



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1453 OF 2014

ANDREA TURUKE OLINGA CLAIMANT

VERSUS

POWerview SOLUTIONS LIMITEDRESPONDENT

JUDGMENT

1. The issue in dispute in this matter is the wrongful termination and non-payment of terminal dues and damages.
2. On 28th August 2014, the Claimant Andrea Turuke Olinga filed the claim against the respondent, Powerview Solutions Limited. Summonses were served on 11th September 2014 but the Respondent failed to enter appearance or file any defence. On 11th December 2014 a hearing notice was served upon the Respondent but there was no appearance at the scheduled hearing date. Court thus directed the Claimant to proceed upon being satisfied that summons and hearing notices were duly served and the Respondent was aware of the matter in court. The Claimant was heard in evidence on 3rd June 2015.
3. The claim is that on 14th June 2013 the Claimant was employed by the Respondent as the operations Manager on an annual renewable contract with effect from 19th June 2013 at a salary of kshs. 30,000.00 Per month. The Claimant commenced her duties but was not paid for the months of June to August 2013, which was later paid in September 2013 through cheques. In November 2013, the Claimant went into an agreement with the Respondent that she was to buy some shares of the Respondent company and she thus instructed the Respondent not to pay her salaries for September and October 2013 which were due and the subsequent months and to instead channel the salary for the payment of such shares. The shares were valued at kshs.242, 000.00. This was until 2nd May 2014 when her services were terminated without notice or being given any reasons.
4. The Claimant is now seeking for orders that her termination was unlawful and that she should be paid back her shares contributions at Kshs.242,000.00; Notice pay; Payment in lieu of untaken leave; Service gratuity; And compensation for unlawful termination. All amounting to kshs.677, 000.00.
5. In evidence the Claimant supported her case and noted that upon employment by the respondent, she was to be paid Kshs.30, 000.00 per month. She also went into agreement with the Respondent Director for the purchase of shares in the Respondent firm and since this seemed to be a good idea she agreed. This was to be paid from her salaries and she managed to contribute 210,000.00. on 29th April 2014 she fell ill on her way home from work, she called the Respondent to inform him that she had been taken ill and would be later reporting to work. However on 1st May which was a public holiday, the Respondent managing director called her and told her not to report back to work. On 2nd May 2014 the

Claimant went to collect her personal effects from the office when the director informed her that his dues would be paid and she was to go home and wait for his call. This was never paid. There was no letter of termination issued or the reasons as to why the Claimant was stopped at work. At the time she had kshs.42, 000.00 of salary due and her contributions for shares sale was never effected. The Claimant is thus seeking her terminal dues and compensations.

6. It is trite that an employer has a duty to issue a written contract of service/employment once they have engaged an employee. This is the document that spells out the terms and conditions of employment as under section 8 of the Employment Act. Equally before termination, an employer is obligated to issue a notice stating the reasons of such termination. This is to enable the employee appreciate the reasons for such termination and where such reasons are not valid, to challenge the same in court. Failure to issue the employee with a written notice of termination or as under the terms of the contract, the law applicable must be read into the relationship based on the evidence of the employee as held in **Frederick Kariuki Kamau versus Bank of India, Cause No. 2424 of 2012;**

An unfair dismissal [termination] may be proved on the grounds that there was no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be varied based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer. On the side of the employer, apart from the requirement in section 47(5) of the Employment Act to justify the grounds of termination, section 43 demand that the employer prove the reasons for the termination, while section 45(2)(a) and (b) require an employer to prove that the reasons for termination were valid and fair reasons.

7. In this case, the Claimant states that she was employed as the operations manager at the Respondent firm at a salary of kshs.30, 000.00 a month. She was to buy shares but this was not effected. She had by then contributed Kshs.210, 000.00 at the time of her termination. She got sick and upon sharing such information with the Respondent she was informed not to report back to work.

8. On the basis that there is no evidence to controvert the Claimant and what has been stated in her evidence, I take it that she was terminated and not issued with any notice or reasons for the termination which is contract to the provisions of section 35, 43 and 41 of the Employment Act which requires notice to be issued giving reasons for the termination and before such termination, to be given a hearing. Which such a process is lacking, the resultant termination is unfair under the provisions of section 45 of the Employment Act.

9. Upon termination of employment, whatever salaries are due these are payable as of right. The Claimant had also contributed to shares purchase of the Respondent company and this was not effected and the salaries remitted to this end are all due. The Claimant is thus award kshs.242, 000.00 in due salaries and shares contribution.

10. Notice pay is due where termination is effected in an abrupt manner without any due cause. This is provided for under section 35 and 36 of the Employment Act. The Claimant shall be paid Kshs.30, 000.00 in lieu of notice.

11. Leave is claimed but noting the Claimant only served for 11 months, this is prorated at kshs.27, 500. This shall be awarded.

12. Service gratuity is due as under section 35 of the Employment Act. Such service pay is due upon prove that no statutory dues were remitted to the NSSF or the NHIF. The Claimant does not attach a pay slip indicating what statutory deduction were remitted but there is evidence that for the first 3 months of her employment this was delayed and later paid through cheques and later salaries were used toward purchase of Respondent shares. There is no indication of statutory dues remittance. That as it may be, service payable is based on each completed year of service as per section 35 of the Employment Act. Even though there is no defence to the case, such dues are not available here, noting the Claimant only

served for 11 months.

13. On the finding that this is a case of unfair termination noting there was no notice issued, no reason were given or compliance with the applicable law. Compensation is due. This will be based on 6 months' salary.

Judgement is entered for the Claimant in the following terms;

- a. **A declaration that the Claimant was unfairly terminated by the respondent;**
- b. **Compensation granted at kshs.180, 000.00;**
- c. **Salaries due and shares contribution at Kshs.242,000.00;**
- d. **Notice pay at Kshs.30, 000.00;**
- e. **Prorated leave at kshs.27, 500.00;**
- f. **Costs of the suit.**

Delivered in open Court, dated and signed in Nairobi on this 10th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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