



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1289 OF 2014

KANINI KIOKO.....CLAIMANT

VERSUS

A-Z DATA SOLUTIONS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Kanini Kioko, the Claimant in this case worked for the Respondent from 7th October 2013 until 31st March 2014 when her employment was terminated. She brought this action seeking compensation for unlawful termination and payment of terminal dues.

2. The Respondent filed a Statement of Defence on 9th December 2015 and the matter proceeded to hearing with the Claimant testifying on her own behalf and Simon Ndirangu Mwangi testifying for the Respondent.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent in the position of Chief Executive Officer at an agreed monthly salary of Kshs. 400,000 plus allowances, effective 7th October 2013. She produced a certificate of service and email correspondence to support this assertion.

4. The Claimant further states that the Respondent's management had made a commitment to transfer some of the Company's shares to her.

5. On 31st March 2014, the Claimant's employment was terminated by email. The Claimant reported a dispute to the Ministry of Labour, Social Security and Services.

6. The Respondent admitted the Claimant's claim by letter dated 7th April 2014 and undertook to give a comprehensive proposal on how to settle the Claimant's dues by 25th April 2014. However, the Respondent did not make good its commitment.

7. The Claimant claims the following:

a) A declaration that the termination of her employment was unlawful

b) An order directing the Respondent to reinstate her without loss of position, status and benefits

- c) An order directing the Respondent to transfer 5% of its shareholding to the Claimant and avail another 5% upon the Claimant paying Kshs. 4,250,000
- d) Unpaid salary for December 2013 to March 2014.....Kshs. 1,389,677.40
- e) Prorata leave for 6 months.....140,000.00
- f) Notice pay.....400,000.00
- g) 12 months' salary in compensation.....6,909,677.40
- h) Less amount paid in July 2014.....(200,000.00)
- i) Costs plus interest

The Respondent's Case

8. In its Statement of Defence dated 7th December 2015 and filed in Court on 9th December 2015, the Respondent states that the basic salary of Kshs. 400,000 plus allowances were as proposed by the Claimant. These terms were however not approved by the Respondent's Board of Directors.

9. The Respondent states that the certificate of service produced by the Claimant in support of her case was executed by an unauthorised party.

10. With regard to the claim on shareholding, the Respondent states that the Management had no legal capacity to offer shares in the Company. The Respondent denies offering the Claimant any shares.

11. The Respondent further states that the proposal to the Ministry of Labour, Social Security and Services was made by an unauthorised person. The Respondent denies making any proposal to the Claimant.

12. The Respondent accuses the Claimant of insubordination.

Findings and Determination

13. There are three issues for determination in this case:

- a) Whether the Claimant's employment was unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

14. The termination of the Claimant's employment was communicated by an email sent from symon@ictkenya.com to kaninikioko@yahoo.com on 31st March 2014 stating as follows:

"Subject: KANINI KIOKO SERVICE

Dear Kanini

I refer to the meeting we had on 24th March, 2014.

As discussed, the company is felt(sic) it was unable to continue with your services due to the current cashflow constraints.

We are in receipt of a letter from the ministry of labour, social security and services ref: MLNBI/LD.64/108/2014 dated 27th March.

We shall respond to the said letter by 3rd April, 2014 with a copy to yourself through the ministry.

Regards”

15. From this email and further evidence adduced before the Court, it appears that the reason for the termination of the Claimant’s employment had to do with what is commonly referred to as redundancy.

16. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

17. While the law recognises redundancy as a legitimate form of termination of employment, it must be undertaken within the following conditions set out under Section 40 of the Employment Act, 2007:

40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions-

a) Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b) Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service.

18. There was no evidence that the Respondent observed any of the conditions set out under Section 40 and as held by this Court in **Francis Maina Kamau v Lee Construction [2014] eKLR** where an employer fails to observe these conditions, the resultant termination becomes unfair within the meaning of Section 45 of the Act.

19. Overall, I find the termination of the Claimant’s employment substantively and procedurally unfair and she is entitled to compensation.

Remedies

20. In light of the foregoing, I award the Claimant three (3) months' salary in compensation. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice. The claim for salary for December 2013 to March 2014 is admitted and is therefore payable. The Claimant is also entitled to prorata leave.

21. The claim for transfer of shares was not proved and is dismissed.

22. Finally I enter judgment in favour of the Claimant as follows:

- a) 3 months' salary in compensation.....Kshs. 1,200,000
- b) 1 month's salary in lieu of notice.....400,000
- c) Salary for December 2013 to March 2014.....1,600,000
- d) Prorata leave (400,000/30x1.75x5).....116,667
- Less amount paid in July 2014.....(200,000)
- Amount payable.....3,000,000**

23. The judgment amount will attract interest at court rates from the date of the judgment until payment in full.

24. The Claimant will have the costs of this case.

25. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2016

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JUDGE

Appearance:

Mr. Ondiek for the Claimant

Mr. Ithondeka for the Respondent