



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 23 OF 2017

CAROLINE WAMBUI WANYEKI.....CLAIMANT

VERSUS

SODEXO PASS KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 24th November, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 25.01.2017 through Kihanga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment with the respondent was unlawful and unfair.
- b) An order that the respondent reinstates the claimant to her employment without loss of position, status or benefits.
- c) Special damages of Kshs. 10, 140, 000.00 being Kshs. 2, 340, 000.00 balance of 50% bonus pay; and Kshs. 7, 800, 000.00 being compensation under section 49 of the Employment Act, 2007.

The memorandum of response was filed on 16.03.2017 through Macharia – Mwangi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

It is not in dispute that by the letter dated 18.12.2015 the respondent offered the claimant employment to the position of Managing Director in the respondent's subsidiary in Kenya. The claimant was to report the respondent's President of Western Europe, Mediterranean and International Development, Sodexo Benefits and Rewards Services.

The formal and detailed contract of employment was dated 01.02.2016. The effective date was 01.02.2016 with a probationary service. Clause 14 thereof made provisions on the termination, suspension and garden leave.

The claimant's case was that on or about 27.10.2016 she received a letter of termination. The letter dated 27.10.2016 addressed to the claimant stated as follows:

“TERMINATION OF EMPLOYMENT CONTRACT

Dear Carol,

Considering a significant financial underperformance of Sodexo Pass Kenya and failure to achieve commercial results, as they've been fixed as a part of your personal objectives, communicated in April this year, we would like to inform you we have decided to terminate, pursuant to Clause 14.1, the employment contract signed with you on the 1st February 2016.

The termination of said employment contract shall be effective on the 1st November 2016 subject to the payment of the equivalent of three (3) months' Basic Salary in lieu of notice.

You will receive your pay for the month of October 2016 including one day in November 2016, and 3-month basic salary, payable in lieu of notice. You will be required to return all company property, including your corporate ID, and laptop. Once those items have been returned, we will release your final dues and fulfil any other obligations as per your employment contract.

We wish you all the best in your future endeavors.

Yours sincerely,

For and on behalf of:

Sodexo Pass Kenya Limited

Signed

Antoine BENECH

VP INTERNATIONAL DEVELOPMENT

Clause 14.1 of the contract between the parties stated thus, **“Either party may terminate this Agreement by giving the other not less than (3) three months' prior notice in writing or by payment of the equivalent of three (3) months' Basic Salary in lieu of notice.”** Further, clause 20 of the contract on the **'Governing Law'** provided thus, **“This Agreement shall be governed and construed in all respects in accordance with Kenyan law.”**

The **1st issue** for determination is whether the termination was unfair. The claimant testified that on 27.10.2016 she went to Serena Hotel in Nairobi to meet one Antoine Benech and Henri de Vismes, the respondent's officers who had arrived from France. Upon meeting her, they informed her that they had decided to terminate her contract of employment and she was not given a reason for that decision. The claimant asked for a reason and the said Antoine replied that she did not need a reason. The claimant's evidence was that the respondent had published an online grievance management procedure requiring that a grievance be in writing and there be a show-cause letter prior to termination. The claimant testified that the respondent paid for accounting processing services in India whereas the services would have been rendered in Kenya by a Kenyan firm. In such circumstances, the claimant testified that it was not clear on how to handle some tax issues about the said accounting services as the claimant's Indian subsidiary was to be paid with respect to that service. The claimant stated that she had a problem accounting the same to the Kenya Revenue Authority (KRA) because the respondent's policy on apportionment of taxes had not been clear. She had been appointed on 01.02.2016 to 01.11.2016 so that she had served for 9 months and there had been no issue about her performance. The claimant believed that her termination was related to the issues she had raised about the apportionment of taxes.

The respondent's witness (RW) was Antoine Benech. He had employed the claimant as the managing director in the respondent's establishment in Kenya. RW testified that on 24.10.2016 they arrived in Kenya together with Henri on their monthly business review visit. On 25.10.2016 they met the entire respondent's staff in Nairobi and on 26.10.2016 they met the claimant alone at the Serena Hotel for hours. They discussed action plans and they noted there had been no progress in business and the claimant offered no design for progress. Thus, as per RW's testimony, they agreed to separate by mutual

agreement. Further, RW stated thus, **“Claimant failed to offer progressive way forward. So we reached a conclusion (Antoine, Henri and carol) to separate.”** RW stated that the separation was to be effective 01.11.2016 because the claimant admitted that she was not doing her duty and in particular a service agreement with PWC had not been signed as was expected. The 3 months’ basic salary in lieu of termination notice together with 50% bonus was paid. RW 2, the said Henri, confirmed that a dismissal notice was not given. He also stated that even none performing employees would be paid bonus. Further, the meeting of 26.10.2016 was to work out the next financial year’s budget as commencing 01.10.2016. The claimant had no plans and an agreement to separate was arrived at.

The court has reviewed the parties’ evidence. The meeting of 26.10.2016 had a specific agenda being to discuss budget and work plans for the next respondent’s financial year. It was not a meeting to discuss the claimant’s removal on account of unsatisfactory performance. It turned out that the respondent may have sensed some element of unsatisfactory performance on the part of the claimant. The court returns that for termination on account of the alleged or emerging unsatisfactory performance, the claimant was entitled to a notice and a hearing as per section 41 of the Employment Act, 2007. The court returns that in absence of such notice and hearing, it cannot be said that the termination was in accordance with a fair procedure as envisaged in section 45 (2) (c) of the Act.

Further, the court has considered the reasons stated in the letter of termination. The letter cites **“significant financial underperformance”** and then **“failure to achieve commercial results”**. The two are clearly matters amounting to alleged poor performance and looking to the past as opposed to the evidence by RW1 and RW2 that looked to the future, namely, lack of plans or progressive designs for the coming budgetary year. In any event, the court returns that section 41 of the Act was mandatory in view of such grounds for termination being alleged poor performance. The court further returns that as already found the procedure as invoked was not fair. The court returns that the claimant had no chance to defend her case and in circumstances whereby she had no notice that the meeting of 26.10.2016 at Serena Hotel was going to be about alleged unsatisfactory performance on her part.

The court has also considered the respondent’s position that in the circumstances the termination clause 14.1 was invoked. The court returns that the clause would not be invoked in circumstances of a clear case of alleged poor performance and in absence of a mutual contract or mutual agreement between the parties that the clause, nevertheless, be invoked. While making that finding, the court returns that the relationship between the parties was clearly documented and an oral agreement to separate, as was alleged by the respondent’s witnesses, did not suffice. Thus, the court returns that the reasons to separate shall be construed as stated in the letter dated 27.10.2016 and nothing more as the court returns that there was no agreement to separate.

The court further returns that in light of the alleged poor or unsatisfactory performance, it was not open for the respondent to invoke clause 14.1 of the contract as a soft landing for the claimant but that the respondent was obligated to invoke the procedure for termination consistent with the alleged poor or unsatisfactory performance being section 41 of the Act and as read with clause 14.2 (b) of the contract of employment that is, termination, if the claimant, **“(b) is guilty of any serious misconduct or serious neglect in the discharge of her duties under this Agreement;”**

While making that finding the court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination.

Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination."

To answer the 1st issue for determination, the court returns that the termination of the claimant's employment by the respondent per the letter dated 27.10.2016 was unfair for want of a fair procedure, and also, in the circumstances of the case, want of a fair reason as envisaged in section 43 of the Act.

The 2nd issue for determination is whether the claimant is entitled to remedies as prayed for. The court returns as follows:

a) The court returns that the claimant is entitled to the declaration that the termination of the claimant's employment was unlawful and unfair.

b) The court has considered that the claimant had served only for 9 months and the respondent's business was essentially a start-up enterprise. The court has considered that the respondent had factored a pay of three months' notice as part of the claimant's terminal dues. The court has also considered that the claimant desired to continue in employment and it was not established that she had contributed to her predicament in any manner. The respondent's evidence was that profitability was not expected until after 2 to 3 years in business and it cannot therefore be said that the claimant's level of performance had led to the lack of or low profits. Taking all the factors into consideration, the court considers that 4 months' gross salaries will meet the ends of justice as awarded under section 49 (1) (c) in compensation for the unfair termination being Kshs.830,000.00 per month making **Kshs.3, 320, 000.00**; to be paid less tax as prescribed under the Act.

c) The claimant prayed for balance of 50% bonus pay of Kshs. 2, 340, 000.00. The claimant did not state any material evidence about that claim as per her witness statement on record. Similarly, in her oral testimony she offered no evidence to support the claim and prayer. For the respondents, RW1 testified that 50% bonus was paid per the computation of terminal dues filed for the claimant as attached on the statement of claim. The court returns as much and the prayer will fail.

d) The claimant testified that she knew that the vacancy accruing after her termination had already been filled and therefore she surrendered the prayer for reinstatement. The prayer is therefore accordingly surrendered.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination of the claimant's employment was unlawful and unfair.
- 2) The respondent to pay the claimant **Kshs.3, 320, 000.00** by **01.02.2018** failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 24th November, 2017.**

BYRAM ONGAYA

JUDGE