



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 965 OF 2014

JULIET OYANDO.....CLAIMANT

VERSUS

HIPORA BUSINESS SOLUTIONS (EA) LIMITED...RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent as a Human Resource Intern in the year 2012 earning a monthly salary of Kshs 15,000. On 16th January 2014, the claimant was employed under a one year contract in the position of Human Resource Assistant. The claimant worked continuously until the contract of employment was terminated on 11th March 2014.

2. In terms of the contract, the claimant earned Kshs 25,000 gross monthly salary. The employment was on a 12 month fixed term contract effective 16th January 2014 and was due to end on 15th February 2014. The contract could be terminated by either party giving one month notice. The claimant was to work from Monday to Saturday for eight (8) hours exclusive of lunch break with one day off for every six days worked. The claimant was also entitled to 21 days annual leave per year. The respondent reserved the right to dismiss the employee without notice in terms of section 44 of the Employment Act, 2007.

3. In terms of the letter of termination, the reasons for the termination of employment were enumerated as follows;

- i. failure to give on consecutive months accurate information on the payroll leading to double payments;
- ii. failure to file staff data and update the file inspite of several verbal and email communication to her by RMS country manager;
- iii. failure to follow up staff final dues inspite of several reminder by the country manager;
- iv. complaints from staff on poor treatment by claimant by phone or when they visit her at the office;
- v. RMS staff reconciliation for Eastmatt was a complete mess despite several verbal warnings and emails to which the claimant did not respond;
- vi. insubordination on 10th March 2014 when the claimant went home without notifying management and before completing the task assigned for the day and did not pick calls made to her. No explanation was given the following day;
- vii. insubordination in that on 11th March 2014 claimant did not send on time an urgent report requested by the director for the client and proceeding on lunch break out of the premises without any communication.

4. Upon termination, the claimant was to be paid salary for days worked in March, one month in lieu of notice and for accrued leave. She was advised to collect a cheque on 16th March 2014.

5. The claimant denies the allegations and states that these are fabrications aimed at getting rid of her from her employment and therefore the termination of her contract was wrongful and unlawful. The claimant seeks;

- a. one month salary in lieu of notice in the sum of Kshs 25,000;
- b. payment for the unexpired term of the contract being nine (9) months in the sum of Kshs 225,000;
- c. maximum compensation for unlawful termination in the sum of Kshs 300,000;
- d. provision of certificate of service.

Memorandum of Response

6. The respondent filed a Memorandum of response dated 29th September 2014 on 30th September 2014 in which it admits that the claimant was employed on 16th January 2014 as a Human Resource Assistant on a one year contract. That on 11th March 2014 the claimant's employment was terminated for gross misconduct in terms of Section 44 (4)(a) and (c) of the Employment Act, 2007.

7. The respondent refers to an email dated 8th March 2008 written by a Mr John Wanjohi to Hasime Ismail and in which the respondent notified the claimant of a disciplinary hearing at 12 pm on 10th March 2014.

8. The respondent avers that the claimant was accorded a fair hearing and fair procedure was adopted before her employment was terminated. The claimant also received a notice dated 18th January 2014 to attend a disciplinary hearing on 20th January 2014 to answer to misconduct. That on Saturday 18th January 2014 the claimant did not report to work inspite of set deadlines for urgent work; declined to pick office calls using different lines and text messages and the assignment was not delivered on time.

9. The respondent did not produce minutes of the two intended disciplinary hearings and the claimant was not asked to show cause prior to attending the disciplinary hearing. The respondent avers that the claimant's employment was terminated for good reason and in terms of a fair procedure.

Hearing

10. The suit was set for hearing on 27th July 2015. The date had been set by Nzioki Wa Makau J in the presence of Mr Anyoke for the claimant and Ms Orina for the respondent. On 4th June 2015 the matter could not be reached and was adjourned. However, the respondent did not attend the hearing and matter proceeded before me ex-parte. The claimant testified under oath and relied on the pleadings and witness statement dated 9th June 2015 and filed on 11th June 2015.

11. The claimant prayed for judgment as per the statement of claim. Both parties filed written submissions. The claimant filed on 18th August 2015 while the respondent filed on 28th September 2015. The parties reiterated the contents of their pleadings in the written submissions and prayed the court to decide the matter in their favour.

Determination

12. The issues for determination are;

- i. whether the termination of employment was for a valid reason and whether the termination was effected in terms of a fair procedure;
- ii. what remedies if at all is the claimant entitled to;

13. Firstly, the claim for payment in lieu of notice, is not in dispute. Accordingly the court awards the claimant one month salary in lieu of notice in the sum of Kshs 25,000.

No claim was made in the statement of claim for leave days not taken and for days worked in March 2014. The court cannot therefore award the same.

14. It is also clear that the claimant worked for more than 8 hours a day for six days but no claim was made in respect of overtime. The court will also not award in respect thereof.

Termination

15. The respondent produced an email containing alleged charges against the claimant and an invitation to the claimant to attend a disciplinary hearing on 20th January 2014 and 10th March 2014. The Respondent however, did not provide any minutes of the disciplinary hearing containing the findings the disciplinary committee.

17. The letter of termination written by the Human Resource Manager to the claimant dated 11th March 2014, does not refer to any disciplinary hearing or findings by a disciplinary committee. Failure by the respondent to attend the hearing in court does not help the situation since no evidence was adduced in court to counter the version by the claimant.

18. Section 43 (1) of the Employment Act, 2007 provides;

“In any claim arising out of termination of a contract the employer shall be required to prove the reason or reasons for the termination, and where the employee fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

19. The respondent provided a raft of reasons in the letter of termination which reasons have been refuted by the claimant. The claimant is under an obligation under Section 37(5) to show that the termination was wrongful. It is the courts considered view that the claimant has established on a balance of probability that she was accused of a series of acts to which she was not given notice to show cause and opportunity to explain in terms of section 41 of the Employment Act, 2007. The claimant has also demonstrated that she was not taken before a disciplinary committee to explain why her employment should not be terminated.

20. It is the court’s considered view that the termination of the employment of the claimant was not for a valid reason. The claimant has also shown that the termination was not done in terms of a fair procedure. This was therefore a wrongful and unlawful termination in terms of section 45 of the Employment Act, 2007.

21. The claimant had nine (9) months left to serve her contract. The employment was curtailed unlawfully by the respondent. The claimant clearly wished to continue working but lost her means of income and career prospects in an unlawful manner. The respondent did not provide the claimant with a certificate of service and did not pay her terminal benefits upon termination inspite of the promise to do so in the letter of termination.

22. In terms of section 49(1)(c) as read with Section 49 (4) of the Employment Act 2007, and for the reasons stated above, the claimant is awarded 9 months’ salary being compensation for the unlawful and unfair termination of employment in the sum of Kshs 225,000.00.

23. In the final analysis the award to the claimant as against the Respondent is;

- (i) Kshs 25,000 in lieu of notice (1 month salary);
- (ii) Kshs 225,000 compensation (9 months’ salary);

Total award is Kshs 250,000.

24. The award is payable with interest at court rates from date of filing suit till payment in full. The

Respondent is also to pay the costs of the suit.

Dated and Delivered at Nairobi this 5th day of February 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE