



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 130 OF 2013**

**ROSE ACHIENG MIHUDHI ..... CLAIMANT**

**VERSUS**

**JOS HANSEN & SOEHNE (EA) LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The issue in dispute herein is the wrongful dismissal and failure to pay terminal due.
2. The claim filed on 31<sup>st</sup> January 2013 is that the Claimant was employed by the Respondent as a Sales and Marketing Representative and deployed to the respondent's Tanzania office. The Respondent being a registered company and incorporated in Kenya issued the Claimant with a contract of service in January 2012 and was to work in Tanzania. The Claimant was then working at a law firm where she was poached to work for the Respondent and as a result she lost all her terminal benefits. Upon relocation to Tanzania, the Claimant was informed that she had to pay for her accommodation contrary to the terms of her contract and was forced to stay in a hotel while searching for a house. When the Claimant found accommodation, she was informed that the practice in Tanzania was that rent was payable one year in advance. She thus obtained a loan from the Respondent to be able to make rent deposit and was to be deducted from her monthly salary leaving her with Kshs.34, 000.00 which was not enough for her while in a foreign country.
3. The claim is also that the Claimant was discriminated against while in Tanzania, she was not paid overtime and promotion allowances which other employees received; she was placed in poor working conditions; was never provided with a car as promised during her induction and noting the nature of her work and the hot weather in Dar as Salaam; at the workplace she did not have an office and other essential facilities and this remained the case until her dismissal. On 1<sup>st</sup> august 2012 the Claimant was asked to execute a new contract that was substantially a derogation from the original one, it had less benefits than the one issued while in Kenya to which she declined. As a result the Claimant was terminated from her position.
4. The claim is that the termination was uncalled for as the Claimant was diligently undertaking her duties despite the poor work environment. There was breach of contract and she claims for compensation for unfair termination; unpaid leave days; relocation expenses and general damages for loss of previous work and benefits.
5. In evidence the Claimant testified that before joining the respondent, she was employed by the firm of Okoth & Kiplagant Advocates where she was induced by the Respondent to resign and join them. Upon employment she underwent training ready for work in Tanzania on a salary of Kshs.80, 000.00. The salary was to include a payment of house allowance, provided with a house and office facilities for the

sales and marketing job. She was in Nairobi for 6 months and in August 2012 she was moved to Tanzania as the contract had commenced on 1<sup>st</sup> April 2012.

6. Upon reporting to the respondents office in Tanzania, the Claimant was forced to stay in a hotel as there was no accommodation provided; she did her field work and sat in her hotel to file reports but was never compensated. She wrote to the finance officer with her concerns that an office had not been provided, there was no accommodation or allowances but nothing was done.

7. The Respondent asked the Claimant to sign a new contract while in Tanzania but she refused to do so as the terms were less favourable than the previous contract. There was no medical cover or accommodation provided. Upon refusal to sign the new contract, she was terminated from her employment without notice or being given a valid reason.

8. While at work in Tanzania, other staff were given their allowances and promotions but the Claimant was left out which was discrimination against her. The Claimant was given a pick up and a driver for her work and due to the heat in Dar es Salaam she got sick and was hospitalised.

9. The Claimant is seeking compensation for unfair termination of her employment; relocation allowance which the Respondent failed to pay; damages for the losses incurred; and the rent refund she was forced to pay for one year under the practice in Tanzania. The Claimant applied for 6 million Tanzania shillings as a loan from the Respondent and by the termination of employment she had only paid kshs.30, 000.00.

10. In cross-examination the Claimant testified that upon employment by the Respondent she was on probation for 6 months and was then sent to Tanzania. She was made to sign a *Certificate of discharge* as a released to go to Tanzania but it was noted that her contract had been executed in Kenya. She was terminated when she refused to sign the inferior contract while in Tanzania. While in Tanzania she stayed in a hotel for one month awaiting provision for accommodation and when the Respondent failed to do so she rented a house and paid for one year after taking loan with the respondent. Upon termination she could not get back her rent due and claim the same from the respondent. She was paid her December salary; work for 10 days and 7 days leave. She has not repaid the loan as the Respondent was aware the purpose for which she took the loan for which was lost in the rent paid in advance. She is seeking relocation allowance as she was forced to buy furniture while in Tanzania and had to move it back to Kenya. The Respondent paid for an air ticket but did not use it as she needed to move with her household goods.

### **Respondent's case and Counter-claim**

11. In defence, the Respondent stated that they freely negotiated employment between them and the Claimant without any inducement and a contract signed on 23<sup>rd</sup> January 2012 with the commencement date being 1<sup>st</sup> February 2012. The contract stated that the Claimant was to work in Tanzania in Dar es Salaam. Probation was agreed at 6 months. parties also agreed that upon confirmation of employment, the Claimant would then be relocated and hired by the Respondent sister company Jos Hansen & Someone (Tanzania) Limited and hence she signed a Certificate of Discharge on 7<sup>th</sup> September 2012 where she agreed her contract with the Respondent ended on 1<sup>st</sup> August 2012 and would relocate to Tanzania to be absorbed by the new company. But the Claimant refused to sign a contract while in Tanzania despite pleas to do so. The Claimant was therefore not confirmed into employment. This resulted in termination of employment vide letter dated 7<sup>th</sup> December 2012 that gave one month's notice. Full dues were paid.

12. At the time of termination, the Claimant had applied for a loan which had not been repaid and has a balance of kshs.337, 000.00 due to the respondent.

13. That this is not a case of unfair termination as the Claimant refused to sign her contract. No leave is due as this was fully paid for and the relocation claims are not payable as there is no support for the same.

14. In counter-Claim, the Respondent is seeking a refund of Tshs.6, 500, 00.00 (kshs.337, 000.00) being a

loan not repaid to them by the claimant.

15. In evidence, the Respondent called Kennedy Miriithi Muchungu the respondent's finance manager as their witness. He stated that the claimant was their employee for a position in Tanzania. She was not induced as she volunteered herself and signed her contract willingly. The contract was clear that place of work was Tanzania subject to confirmation. The claimant signed a certificate of discharge and was to sign a new contract with the respondent's sister company in Tanzania. She refused to sign the new contract and was terminated and paid all her terminal dues. The Respondent agreed to relocate the Claimant back to Kenya but she declined. The Respondent was willing to bear the costs but the Claimant wanted to stay longer in Tanzania after the Respondent had issued her with a one-way ticket to Nairobi but she declined.

16. The Respondent has counter-claimed for monies paid to the Claimant for a loan she applied for and had not repaid when she was terminated. This is the sum of Kshs.337, 000.00 that she has refused to repay.

### **Submissions**

17. The Claimant submitted that she entered into a contract of employment with the Respondent on probation for 6 months after which she was to be deployed to Tanzania which was done. However she was made to sign a new contract which she declined and was terminated. There was no notice or any reasons given for the termination and the same was a breach of her clear terms and conditions of employment as agreed upon. The claimant was made to work under a very hostile environment and was thus frustrated resulting in her termination. She was discriminated against when the Respondent refused to pay overtime and promotions allowances despite other employees earning the same.

18. The Claimant also submitted that she was induced to leave her previous job where she lost her terminal benefits to join the respondent. That she would have retained her job had the Respondent not done so. She claims damages. That the Respondent is in breach of section 45 and 43 of the Employment Act and claim reliefs under section 49 of the Act.

19. The Claimant relied on **Edwin Kabogo munene versus Equity bank Ltd, Cause No. 1123 of 2012; Jane Wairimu Macharia versus Mugo Waweru & Associates, Cause No.62 of 2012; and Ivetta Mkala versus Nation Media Group, Cause No.2367 of 2012.**

20. The Respondent also submitted that the Claimant has failed to prove her case with regard to the award of general damages claimed, claims for being induced to leave previous employment or that she was discriminated against. Such cannot be awarded. The Respondent also paid all terminal dues due to the claimant.

21. The Respondent also submitted that the Claimant did not prove that she was entitled to a car or accommodation while at work in Tanzania and was not entitled to the same or an allowance as her contract was specific. When she signed the certificate of discharge, the Respondent was absolved from any liability as the Claimant was to sign a new contract with the sister company in Tanzania. The new contract offered was not a derogation from the contract with the Respondent as the terms were substantially the same. The termination was therefore justified as the Claimant refused to sign a new contract hence ending her relationship with the respondents. No compensation is due or warning.

22. The Respondent also submitted that they are entitled to the counter-claim as the Claimant applied for a loan and has failed to repay. It should be paid with interest and costs of the case.

### **Determination**

Whether there was discrimination against the claimant

Whether the Claimant was induced to take up employment with the respondent

Whether there is a case for unfair termination

Whether the Respondent is entitled in counter-claim

Whether the remedies sought are available

23. The power of contracting between parties is to be respected by the Court unless there is obvious illegality, fraud, misrepresentation or an outright unfair labour practice. In this case, both parties have a valid contract of employment dated 23<sup>rd</sup> January 2012 that outline the terms and conditions of employment of the Claimant as the respondent's Sales and Marketing representative. The contract is well detailed in that the Claimant was;

*... You will be employed at the company's premises situated at Ohio Street, Dar as Salaam or at such other location of the company's activities as the company may determine from time to time on notification to you.*

24. That much was spelt out under the contract of employment. The place of work was to be determinate by the employer from time to time but in this case, the Claimant was to be situated in the respondent's premises situated at Ohio Street, Dar as Salaam. The Claimant has signed this contract of employment, she did not site any fraud, forgery, misrepresentation and the referred inducement was by a third party other than a representative of the respondent. Despite such third party presentations, the Claimant signed the contract of employment and by so doing agreed to leave her otherwise good job with a previous employer and opted to join the respondent. I find no evidence of interference with the claimant's power to contract and enter a new employment contract with the respondent, she was fully aware of the terms and willingly opted to take up such employment which she stated in her evidence, promised to be a better paying job.

25. In the contract of employment, the Claimant was entitled to various benefits. Her salary was Kshs.80,000.00 for one year and was to be reviewed after one year upon payment and earning commissions. The Claimant was also entitled to a medical cover for self and family. Probation was agreed at 6 months.

26. Thus under the terms and conditions of employment, the benefits are clearly set out. I take it then that the Respondent was well aware at the initiation of the contract that the place of work would be Ohio Street, Dar as Salaam. Had this not been the case, the contract should have specified other places of work. The evidence that the Claimant was to be confirmed after 6 months to work for a sister company in Tanzania therefore lacks any merit. I find The Contract issued in Tanzania is meant to circumvent the employment contract issued and agreed upon in Kenya, which is an unfair labour practice contrary to the provisions of article 41 of the constitution. A contract by mutual consent had already been signed between the Claimant and the Respondent in Kenya stating that she was to be deployed in Tanzania. To then make changes to the same without her consent is an illegality.

27. The Claimant was to be on probation for 6 months. Upon commencement of work on 1<sup>st</sup> February 2012, such probation ended on 1<sup>st</sup> August 2012. By operation of section 42 of the Employment Act, and where the probation period was not extended by mutual consent, the Claimant became a confirmed employee of the respondent. The fact that the Claimant was made to move to Tanzania soon thereafter is not a bar to her confirmation. Such move from Kenya had been contemplated in her contract of employment as held in the case of **Peris Nyambura kimani versus Delbit Group Limited, petition No.63 of 2014.**

28. To thus purport to issue a Certificate of Discharge on a contract that had since been confirmed by operation of the law without the clear consent and agreement of the Claimant was an unfair labour practice. By the time the Claimant moved to Tanzania, she was an employee of the Respondent and any new contract issued by a third entity had to take into account the existing contract. In any event, the Respondent had lodged a counter-claim over a loan the Claimant had obtained with this third party while in Tanzania. What is the basis of that counter-claim? Was the loan issued to the Claimant as the employee of the Respondent or of the sister company? Who is owed this amount?

29. In this case, I find the Claimant remained the employee of the Respondent until her termination and effort to relocate her to Kenya which she clearly stated she declined on the basis that she needed to be relocated together with her luggage. The termination that therefore arose was without any notice, reason and was not justified and contrar5y to section 45 of the Employment Act.

30. The Claimant is stated that she was discriminated against. The basis of the claim is that other employees were paid overtime allowance and promoted but she was not. The Respondent receptions did similar work like the Claimant but was paid allowances while the Claimant was not. In this regard, I find the Claimant was under a specific employment contract, it had her terms of employment and there is no clear outline of different treatment contrary to set policy, outside her contract or upon a legitimate expectation that a promotion or allowances were due and owing by virtue of other employees earning the same. such are matters that should clearly gone into for the Court to assess the different circumstances the Claimant was placed in a claim for discrimination against the Claimant as held in the case of **Collins Osoro versus AAA Growers Limited, Cause No.100 of 2012** thus;

*On the question as to whether there was discrimination against the claimant, where a person is treated differently from others similarly situated like him, this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is a specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the Claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified.*

31. In this case therefore, I find no elements of discrimination against the claimant. See also the case of **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited, Cause No. 60 of 2013.**

32. In this regard, the claimant's contract had no provision for the provision of accommodation. Her salary was all inclusive. Such accommodation cannot be claimed outside the clear terms of her contract. The amounts spent in hotel accommodation or in payment of rents, these the Claimant was responsible for from her salary. There is no evidence that such salary was not paid.

## **Remedies**

33. Upon the finding that the Claimant was unfairly terminated, compensation is due. The Claimant served the Respondent for a period of one year, her termination was without any justifiable cause, not notice was issued and effectively she was frustrated in the course of her work by the issuance of a new contract that she refused to sign. Such are circumstances that no employee should be subjected to. Where there is a clear offer of new employment, an employee should be made to give consent without any coercion or thereat with termination. The Claimant shall be awarded compensation for 12 months on a salary of Kshs.80, 000.00.

34. The Claimant is seeking damages for discrimination, inducement to leave her previous employment and for being subjected to poor work environment. The Claimant however fails to set out clear evidence in this regard. Damages shall not be awarded.

35. The Claimant is seeking relocation expenses. It was the claims evidence that while in Tanzania she was forced into expenses when she had to rent a house; she bought furniture and had to carry it home upon termination. On the converse, the Respondent stated that they offered a return-ticket that the Claimant declined. In this regard therefore, the duty of relocation to Tanzania was on the Respondent and the return back was also on the respondent. I find no just cause for the Claimant to claim for any other dues as she was in employment and ought to have appreciated the demands for the same and either taken the offer for a return ticket or seek a conversion of the same to suit her needs. Once the Respondent meant their responsibility, the duty was then on the Claimant to accept or take her own means. This claim shall not be confirmed.

36. The claim for notice, untaken leave is outlined as having been paid. This shall not be awarded.

**Counter-Claim**

38. On the respondent’s counter-claim, the evidence is that the Claimant was advanced a loan while in Tanzania. Indeed the Respondent has advanced evidence of a cheque paid to the Claimant of Tzs.1, 974, 720.00 paid by Jos.Hansen & Soehne (Tanzania) Limited. Indeed the application and payment vouchers are made by Jos Hansen & Soehne (T) Ltd and not the Respondent as outlined herein. This amount is thus not advanced by the Respondent and the entity that advanced it has not been enjoined as a party herein to warrant the claim for the loan due to such an entity from the claimant. I find no legal basis as to why the Respondent should seek such repayments to them noting very clearly that this is an entity [sister company] separate from themselves. The Respondent did not pay this amount to the claim and where due and owing, it ought to be paid to the entity that paid the same unless there is express authority to the Respondent to receive the same for and on behalf of this third party. Such a claim herein must fail.

**Conclusion**

**In conclusion therefore, the counter-claim by the Respondent is dismissed. Judgement is entered for the Claimant against the Respondent in the following terms;**

- a. **The Claimant was unfairly terminated from her employment by the respondent;**
- b. **The Claimant is awarded compensation of kshs.960, 000.00; and**
- c. **Each party shall bear their own costs.**

Delivered, dated and signed in open Court at Nairobi this 10<sup>th</sup> August 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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