



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 38 OF 2014

PRAMILLAH ASENA AYUMA CLAIMANT

VERSUS

QUEST LABORATORIES LIMITED.....RESPONDENT

JUDGEMENT

1. The issues in dispute are the non-payment of salary for the month of October 2012, November 2012, January 2013 and March 2013.
2. The memorandum of claim was filed on 28th January 2014 and the defence and counter-claim filed on 28th May 2014. The claimant also filed a reply to the defence and counter-claim on 10th June 2014.

The claim

3. The claimant applied for a job with the respondent for Regional marketing Manager and was called for an interview. The terms were never agreed upon and the claimant did not take up the job offer. The respondent later reconsidered the offer and called the claimant for the position of Coastal Regional Marketing manager to be based in Mombasa on a monthly salary of Kshs.50, 000.00 pending appraisal and confirmation with the benefit of a medical cover for self and family and a car. Before departure to Mombasa, the claimant requested to have her contract signed but this was not done. Despite request, this was not done. The claimant commenced work on 16th October 2012 in Mombasa at the respondent offices. She diligently served for 6 months until 30th March 2013 but was only paid twice on 23rd December 2012 via Mpesa phone number *[particulars withheld]* and on February 2013 via Mpesa phone number *[particulars withheld]* for Kshs.50,000.00 each all being Kshs.100,000.00. On 30th March 2013 the claimant stopped work as she realised her contract had been breached and continued work for the respondent might cause her more damage and massive financial loss.

4. The claimant is seeking her 4 months unpaid salaries all being kshs.200, 000.00; any other benefit that is due together with costs and interest.

5. In evidence, the claimant testified that when she learnt of a vacancy at the respondent she applied but upon her interview she could not take it up and there was no agreement on her salary. The manger called her with a new offer for a position in Mombasa as regional manager and agreed the salary at Kshs.50, 000.00, medical cover for self and family and a car to facilitate her movements. She was advised to move to Mombasa and her contract would be sent for her signature but this was never issued. She made

several follow ups but no contract was issued. She reported to work in Mombasa under the manger there and commenced work and filed reports. The computers in the office were not working and she had to use her personal means to send emails and reports. For the 6 months she remained with the respondent she was only paid twice via Mpesa. She had a family that required her support and could not cope with non-payments of her salary and had to make a decision. She left the respondent employment in March 2013 but her 4 months' salary arrears had not been paid.

6. In cross-examination the claimant stated that before joining the respondent she was working with Build Africa and had to resign to join her new employer. It was easy to settle in Mombasa as this was her previous work station. She resigned upon giving notice. She called head office and spoke to her supervisor and did a hand over. The notice was verbal. At the time there was a client who needed some products which had not arrived, but her work colleague Zacchaeus was aware. The required products were not in Mombasa and time was required for delivery. All the unpaid funds were within the knowledge of the respondent. It was difficult marketing respondent products as team work was required. Her terms of employment were to be in the contract that was never issued. In the discussion with the manager, it was agreed that her take home salary should be kshs.50, 000.00. The communications with regard to salary arrears were done through the office email address and when the system went down, the claimant could not access these communications.

7. The claimant also stated that she was not aware of any bank loan with Equity Bank giving the respondent as the employer. What she was entitled to was not a commission but a salary.

Response

8. In defence and counter-claim, the respondent admitted that the claimant was their employee and was appointed on a temporary contractual period of 3 months as a marketing Agent from October 2012. She was to be paid a 12.5% commission of the monthly gross sales made by selling respondent products and to give weekly sales reports and work hours being 8,30a.m to 5p.m. the sales targets were set at kshs.401, 206.00 per month. During October 2012 to February 2013 the claimant was persistently absent from work causing huge financial losses tot eh respondent, she failed to meet her sales targets or account for goods sold and non-remittance of Kshs.28, 767.00 paid to her. The claimant took a loan of kshs.80, 000.00 with Equity bank limited indicating the respondent was her employer without notice or consent and as a result the bank officials visited the respondent premises making enquiries about her whereabouts and demanding loan repayment. This caused the respondent embarrassment as there was no knowledge to the loan the claimant had taken. The claimant refused to tender her weekly reports and stopped attending work and followed by switching off her phone so that she could not be reached. The amount paid of kshs.100, 000.00 was given to the claimant to aid her in settling her personal expenses and her child's medical expenses and this was not a salary.

Counter-claim

9. The respondent in counter-claim state that the claimant underperformed in her duties by being absent from work, did not meet her monthly targets and failed to remit the sum of kshs.28,767.00 paid to her. The claimant has also refused to repay the sum of kshs.100, 000.00 advanced to her as a soft loan and thus demands kshs.128, 767.00.

10. In evidence the respondent's witness was Juliana Makena Muriithi the human resource officer of the respondent. She testified that the claimant is not entitled to a salary of kshs.50, 000.00 as such a salary was due to permanent staff who received the same each month end and was deducted statutory dues. The Kshs.100, 000.00 paid to the claimant was not a salary but a soft loan which was never paid back. The claimant was entitled to a commission and had set targets. There were no complaints of non-payment of the commissions and in any case, the claimant failed to meet her targets set for her sales per month. The claimant then left her employment since she was unable to meet set targets. The clamant was supervised by Juma, she wrote to him noting that she had not met her set targets as she was frequently absent from work. On 2nd March 2013, the claimant sent an email noting that she had not met her targets.

11. Ms Muriithi also testified that all cash deposits were made at Fina bank, the claimant had the account details and the respondent would track all deposits. There were unpaid for products that the claimant recorded but failed to remit the sales made and the respondent is claiming this amount. The claimant was terminated for deserting duty. There was a requirement that all sales persons report to the office first before proceeding to the market and where not able to report to communicate with the supervisor. The claimant left never to be seen again. The counter-claim should be confirmed and the claim by the claimant dismissed with costs.

Submissions

12. In submissions, the claimant relied on section 9 and 20 of the Employment Act noting that she was not issued with a contract of employment are required. She wrote and demanded to be issued with the same but the respondent failed to do so. Also, she was not issued with an itemised statement of her dues that noted what was paid in salary or deducted in statutory payments and remittances. The demand of 28,767.00 is unknown to the claimant as this has never been communicated to her.

13. In response the respondent submitted that section 2 of the Employment Act define who an employee is and in this case the claimant was not employed as such. She did not prove employment. Section 107 and 109 of the Evidence Act requires the claimant to prove her employment. The terms of employment are dictated by an agreement which is underpinned by the law as parties can agree on whatever terms they deem most suitable to their relationship. An employee employed on a temporary basis enjoys rights accruing to an employee employed on permanent basis except the law of contract limit the rights and obligations. The claimant in this case just stopped attending work. Section 10 of the Employment Act provides the minimum requirements for an employment relationship. In this case an employer can terminate a contract of employment due to misconduct, poor performance or incapacity but the claimant failed to attend work and thus terminated her contract.

14. The respondent also submitted that the claimant was their employee on temporary basis and failed to meet her sales targets. She was not salaried and thus not owed kshs.200, 000.00 as claimed. The claimant has not stated how she was paid her commissions and has failed to account for the soft loan and the remittances due from her. There is a counter-claim for the sum of Kshs.128, 767.00 that should be confirmed and the claim by the claimant is dismissed with costs

Determination

What were the employment terms of the claimant?

Are there any remedies due?

What is the status of the counter-claim?

15. As a general rule for the court, technical rules of evidence do not apply to proceedings before court save in criminal proceedings. This is set out under section 20 of the Industrial Court Act thus;

20. (1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities

16. The above provisions must be seen in the context of creating an enabling environment for an employee to be able to articulate their claim without recourse to strict provisions of the Evidence Act or matters of law that do not address the substantive issues at hand. Where employment is alleged, the duty is upon the employer under section 74 of the Employment Act to produce work records, statements or any material relevant so as to prove the nature of relationship that existed between them and a person alleging to be an employee. In this case, the claimant has asserted her rights in the capacity of an employee whereas the respondent has disputed this and admitted the claimant was their employee as a Commission Agent. Such evidence has however not been produced to see what terms and conditions of such engagement were agreed upon. The duty is vested upon employer at all material times to ensure that all

work records, contracts of employment, piece work contract or any work records are kept by them. The employee as the recipient of such records is not the one talked to produce the contract in a claim such as this one. Whether the employer is a claimant or respondent, the law is emphatic; work records are kept by the employer and should be produced in court where a claim is filed. I find no such material. The evidence of the claimant must therefore be taken as such – she was an employee of the respondent.

17. Even where there is no production of a contract of employment, other work records are necessary to produce so as to aid the court to appreciate the nature of relationship that existed between the employer and employee. Where the claimant was to be paid commissions for her work targets such details are not availed to court. Where the claimant took a soft loan to pay for the medical needs of her child, such records is not produced. What is left is word of mouth. Such details only mar the process and in this regard the word of the employee must be taken as the truth. Equally, the sales returns produced by the respondent do not speak of the claimant. Though Ms Muriithi outlined the dues owed to the respondent by the claimant, the attached record in evidence “QLL1” does not indicate who did the sales and how the claimant is linked with the document. Some cash sales and remittances were made as late as 2nd April 2013 and 2nd July 2013, way after the claimant had left the respondent employment. The respondent being a corporate has its financial reports, audits and daily cash flow statements and where the claimant held any such products for a period longer than a week or a month, the monthly bank statements could have been a useful statement in assess and analyse the same. The QPP Stock – Mombasa Branch is not clarified as to who did the analysis and how the claimant is responsible. Without the contractual agreement between the respondent and the claimant outlining the terms of her employment, the nature of products she was to hold on the respondents behalf, how funds were to be remitted and the durations of holding such sums or products or debts owed by the various clients, it becomes practically impossible to find in favour of the respondent, the employer in this case. There is nothing that stopped the respondent from writing down the terms of engagement they had with the claimant. Where the claimant became an impossible employee/agent/commission agent from October 2012 as suggested, she had 3 months’ probation period to be assessed and terminated on short notice as under section 42 of the Employment Act.

18. Therefore to allow the continued employment of an employee who was underperforming her duties, she was absconding duty and was absent in most occasion is not what a diligent employer does. The fact that the claimant had to resign from her employment due to what is stated as non-payment of her salary is more plausible. In any case, the evidence by Ms Muriithi that the claimant was terminated for absconding duty is not supported in evidence as I find no letter to this effect. I take it the claimant resigned following the non-payment of her owed salaries. Where an employee such as the claimant has offered herself to an employer and remains in such employment until it is terminated, salaries due are payable. In this case the court shall award the claimant salary of 4 months at kshs.50, 000.00 all being kshs.200, 000.00.

19. I agree with the submissions of the respondent to the extent that section 10 of the Employment Act spell out the basic minimum requirements that should go into a contract of employment. Such are details that can help any employer to write a contract of employment once they engage any employee. But that far stated, the respondent failed in this regard, they did not adhere to the provisions of section 10 of the Act as much as this is clearly noted in their submissions. There claimant was not issue with such a contract setting the minimum basic terms and conditions of her employment. The respondent then left the relationship between themselves and the claimant exposed. This must be interpreted for the benefit of the employee, the claimant.

20. Indeed section 10(1) of the Employment Act give emphasis on what an employer should do upon recruitment of an employee thus;

*10. (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and **shall be given not later than two months** after the beginning of the employment— [emphasis added].*

21. Upon employment, whatever the terms, and where an employee continues in employment and

maybe in some cases an employer is not able to issue the employment contract, this should not be allowed to continue for more than two months. Two months is a reasonable period for any employer to hold the process and write a well detailed contract of employment and cause the same to be signed and issued to the employee. To failure to comply only leaves the employer exposed as in this case. At the end of the claimant's work period, there was no written contract on her terms of engagement; there is no agreement or record of the set sales targets or evidence of any soft loan advanced. For an employer to give out a loan of up to Kshs.100, 000.00, basic principles of the law of contract require that such a matter be made in writing. Where the claimant had a bad work history as alleged, I find no rationale why she would be granted such a huge sum of cash in loan without documentation. Even where the claimant is alleged to have been a temporary employee, to grant a loan such as alleged without securing it is way beyond what a reasonable person ought to undertake. This I find not to be such a loan in the absence of supporting documents from the same. I take it then this was part payment of the claimant's due salaries set at kshs.50, 000.00 per month. Where such salary is not paid, it becomes due and owing.

Remedies

22. The claimant is seeking for her due salaries and any other remedy the court may deem fit. Based on the evidence, the above analysis, the claim for due salaries is awarded at kshs.200, 000.00. the claimant resigned her employment, she did not note give written notice as required, and thus no other remedies become available.

23. I find no basis to the counter-claim. The same is dismissed.

24. Noting the respondent failed to adhere to legal requirements of issuing a written contract to the claimant, the suit would have been unnecessary as such a contract would have been useful to appreciate the terms as between the parties, in the absence of the same, costs shall be awarded.

Conclusion

The counter-claim by the respondent is hereby dismissed. Judgement is hereby entered for the claimant against the respondent in the following terms;

Salary due awarded at Kshs.200, 000.00; and

Costs of the suit.

Delivered, dated and signed in open Court at Nairobi this 9th July 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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