



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 79 OF 2016

SHALOM NYAMBURA NDEGWA.....CLAIMANT

VERSUS

VISIONARY EMPOWERMENT PROGRAM (VEP).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 15th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 29.04.2016 through Waiganjo Wachira & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant was wrongfully and unlawfully dismissed from her employment.
- b) Unpaid dues in the sum of Kshs.462,100.00 comprising unpaid commissions from 03.03.2015 to 22.06.2015 Kshs.32,100.00, Kshs.60,000.00 illegally deducted salary for six months at Kshs 10,000.00 per month, and 12 months' salaries for compensation for unfair termination Kshs.360,000.00.
- c) Certificate of service.
- d) Costs and incidentals of the suit.

The claimant's case is that the respondent employed her on renewable annual contract effective 23.03.2015 as a Sacco Officer at Kangari Branch. The written contract provided for a monthly salary of Kshs.30, 000.00. Upon assuming the appointment, the claimant's case is that she was assigned the higher duties of a chief executive officer and despite her outstanding performance, the respondent arbitrarily and without notice reduced her monthly pay from Kshs.30, 000.00 to Kshs.20, 000.00. In the circumstances the claimant opted to resign on 15.10.2015. The claimant alleges unfair constructive dismissal. She also prays for final dues as pleaded.

The statement of defence was filed on 20.05.2016 through L.M. Kinuthia & Associates. The respondent denied that it employed the claimant but that the claimant worked for Visionary Empowerment Programme Sacco Limited (VEP Sacco Limited). Further, the claimant's payment was based on commissions subject to achieving set minimum recruitment of the Sacco members. The claimant resigned from employment and all due commissions had been paid on time as they fell due. The respondent prayed that the suit be dismissed with costs.

The claimant changed its advocates to Daniel Henry & Company Advocates by the notice dated 29.09.2013 and further filed a reply to defence. The claimant reiterated that she was entitled to earn a

monthly salary of Kshs.30,000.00 per month plus commissions for every member she introduced to the respondent.

The **1st issue** for determination is whether the respondent employed the claimant. The claimant relies upon a purported letter of appointment dated 23.03.2015 but which is not signed for the respondent. The original letter was produced at the hearing of the case. The claimant testified that she was employed by the respondent on 13.03.2015 when the respondent's director one Bernard Ndungu informed her that she had been employed. She was then given an appointment letter dated 23.03.2015 which she signed and returned to the respondent. The respondent did not sign on its part and the claimant retained one of the two copies she had signed and which she produced it in court. She testified that she kept asking for a signed copy but the director kept pushing the issue and the issue remained unresolved. The claimant testified that she was employed as a Sacco Officer and the Sacco enterprise was a subsidiary of the respondent. The claimant stated that she received payslips with the respondent's initials "**VEP**". In the resignation letter dated 23.03.2017, the claimant stated that she was resigning to concentrate on her son's and mum's health. She also admitted that if the letter of appointment were valid, then only the Sacco had the authority to terminate her employment.

The respondent's witness (RW) was the director one Bernard Karanja Ndungu. He denied that the claimant was the respondent's employee. It was his evidence that the Sacco and the respondent were separate legal entities because the respondent was a Non- Governmental Organisation. The two entities were registered under separate laws. RW admitted that he served as a board member of the Sacco and the Sacco engaged her to do some market activation and she eventually resigned by email of 11.09.2015 to attend to her son and mother.

The court has considered the pleadings, evidence and submissions. The court return that the letter of appointment relied upon by the claimant was not signed for the respondent and therefore cannot be binding upon the respondent. The court further returns that the parties are in agreement that the claimant was employed as a Sacco Officer in the Sacco limited. The court has further noted the contradictory account by the claimant of the reason for resignation namely, that as per the resignation mail, she was to attend to her son and mother, and then in her pleadings and evidence that she resigned in view of adverse variation in her pay. Such contradictory positions do not aid the claimant's case as they are incredible. Accordingly, the court finds that there was no contract of employment between the parties.

The **2nd issue** for determination is whether there was constructive dismissal. It is clear that the claimant resigned to attend to her son and mother. The resignation and the reasons were express and in writing. Thus, there was no case for constructive dismissal made out in the present case.

To answer the **3rd issue** for determination the court returns that the claimant is not therefore entitled to any of the remedies as prayed for as the same are not justified at all.

Signed, dated and delivered in court at Nyeri this **Friday, 15th December, 2017.**

BYRAM ONGAYA

JUDGE