



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1551 OF 2012

LILIAN O. OCHANG.....CLAIMANT

VS

KENOL KOBIL LIMITED.....RESPONDENT

AWARD

Introduction

1. Lilian O. Ochang, who is the Claimant in this case was a long serving employee of Kenol Kobil Limited. Following the termination of her employment on 13th August 2012 she brought this action seeking relief for wrongful termination.
2. The Respondent Company filed a Memorandum of Response on 1st November 2012 and the Claimant testified on 19th November 2014. When the matter came up for defence hearing on 8th April 2015, the Respondent indicated that it would not be calling any witnesses. The Court therefore closed the case and directed the parties to file final submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 17th April 2000 in the position of Secretary at an initial salary of Kshs.39,000.00 which was progressively increased to Kshs.166,975 as at the time the Claimant left the Respondent's employment.
4. Sometime in May 2012, the Respondent announced an impending takeover by a foreign third party company known as PUMA Energy. The Respondent's employees were informed that the takeover would result to a staff reduction at the Respondent Company. Upon getting this information, the Respondent's employees sought clarification on their employment status but none was forthcoming. The employees therefore filed Cause No 1022 of 2012 seeking protection of their labour rights. The Respondent subsequently notified its employees that it was facing harsh economic times and was therefore forced to reduce its workforce.
5. The Claimant was pressurised to resign but she declined. Thereafter, the Respondent terminated her employment on grounds of poor performance. It is the Claimant's case that for over a decade she had posted a good performance rating and the termination on grounds of poor performance was therefore unjustifiable and unreasonable. In this regard, she cites her last performance appraisal undertaken three (3) weeks before the termination in which she was rated 'very good' and awarded a salary increment.

6. The Claimant seeks the following remedies:
 - a. A declaration that the termination of her employment was unlawful
 - b. A declaration that the termination should only take effect upon the Respondent complying with the law and that the Claimant is therefore entitled to her monthly salary in the intervening period
 - c. An order for payment of the Claimant's monthly salary until retirement age (166,975x12x16 years).....Kshs.32,059,200.00
 - d. General damages for unfair termination of employment
 - e. 12 months' salary in compensation for unfair termination (12x166,975).....Kshs.2,003,700.00
 - f. In the alternative, the Claimant's reinstatement to her former position
 - g. Severance pay (½ month's salary for 12 years).....Kshs.1,001,850.00
 - h. Service charge for abrupt termination of employment.....Kshs.1,001,850.00
 - i. Compensation for violation of the Claimant's rights under Article 41(1) of the Constitution
 - j. An order compelling the Respondent to repay the Claimant's loan with Standard Chartered Bank
 - k. An order barring the Respondent's transfer of shares to PUMA Energy or any other company pending compliance with the foregoing orders
- Costs plus interest

The Respondent's Case

7. In its Memorandum of Response filed on 1st November 2012, the Respondent denies that the Claimant was a diligent employee and states that the Claimant's performance was not satisfactory leading to the termination of her employment. According to the Respondent, promotions and salary increments were not based on performance but were available to all employees.

8. The Respondent further states that the termination of the Claimant's employment was not in any way related to the ongoing negotiations for takeover.

Findings and Determination

9. The following are the issues for determination before the Court:
 - a. Whether the termination of the Claimant's employment was justifiable and fair;
 - b. Whether the termination of the Claimant's employment amounted to violation of her constitutional rights;
 - c. Whether the Claimant is entitled to the remedies sought.

The Termination

10. On 13th August 2012, the Respondent wrote to the Claimant as follows:

“Dear Ms. Ochang,

RE: CONTRACT TERMINATION

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.

In line with your employment letter dated 17th April 2000 we hereby give you one month notice to terminate your services effective 13th August 2012.

However, you will be exempted from serving the notice period and will be paid one month's pay in lieu of notice, thus your last day of employment will be 13th August 2012.

All the monies that may be owed by you or to you will be calculated in your final dues and communicated to you.

We wish you well in your future endeavours and request you to get in touch with the H.R officer in order to follow the relevant company procedures.

Yours Faithfully,

G.N. Mwangi

Group Export & Regional

Support Manager”

Roseline Gatigi

Human Resources Manager

11. From this letter, it is apparent that the termination of the Claimant's employment was motivated by poor performance, an allegation vehemently contested by the Claimant.
12. On the contrary, the Claimant told the Court that she had an impressive employment record citing merit awards, bonuses and salary increments awarded to her on account of her performance. There were no complaints made against the Claimant by her employer.
13. The Respondent did not dispute the Claimant's employment record as narrated by her. It was however submitted on behalf of the Respondent that a good performing employee could drop in performance. The Claimant's last performance appraisal covering the period July 2011 to June 2012 was undertaken on 26th June 2012.
14. The Claimant's overall rating from this appraisal was 'very good' and by letter dated 25th July 2012, she was awarded a 3% merit increment over and above a cost of living adjustment (COLA) of 8% awarded to all employees in April 2012.
15. Less than a month after the letter communicating her merit increment, the Claimant's employment was terminated. The Claimant told the Court that the termination letter was handed over to her by her supervisor George Mwangi who was the Head of Exports on the evening of 13th August 2012.
16. The law recognises poor performance as a valid ground for termination of employment. However, like all other grounds for termination an employer advancing poor performance must prove its existence. As held in **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)** once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and allow them reasonable time to improve.
17. Further, in **Jane Wairimu Machira V Mugo Waweru and Associates (Cause No. 621 of 2012)** this Court held that an appraisal of the performance of an employee must of necessity

involve the active participation of the employee.

18. A reading of Section 41 of the Employment Act, 2007 which sets out the procedural fairness requirements in the handling of internal disciplinary cases covers poor performance. It is therefore not enough for an employer to state that an employee is a poor performer. Even where there is disagreement between an employee and an employer on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place.

19. In my view, disciplinary action based on poor performance must be preceded by a capability hearing within the parameters set out in Section 41. The Respondent did not produce any performance appraisal record to prove its verdict that the Claimant's performance was '*below expectation*'. Even worse, there was no evidence that the Claimant was given an opportunity to respond to the allegation of poor performance. Consequently, the Court finds that the termination was devoid of any valid reason and was in contravention of the procedure set out in law. The termination was therefore substantively and procedurally unfair.

The Termination and the Claimant's Constitutional Rights

20. In her Statement of Claim, the Claimant pleads that the termination of her employment amounts to violation of her constitutional rights under Articles 26(1), 27(5), 41(1) and 47(1) of the Constitution.

21. The jurisdiction of this Court to enforce the Bill of Rights within an employment relationship is no longer in doubt. This position was well articulated by **Majanja J** in ***United States International University (USIU) V Attorney General [2012] eKLR*** where he rendered himself in the following terms:

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationship defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court.”

22. This Court fully associates itself with the position taken by **Majanja J** in the ***USIU Case*** (Supra) and claims jurisdiction to make any finding and issue any orders under the Constitution in as far as employment and labour rights are concerned. However, not every injury occurring within an employment environment is a constitutional matter.

23. In my view, where rights of employees are fully addressed in an employment contract and in statute, this Court should not throw the constitutional net to fish for violations where none exist. Furthermore, there is the well grounded principle that parties seeking redress for violation of constitutional rights must provide recognisable particulars. I have looked at the Claimant's claim in this light and find no proof of violation of her fundamental rights as pleaded. Her remedies therefore lie in statute.

Remedies

24. In view of my finding that the termination of the Claimant's employment was unjustifiable and unfair I award her twelve 12 months' salary in compensation. The prayer for reinstatement is consequently declined. I also award her one month's salary in lieu of notice.

25. The Court found no legal basis for the claims for suspension of the termination, payment of salary until retirement age and for general damages which are hereby dismissed. Similarly no basis was laid for the claims for severance pay and service charge which also fail and are dismissed. Given the foregoing finding that the termination of the Claimant's employment did not raise

constitutional issues, the claim for violation of rights under Article 41(1) of the Constitution must fail. There was no evidential support for the claims for orders compelling the Respondent to repay the Claimant's loan and barring transfer of shares to PUMA Energy which are therefore dismissed.

26. In the upshot, I make an award in favour of the Claimant as follows:

a) 12 months' salary in compensation for unfair termination....Kshs.2,003,700.00

b) 1 month's salary in lieu of notice.....Kshs.166,975.00

Total.....Kshs.2,170,675.00

27. I award the costs of this case to the Claimant. The award amount shall attract interest at court rates from the date of the award until payment in full.

28. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF JUNE 2015

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JUDGE

Appearance:

Mr. Change for the Claimant

Mr. Ahisi for the Respondent