



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 1522 OF 2012
HELLEN WAMBUI CLAIMANT
VERSUS
KENOL-KOBIL LTD RESPONDENT

Mr Change for Claimant

Mr. Ayisi for the Respondent

JUDGMENT

1. Claim was brought vide a Statement of Claim dated 28th August 2012 and filed on 30th August 2012.
2. The Respondent filed a statement of Response on 1st November 2012.

Facts of the case

3. The Claimant was employed on 30th January 2001 as Administrative Assistant at a starting salary of Kshs.24,282.00. She served the Respondent until 10th August 2012 when her employment was terminated on the ground of poor work performance.

At the time of the termination she was earning Kshs.134,432.00.

4. The Claimant states that over the years, her performance was either rated '*excellent*' or '*very good*' in all the appraisals conducted by the Respondent. As a result she was bestowed several commendations by the Respondent and received numerous promotions, salary increments, gift vouchers and bonuses over and above her salary in the cause of her employment.
5. In May 2012, the Claimant and her colleagues learnt that a foreign company by the name PUMA Energy was due to take over the Respondent company upon purchase of majority shareholding of the Respondent.
6. As a condition precedent to the take-over, the employees were informed that employees had to be down sized and when representatives of PUMA visited the company, they confirmed that eventuality.
7. Employees became anxious upon learning of this development and instituted **Industrial Cause No.**

1022 of 2012 in a bid to secure their rights which case was still pending.

8. The claimant was severally requested to resign soon thereafter owing to alleged financial difficulties being faced by the Respondent. The Claimant was not willing to consider that option because of her personal financial commitments.

9. When the Respondent failed to cajole the Claimant to resign, the Respondent terminated her employment vide a letter dated 10th August 2012 on dubious grounds that her performance was below expectation.

10. The Respondent insists that the termination of the Claimant was based on review of all business processes within the company and in particular the Claimant's department performance and after consultation with her immediate supervisor, it was noted that her performance was below expectation and her employment was terminated in line with her employment letter dated 7th February 2000 and confirmed on the 30th January 2001.

11. That the Respondent has not been taken over as alleged or at all and therefore the decision to terminate was not informed by the need to downsize the staff compliment of the company.

12. Issues for determination

- i. Whether the respondent had a valid reason to terminate the employment of the Claimant.
- ii. Whether the termination of the Claimant was effected in terms of a fair procedure.
- iii. Remedies available to the Claimant if at all.

i. Whether the Respondent had a valid reason to terminate the employment of the Claimant.

13. The Court has perused the documentary evidence presented by the Claimant and in particular the following;

- a. letter dated 19th July, 2011, titled merit 2011, in which upon review of the claimant's performance in co-ordination with the Department head the Claimant's performance was rated 'V. Good' and was awarded a merit salary increase of 2% effective 1st July 2011;
- b. letter dated 16th July 2010 titled merit 2010 in which the Respondent, upon conducting a review of the Claimant's performance rated it as 'Excellent' and accorded the Claimant a merit salary increase of 3.5%;
- c. letter dated 16th July 2009, in which the Respondent, upon conducting a review of the Claimant's performance rated it 'V. Good' and accorded the Claimant a merit increase of 3.5%;
- d. letter dated 11th July 2006, in which the Respondent reviewed the performance of the claimant and rated the Claimant's performance as excellent and awarded the Claimant 7.5% merit salary increase;
- e. letter dated 17th July 2012, in which the claimant's performance was reviewed by the respondent and the Claimant's performance was rated 'V. Good' and she received a merit salary increase of 3%.

14. The Court has also seen various letters of commendation including provision of gift vouchers and bonuses to the Claimant in recognition of her good performance. These documents were produced as annexures to the statement of Claim.

15. The Court in particular notes the letter dated 17th July 2012 in which the Claimant's performance was rated 'V. Good' by the Respondent in consultation with the Claimant's departmental head, was closely followed by the letter of termination dated 10th August 2012.

16. In the termination letter, hardly a month later, the Respondent wrote;

“following review of all business processes across the company and in particular your department performance and in consultation with your immediate supervisor we note with concern that your performance is below expectation.”

(Emphasis mine).

17. The Claimant was given one month’s notice to terminate her services effective 10th August 2012. This meant that she was to leave the employment immediately.

18. It is the Court’s considered view that this conclusion by the Respondent ran against the recent history of the Claimant’s performance depicted in the Respondent’s own letters that indicated consistently, very good and excellent performance by the Claimant.

19. In terms of **Section 45(2)(a)** of the Employment Act, 2007, the Respondent has not demonstrated that it had a valid reason to terminate the employment of the Claimant. The Court finds that the Claimant has demonstrated on a balance of probabilities that her employment was curtailed unlawfully.

Issue 2 – procedural fairness

20. It is common cause that the Claimant was not given a show cause letter nor was she subjected to a disciplinary process in terms of **Section 41** of the Employment Act, before her employment was terminated. Not an iota of evidence was adduced in this regard.

21. No correctional measures to improve the performance of the Claimant, if it was poor, as alleged by the Respondent before giving her the ultimate sentence especially taking into consideration the long and excellent service she had given the Respondent.

22. The Court has arrived at the inevitable conclusion that the termination of the Claimant’s employment was not done in terms of a fair procedure contrary to **Section 45 (2) (c)** of the Employment Act.

23. Accordingly, the termination of the employment of the Claimant was both substantively unlawful and procedurally unfair and the Claimant is entitled to compensation in terms of **Section 49** of the Employment Act, 2007.

24. Remedy

- a. The Claimant’s termination was effectively done for operational reasons under the guise of poor work performance.

Accordingly, the Claimant is entitled to payment of severance pay calculated at ½ month’s salary for each completed year of service in terms of **Section 40(1)(g)** of the Employment Act 2007 in the sum of Kshs.806,592 ($\frac{1}{2} \times 134,432 \times 12$).

b. Compensation

25. The Claimant is entitled to compensation for the unlawful and unfair termination of employment in terms of **Section 49(1)(c)** of the Employment Act, 2007.

26. The compensation payable is guided by **Section 49(1)(c)** as read with **Section 49(4)** in that it ought not to exceed the equivalent of twelve months salary and the Court has taken into consideration;

- a. The wishes of the employee and in this case, the Claimant wishes to be reinstated to her previous job though the Court deems it inappropriate to order reinstatement, in view of the ruse used by the Respondent to get rid of her.
- b. The Court has considered and found that the Claimant’s employment was terminated for no fault

- of her own at all but was victimized for operational reasons.
- c. That the Claimant had offered the Respondent an excellent service for twelve (12) years with no adverse record at all.
 - d. That the very good prospects of continued employment was cut-short in a very abrupt and unexpected manner.
 - e. That the Respondent avoided in a sly manner to pay meaningful terminal benefits to a very long serving, excellent employee.

27. In the circumstances the Court awards the Claimant maximum compensation for the unlawful and unfair termination equivalent to twelve (12) months salary in the sum of Kshs.1,613,184.00.

Total award to the Claimant is Kshs.2,419.776.00

The award is payable with interest at Court rates from the date of this judgment to payment in full.

The Respondent is also to pay the costs of the suit.

Dated and Delivered at Nairobi this 8th day of May, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE