



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

CAUSE NUMBER 7 OF 2015

CAROLYNE WAMBUI NJUE.....CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (KENYA) LIMITED.....RESPONDENT

RULING

1. The Motion dated 6th May, 2015 seeks orders among others:-
 - a. That this Honourable Court do compel by way of an Order of production directed to the Human Resource Manager of the Respondent to produce before this Court under oath the following documents:-
 - i. Certified copies of the payslips for the three (3) months preceding the 29th October 2004 with respect to Rafael Araujo and Victor Ayiera.
 - ii. Certified copy of the payslip for the month of April 2015 with respect to Rafael Araujo and
 - iii. Certified copies of the academic certificates for Rafael Araujo and Victor Ayiera.

(b) That the above mentioned documents be produced by the respondent within fourteen (14) days of such other time as the Court may determine failure to which the Respondent's reply filed in his cause be struck out with costs.

(c) That the costs of this Application be in the cause.
 2. The application was based on the grounds:-
 - a. That the documents sought are in fact and in law in the custody of the Respondent.
 - b. That the documents sought are relevant and necessary for the proper determination of the issues in dispute between parties.
 - c. That the information contained in the documents sought is pertinent to the Claimant/Applicant's case and ought to be included in evidence.
 - d. That full discovery is necessary to ensure fair trial as they would assist in the just, expeditious and proportionate disposition of this matter.

3. It was further supported by the affidavit of Caroline Wambui Njue who deponed on the main:-

- a. That the Respondent has in its custody the documents he request in this Application that are relevant and necessary for the proper resolution of the issues in dispute in this suit and in particular the payslips of Rafael Araujo and Victor Ayiera as well as their academic certificates. The documents sought are pertinent to her case with respect to her claim for discrimination at the workplace.
- b. That in order to prove her claims in this suit, she had to produce, as evidence before this Court, the documents she requests in this Application, which documents are within the custody and control of the Respondent.
- c. That she is duly informed by her Advocates on record which counsel she verily believe to be true that the aforementioned documents are pertinent to her case and ought to be produced to allow for the just, expeditious and proportionate determination of the issues in this suit.
- d. That the documents she seeks in this Application are of high evidential value with respect to ascertaining her claim for discrimination in terms of equal pay for equal work against the Respondent.

4. The respondent opposed the application by filing grounds of opposition dated 20th May, 2015 in which they contended that:-

- a. The application is bad in law as it seeks the production or disclosure of confidential information.
- b. The Application offends the provision of Article 31 of the Constitution of Kenya.
- c. The Application offends the provisions of section 5(4) (b) of the Employment Act, 2007.

5. Mr. Nyaribo for the claimant submitted that it was a well settled principle of law that discovery is an important stage in litigation to enable parties present to Court all the evidence necessary for the satisfactory determination of the dispute between them. To this Counsel relied on article 35 of the Constitution and further submitted that the documents sought and which are listed in the application are documents in the possession of an employer as required by section 21 of the Employment Act and which the respondent can avail for inspection by the Court upon its direction. To support this argument, counsel sought reliance on the case of **Concord Insurance Co. Ltd v. NIC (2013) eKLR.**

6. Counsel further submitted that in deciding what can and should be produced as evidence in Court, a balance ought to be struck between public interest that is harm which could occur to the public by the disclosure and that justice should not be frustrated by withholding documents which must be produced in evidence. In this regard Counsel relied on the case of **Convay v. Rimmer & Another (1968 (All ER 874.**

7. According to Counsel, the claimant's case is that during her employment with the respondent she was discriminated against on the basis of pay and in particular that her remuneration was substantively lower than that of her colleagues with whom she worked at the same level. Further that such colleagues had inferior academic qualifications.

8. Mr. Nyaribo submitted that in determining whether to compel the production of the documents sought, the Court needs to address its mind to whether the documents sought are relevant to the case and whether the documents are covered by privilege. In this regard, counsel relied on the case of **Oracle Production Ltd v. Decapture Ltd & 3 Others.** Counsel further submitted that the relevant information even if confidential should be produced and in this regard

relied on the case of **Alfred Crompton Amusement Machines Ltd v. Commissioner of Customs & Excise (NO 2) (1973) 2 ALL ER 1169** where it was held in part that privilege against disclosure could not be claimed on the ground that documents whether confidential or not belonged to a third party.

9. Mr. Koche for the respondent on the other hand submitted that article 31 of the Constitution protects confidential information. To support this, Counsel sought reliance on the case of **Lelano I Salano v. Intercontinental Hotel (2013) eKLR and Sitati v. Mumias Sugar Company.** According to Counsel the academic documents of Rafael Aranjó and Victor Ayiera contains information that has been disclosed to the respondent in a relationship of trust by the said individuals which information was shared with the legitimate expectation that it would not be divulged to any other person. These documents according to counsel do not belong to the respondent.

10. Counsel therefore submitted that article 31 of the Constitution on the right to privacy acts as a limitation to article 35 on access to information and therefore no person can be compelled to divulge private and confidential information. In this regard counsel sought reliance to the case of **Baseline Architects Ltd & 2 Others v. NHIF Board (2008) eKLR.**

Dated at Nairobi this 13th day of November 2015

Abuodha J. N.

Judge

Delivered this 13th day of November 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge