager, Agnes Njuguna on 20th January 2017. She denies any insinuation of constructive dismissal or variation of terms of employment to warrant reinstatement.

4. Njuguna further depones that the Claimant was entrusted with supervisory duties as well as banking

daily collections which she did very well until 14th, 15th and 16th October 2016, when she deliberately failed to bank, a fact she failed to communicate to her supervisor.

5. The Claimant failed to give a satisfactory explanation on this lapse and the Respondent could no longer trust her with sensitive duties and she was therefore transferred. The Respondent denies demoting the Claimant.

6. I have looked at the payers sought in this application alongside those sought in the main claim and find that they are substantially the same. The effect is that if the prayers sought in the application are granted, the entire suit will have been determined at the interlocutory stage.

7. Further, in the pleadings filed in the application, there are many issues of fact that are in contention. To my mind, these issues can only be determined after taking evidence in a full hearing. Indeed, in the submissions filed on behalf of the Claimant on 15th March 2017, there is a clear attempt to canvass matters of evidence which can only be achieved *viva voce*.

8. For this reason, the Claimant's application dated 12th January 2017 fails and is dismissed with costs in the cause.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF OCTOBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Lugadio for the Claimant

Mr. Ongicho for the Respondent