



**REPUBLIC OF KENYA**

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

**CAUSE NO 1794 OF 2014**

**MICHELLE NOELLE OCHIENG ..... CLAIMANT**

**VERSUS**

**VIRTUAL WORKS LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The issues in dispute herein are the unlawful and unfair termination of the claimant; non-payment of house allowance; and failure to pay terminal dues.
2. The claim is that on 10<sup>th</sup> September 2013 the claimant was issued with a contract of employment by the respondent as a Marketing Manager in charge of Eastern & Southern Africa region to commence on 16<sup>th</sup> September 2013. The claimant was placed under probation for 3 months earning Kshs.150, 000.00 per month. Other benefits issued were phone expenses were covered by the respondent; leave of 30 days; and a medical cover for self and family. On 5<sup>th</sup> June 2014, the employment contract was unilaterally amended with an addendum reducing the holiday days to 21 days a year.
3. In April 2014, the respondent brought a General manager Mr Francis Thomas from Uganda to fill the position of CEO responsible to Kenya and South African Countries (SADEC). Mr Thomas started by calling for a meeting of all staff where he threatened that he would bring changes in the respondent company and would have to dismiss some staff.
4. At the time of employment, the claimant was a student taking her Bachelor's degree in International Business. She noted that she was taking weekly lessons with days of such attendance varying every semester and that she had 1 year to complete her studies. In this regard, in August 2014, the claimant went to the human resource manager to apply for leave to attend to her examinations but the manager informed her that she need not apply for such leave as there were directions to declare her redundant. She was shocked as there was no prior notice or indication that there was a redundancy process ongoing. On 8<sup>th</sup> August 2014 the claimant received a termination letter instead of a letter for redundancy as indicated to her. At the time the claimant was earning kshs.165, 000.00 per month which was ambiguous as it did not outline what she earned and was therefore excluding her house allowance.
5. The claimant is seeking pay for house allowance; 30 days holiday pay and compensation for unfair termination.
6. In evidence the claimant testified that upon employment her duties were outlined in her contract and was given a lump sum pay without a breakdown stating did not state that her house allowance was included. Changes were made to her contract without notice or consent and this affected her holiday pay. She was later called and informed verbally that she would be terminated due to redundancy but was

issued with a termination letter without stating that she had been declared redundant. She had only served for 11 months when she was terminated.

7. The claimant also testified that the averments made in the statement of defence by the respondent is false as she was not underperforming, she had not been appraised or given target upon which she would be assessed. Upon termination she prepared a handover report for all the duties she was undertaking prior to her termination. In her terminal dues she was paid for

- a. Salary for 8 days worked in August 2014;
- b. Notice pay
- c. Leave accrued
- d. Clearance certificate was issued.

8. That she was never issued with a Certificate of service. The financial statements attached by the respondent that they were doing badly financially is not correct as the statement relates to their Uganda office and not where the claimant was employed. There was no prior notice that there were financial problems and the resulting termination without notice or reasons was unfair.

### **Respondent's case**

9. In defence, the respondent admit they had employed the claimant as a Marketing Manager with an anticipation of getting distribution rights of an IT platform called EMC. The duties allocated to the claimant were wholly dependent upon the respondent securing the distribution rights and management of the EMC platform. The claimant's contract was realigned to have the holiday period at 21 days per year and the salary was inclusive of the house allowance.

10. The defence is that after the claimant had been employed for 8 months, the anticipated contract for EMC platform product was not secured and these circumstances compelled the respondent to review its collective operational position and thus the claimant was informed her position was redundant. She had not achieved the set targets of her position and she willingly accepted the impending redundancy. This was meant to restructure the respondent into a lean team to undertake its operations due to the weak financial status. The claimant was paid her August 2014 salary, notice pay and leave days due. The salary paid was inclusive of house allowance and this cannot form a separate claim. A Certificate of Service has been issued. The claim should be dismissed with costs.

11. In evidence, the respondent called Francis Thomas the general manager of the respondent who joined the Nairobi office in April 2014 after being in Uganda. The respondent business is IT distribution in all its products. The respondent does distribute IT products to various vendors and in this business EMC platform a USA Company dealing with *cloud* storage as multinational in IT solutions commenced negotiations with the respondent for their products storage and distributorship in the region. In the interim, the respondent had other products but the contracts ended in 2012 thus losing the core business. What remained was not sustaining the company.

12. The respondent thus commenced negotiations with EMC to take distributorship and there were assurances in 2012. The respondent was asked to source for staff that would handle the EMC business as they did not want to share resources with other products but the contracts were not forthcoming in 2013 or 2014. The position of Marketing Manager upon which the claimant was employed had been created in anticipation for the EMC business. Without the contract, the respondent started making financial losses and by 2014 noting the biggest expenditure was salaries he called all staff to a meeting and told them that they needed to buckle their belts and a few changes had to be made like reduced power consumption. But by June 2014, he noted that serious measures had to be taken and when he consulted with the chairman no contract had been signed. In July 2014 they agreed that a serious decision had to be taken that the hired staff had to be terminated. Since the claimant had been hired in anticipation for new business, she had to be terminated.

13. As this was happening, the claimant came to Mr Thomas office and a discussed commenced and

noting the challenges the claimant agreed to her leaving the respondent upon payment of her dues. She did not object to the proposal to terminate her contract thought the discussion was verbal. She did a handover and was cleared and all her dues were paid. A termination letter was thus issued to her but the reasons for termination were not stated. The letter of reference was issued which can be taken as a Certificate of Service.

14. The witness also testified that the respondent only got the EMC contract in March 2015. The claimant can be recalled back as she left without any acrimony. But the respondent was shocked when the claimant filed the claim stating that she had been unfairly terminated as the termination had been discussed. The termination had not been planned as it was a proposal and had the claimant refused to agree to the proposal, the respondent had other options.

### **Submissions**

15. On 17<sup>th</sup> July 2015 at the close of the hearing, both parties agreed to file their written submissions and mention the matter on 14<sup>th</sup> August 2015 to confirm. On the due date the written submissions were not on file and the court gave 7 more days for the same to be filed but only the claimant did comply.

16. In submission, the claimant filed her written submissions on 7<sup>th</sup> August 2015 and submitted that her contract of employment did not make provisions for housing allowances hence her claim for the same. The contract is vague with regard to gross consolidated salary and this should not be held to mean that housing was included.

17. The claimant also submitted that there were no valid reasons to declare her position redundant. There was no evidence for restricting or financial losses. This was contrary to section 40 of the Employment Act. Even where the claimant did not contest the directive to clear from her office, the respondent had already breached her contract as they were in control of the business. The court in **Bernard Misawa Obora versus Coca Cola Juices Kenya Limited [2015] eKLR** held that a redundancy requires specific procedures to be followed and any action of the employer through an act of omission or commission that disadvantages an employee is inherently unfair. In this case the claimant is entitled to compensation for unfair termination of her employment through redundancy process.

### **Determination**

18. The enactment of the Employment Act, 2007 has since created a fundamental change to employment and labour relations in Kenya. Employees are protected from arbitrary actions of an employer while the employers are also given the right to spell out the terms and conditions of employment in writing to ensure that each and every employment requirement for their business is met. In this regard, an employee should be issued with an employment contract as under section 9 Of the Employment contract. Once such a contract has been issued and accepted, any new change must comply with the provisions of section 10 (1) and (5) of the Act 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—*

...

*(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.*

[Emphasis added].

19. Thus any contract once issued, any new changes to its core terms must be done in writing in consultation with the employee as held in **KUPPET versus Teachers Service Commission & Another,**

**Petition 49 of 2015.** However, where an employee has signed to such changes as per section 13 of the Act;

*13. (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.*

20. This must be construed to have accepted the changes made to their contract. The duty rests on the employee when challenging such acceptance to disprove the same that a signature in acceptance was done through coercion, misrepresentation or otherwise a forgery. In this case the claimant signed to the addendum in the changes to her contract. Any protests that the same was unilateral is not documented and even where such was done verbally, at this point where the claimant agreed to sign to it, she became bound by its terms.

21. An employee cannot agree to a redundancy. To agree to such a process is a fallacy. This is simply so as a redundancy is a business situation that an employer is seized of and has to downsize, restructure or do such other thing that ensures better productivity or profitability. This has nothing to do with the skills of an employee. Rather, it has everything to do with an employer who must assess their business and based on the same, inform its employees that a lay off or restructuring must follow. It cannot thus be that an employee can accept a redundancy.

22. In this case, the respondent's witness Mr Thomas was clear that the claimant was sorely employed over anticipated business that never came through. The respondent was making massive losses since 2012 and a decision had to be made by 2014. The opportunity presented itself on 8<sup>th</sup> August 2014 when the claimant went seeking for time off to do her examinations. There was a discussion about the business situation and the claimant accepted a proposal to be terminated as she did not contest the proposal. She handed over and this was taken to be in approval of the proposal to a termination. Even where the claimant accepted to the same, the termination letter is vague and does not give the reasons for the termination. I take it then, as stated by the claimant and confirmed by the respondent's witness, the reason for termination was the bad financial position of the respondent as at August 2014.

23. In situations such as the respondent found itself at the time of terminating the claimant, the applicable law is section 40 of the Employment Act. Such a situation defined in law to comprise a redundancy process. It is a process. It entails notification and the employees to be affected being taken through a process of consultation before termination can follow. When the respondent realised as at 2012 that its business was not doing well, it did not help much to hire the claimant and issue her with a contract in 2013. Such a contract was bound to be frustrated. But how the respondent opted to treat the hard financial times is in utter disregard to the applicable law. The claimant was entitled to a notice prior to the termination notice specific for her position. Even where the respondent opted to pay for the personal notice to the claimant, the general notice over the redundancy process is a mandatory requirement under section 40 of the Employment Act. To thus terminate the claimant without such notification and then fail to state the reasons for the eventual termination of her contract is an unfair labour practice.

## **Remedies**

24. Upon the finding that the claimant was unfairly terminated compensation is due. I note most of the terminal dues were paid immediately. Based on the last paid salary of the claimant at Kshs. 227,564.00 compensation is awarded at 6 months' salary.

On the claim for house allowance, the court relies on the contract issued to the claimant. At clause 4.1(a) give a monthly salary net *which is inclusive of basic salary and all allowances*. All allowances are thus covered under the net pay agreed upon by the parties. Such allowances cannot be separated to state housing allowances were not included as had such been the intention such as the telephone allowances payable, the same should have clearly been stated and outlined under the contract of employment. Such a claim for house allowances is declined.

25. On the finding that the changes to the contract were given consent with the approval of the claimant, holiday pay claimed does not arise.

**Judgement is hereby entered for the claimant for compensation at Kshs.1, 365,384.00 together with costs of the suit.**

**Delivered, dated and signed in open Court at Nairobi this 21<sup>st</sup> Day of September, 2015.**

**M. Mbaru**

**JUDGE**

In the presence of:

Court Assistant.....

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