



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 230 OF 2012

(Before Hon. Justice Maureen Onyango on 26.1.2015)

MERCY MWENDE KIVUNDU CLAIMANT

-VERSUS-

**S. N. ANJICHI - AS THE SECRETARY & EXECUTIVE DIRECTOR OF
KENYA INSTITUTE OF BANKERS RESPONDENTS**

JUDGMENT

By a Memorandum of Claim dated 3rd February 2012 and filed on 15th February 2012 through the firm of Mwangi & Guandaru Advocates, the claimant Mercy Mwende Kivundu alleges that she was employed by the respondent S. N. Anjichi, the Secretary and Executive Director of Kenya Institute of Bankers in 2006 as an administrative secretary at a salary of Kshs 18,000/= which was reviewed upwards gradually and as at May 2011 she was earning Kshs 30,000/= per month. The claimant avers that she was terminated by a telephone call made by one Simon K. Guchu on 14th May 2011 in violation of Section 45 of the Employment Act. She seeks judgment against the respondent in the sum of Kshs 783,000/= made up of notice, 3 months maternity leave pay, unpaid leave, severance pay and 12 months salary as compensation. She also seeks interest from May 2011, certificate of service and costs of the claim.

The respondent filed its Response to the Claim on 26th March 2012 through Kimani Githongo & Co. Advocates in which it made a general denial of the claim.

The claimant filed a Supplementary Memorandum of Claim on 21st August 2012. She did not make any averments in the Supplementary Memorandum of Claim but only attached additional documents she wished to rely on at the hearing. The respondent filed a reply to the Supplementary Memorandum of Claim through the firm of Onyony & Co. Advocates who came on record in place of the respondent's former advocates. In the Response to the Supplementary Memorandum of Claim filed on 11th September 2012 by the respondent, it stated that the claimant's pleadings had not disclosed any continuous employment relationship or maternity leave and that the claimant was not entitled to the prayers sought.

The case was heard on 2nd July 2013 when the claimant's testimony was taken and on 21st May 2014 when the respondent's witness testified. The claimant testified on her behalf while the respondent called Immanuel Okutoyi Masinde it's Accountant/Administrator. Parties thereafter filed written submissions. The claimant was represented by Mr. Thuita while the respondent was represented by Mr. Onyony.

The claimant testified that she was employed in January 2006 as an administrative secretary and left employment in May 2011. Her first salary was Kshs 18,000/=. At the time of leaving employment her

salary was Kshs 30,000/=. Her salary was paid monthly by cheque. She testified that in May 2011 she went on maternity leave and she delivered on 19th June 2011, that she was supposed to resume duty on 19th September 2011. However one week before she resumed Mr. Simon Guchu, the Training Manager who was her immediate supervisor called and informed her not to go to work until he calls her. He however never called her. The claimant tried to call him but he did not answer to her calls.

The claimant testified that she worked from Monday to Friday and occasionally on Saturday. Whenever she worked on Saturday she was paid Kshs 500/=. She never went on annual leave. In her opinion she was terminated because she went on maternity leave and had a young baby. She prayed for payment for notice, leave for 5 years, 3 months maternity leave, compensation for loss of employment and costs.

Mr. Masinde for the respondent testified that the claimant was not an employee but only worked whenever there was training. She was therefore not entitled to any of the prayers she had sought.

The first issue I have to establish is whether the claimant was an employee of the respondent or was a part-time employee.

In support of her claim the claimant annexed several deposit slips for payment of her salary, the respondents training and seminar calendar for 2011 and minutes of the Annual General Meeting held on 30th September 2010. In the Training and Seminar calendar there are several photographs where the caption describe the claimant variously as "from Kenya Institute of Bankers", "Training Secretary - KIB" and "Administrative Assistant - KIB". On the page where there are photographs of what is described as "The Kenya Institute of Bankers Family" the claimant's photograph appears while seated at a computer station and is described as Administrative Assistant (Training). Her photograph appears on the same line with Secretary to Director and Administrative Assistant (Examinations). Others whose photos are on the same page are the Chief Accountant (RW1), the Office Assistant, the Librarian and the Registrar. The top of the page has the title "KIB STAFF PICTORIAL".

RW1 testified that the family (staff) of KIB is seven and in the pictorial the claimant appears as one of the 7. No records were submitted by the respondent to prove that the payments made to the claimant were a one off or produced the training calendar or other evidence to tie the payments to the claimant to specific trainings. The respondent also failed to specify the periods when the claimant was engaged if not on continuous basis.

The Employment Act provides for the employer to be responsible for preparing the employment contract and to ensure the employee executes the contract. The Act further provides at Section 10(7) that in legal proceedings where the employer fails to produce prescribed employment records it shall be the burden of the employer to disprove the allegations by an employee on the terms of employment.

For these reasons I find that the claimant was employed by the respondent on a continuous basis from January 2006 to May 2011.

The second issue that arises from the pleadings and submissions is whether the person sued that is S. N. Anjichi, as the Secretary & Executive Director of Kenya Institute of Banking, is properly sued.

The respondent submitted that the claim is fatally defective as the respondent is not a registered official of Kenya Institute of Bankers. The respondent relied on the case of **Abdinoor Dima Jillo (suing as Secretary for and on behalf of Damesa Association) V County Council of Isiolo & 4 Others [2008] eKLR** where the court struck out the case as it was instituted by a wrong official.

The claimant in response to the respondent's submissions submitted that Section 41 of the Societies Act provides that Societies are unincorporated bodies and are not juristic persons hence suits cannot therefore be instituted in their names but in the names of representatives. The claimant relied on the case of **Simu Vendors Association V Town Clerk, City Council of Nairobi & Another [2005] eKLR** in which Justice Bosire (as he then was) cited with approval HCCC No. 5116 of 1992 (O.S): **Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank** in which the court held that:-

"The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 Civil Procedure Rules. In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name."

On the respondent's argument that he is not a registered officer, the claimant submitted that the respondent is the appointed representative of Kenya Institute of Bankers as he is the Principal Executive Official of the Kenya Institute of Bankers and therefore can be sued on its behalf.

In my opinion the arguments by the parties though valid, are not relevant in determining the capacity in which a party can sue or be sued in an employment situation. The Employment Act defines employer as:-

"Any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company."

A "firm" may mean any of the following; "company, business, concern, enterprise, organization, corporation, conglomerate, office, bureau, agency, consortium, informal outfit or set-up."

The above definition of employer includes both corporate and incorporate bodies. It is also my view that the new constitutional dispensation which provides at Article 22(3) (d) to the effect that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities, and Article 159(2)(d) to the effect that justice shall be administered without undue regard to procedural technicalities behove this court to determine cases in a manner that ensures substantive justice and in a manner that does not lock out a litigant with a valid claim from accessing justice. Section 20(1) of the Industrial Court Act reinforces this position by providing that:-

"In any proceedings to which this Act applies, the court shall act without undue regard to technicalities and shall not be strictly bound by rules of evidence except in criminal matters."

In the present suit, the respondent has been defined in a manner that does not leave any doubt about the capacity in which he has been sued. He is aptly described as "Secretary and Executive Director of Kenya Institute of Banking". He has not been sued in his personal capacity but as an office of the Chief Executive Officer.

I find that there is no ambiguity or prejudice caused to the respondent by the manner in which he has been sued in the suit and that by virtue of the definition of "employer" in the Employment Act, he has been properly sued by the claimant.

The next issue for determination is whether the claimant was unfairly terminated. The claimant testified that she went on maternity leave in June and delivered on 19th June 2011. That a week before she was to report back she was called by Mr. Guchu who told her not to report back until he called her but he never called. Respondent did not deny this allegation. RW1 confirmed that Mr. Guchu was still the Director of Training but he was not called to testify and confirm or deny the allegations of the claimant.

For termination of employment to be valid the employer must comply with the procedure prescribed in Section 41 and must prove valid reasons for the termination as provided in Section 43 of the Act. The respondent has not denied that the claimant's employment was terminated by a telephone call from Mr. Guchu. The termination therefore did not comply with both Section 41 and 43 and is unfair in terms of Section 45 of the Act. I find the termination of the claimant unfair.

The claimant seeks several remedies. The first is payment in lieu of notice which she is entitled to as she

was not given notice or paid in lieu. The claimant also prayed for maternity leave. The claimant testified that she took maternity leave in May 2011 and delivered on 19th June 2011. She testified that she was to return to work on 19th September 2011. The claimant did not state the date in May 2011 when she started her maternity leave. She also did not explain why she took maternity leave in May when the delivery was on 19th June 2011.

In paragraph 8 of the Memorandum of Claim the claimant pleaded as follows:-

"The claimant further avers that on or about 14th May 2011, she received a phone call from the respondent's agent servant, employee and/or representative one Simon K. Guchu, who without offering any explanation whatsoever informed the claimant not to report back to work on 19th September 2011."

The claimant is bound by her pleadings.

As has been pointed out by the respondent, the claimant did not adduce any evidence to prove that she took maternity leave. Having been terminated on 14th May 2011, any maternity leave (if indeed it was there) was after the termination of employment. The claim for pay during maternity leave has therefore not been proved by the claimant and I dismiss the same.

The claimant also seeks annual leave for the period she was in employment. She worked from January 2006 to 14th May 2011. She is therefore entitled to 112 days leave which I grant her.

The claimant also prayed for severance pay at Kshs 150,000/=. She is not entitled to the same as she was not declared redundant. The prayer is dismissed.

The claimant also prayed for compensation of 12 months salary. Having been in employment for only 5 years and 4 months, I award her 5 months salary as compensation. The claimant is also entitled to certificate of service.

The claimant will also be paid costs of the claim and interest on decretal sum from date of judgment.

In summary I award the claimant the following:-

i. Notice - Kshs 30,000/=

ii. Leave for 5 years 4 months - Kshs 112,000/=

iii. Compensation - Kshs 150,000/=

TOTAL = KSHS 292,000/=

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Orders accordingly.

Dated and delivered in Nairobi this 26th day of January 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)