



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1796 OF 2014

CAROLINE GATHONI GIKONYO CLAIMANT

VERSUS

KENYA ASSOCIATION OF INVESTMENT GROUPS RESPONDENT

JUDGEMENT

1. The issue in dispute so the failure to pay salary/employment dues/wages to the claimant.

2. The claim is that the Claimant was employed by the Respondent who is an association of investments groups and registered under the Societies Act. In July 2013 the Claimant commenced work where she served diligently as a Business Development Manager with duties of day-to-day running of the Respondent until November 2013. The salary paid was kshs.89, 608.00 per month. On 2nd November 2013 the Claimant gave her one month resignation notice to take effect on 30th November 2013. Despite notice, the Respondent has not paid October and November 2013 salaries amounting to kshs.179, 216.00.

3. The claim is also that the chad an oral contract, there were no written terms. Upon leaving the Respondent they refused to issue a Certificate of Service.

The claim for the payment of due salaries at Kshs.179, 216.00; Certificate of Service; costs and interest and any other relief the Court may deem fit.

4. In evidence, the Claimant testified in support of her case and stated that she is a Banker by profession and before joining the Respondent she had served at several banks. In July 2013 she joined the Respondent but was not issued with any letter of employment or contract. She was placed on probation for 6 months with a salary of kshs.120, 000.00 after deductions the net pay was Kshs.89, 608.00 per month. In November she gave her resignation notice of 30 days as the Respondent was not able to pay her salary. In September part of the salary was not paid until October and later October and November 2013 salaries were never paid. On 20th October 2013 she got into an accident and was forced to work from home. The Respondent had an office in town and in South B where the Claimant attended meetings as her nature of work did not require her to be at the office all the time.

5. On 11th November 2013 the Claimant spoke with the Respondent vice-chair who advised her not to report to the office. She however had duties outside the office but she was told not to report to work. Her October and November salaries were not paid. On 6th December 2013 she sent an email as part of the handover report to Patrick Kariuki and Vincent Ambwayo with a breakdown of all dues owing.

6. That in the Respondent defence there is an allegation against the Claimant that she failed to hand over, but the lap top was left with Mathenge. Upon handover she wrote tot eh Respondent officer but they

refused to have a meeting. The Respondent chairman refused to pick her calls or answer to emails. She explained her absence from office was due to an accident but she kept on working from home. The allegation that the Claimant owes the Respondent petty cash has no basis as there was no such cash to account for. During the handover there was nothing noted about unaccounted petty cash until the Respondent filed their defence.

7. In cross-examination, the Claimant testified that part of her duties as a Business manager was to source for clients and also manage the Respondent office. There was one intern as the only other employee of the respondent. She was supervised by Ambao for the Respondent Board. They communicated through weekly meetings and daily emails exchange. Such meetings were held at the vice-chair's office in South B. on 16th October 2013 she was at the office but on 20th she got an accident. She called Ambao and communicated on office related matter as the accident was a personal matter. On 7th November 2013 she gave her resignation notice while still under probation. She remained at work until the Respondent told her not to report to work. All meetings were verbal and the resignation notice was acknowledged verbally.

8. That the Claimant drew cheques for the Respondent but did not get the bank statements to know the balances. Upon leaving the respondent, she did a handover report and left the lap top at the office. It was not handed over to Mathenge the intern at the office, but left it at the office as she found it. She was custodian to petty cash voucher and before leaving all had been reconciled but there was no cash to handover. The parking fees was paid to the parking attendant and the receipts submitted in August 2013. This was not an issue until the Claimant filed suit herein.

Defence

9. In defence, the Respondent admit that they had employed the Claimant and was on probation for 6 months ending in December 2013. During the probation period she could resign by giving 14 days' notice. From October 2013 the Claimant started absconding duty and would not come to the office on some days or come in late. On 16th October 2013 the Claimant was at work but did not return until 31st October 2013. On 2nd November 2013 the Claimant resigned from her position and was only required to give 14 days' notice as she was still on probation. The Respondent notified the labour officer of the Claimant absconding duty and resignation. The cis not owed as claimed. The Claimant worked for 16 days in October and 2 days in November and thus only entitled to 18 days' pay. On 7th December 2013 the Claimant sent an email alleging it was a hand over but she has the lap top; petty cash book and receipts for parking allowances of kshs.18, 000.00 in her custody. That the due salary can only be paid upon hand over of the Respondent property.

10. In evidence and to support the defence, the Respondent witness was Vincent Ambao the vice-chair. That he employed the Claimant in July 2013 as the respondent's Business Development Manager. The claimant's role was to get business for the Respondent and was given a free hand to do her work. By November 2013 it was apparent that the Claimant did very little based on low revenue and only her salary and rents were raised. In July 2013 the Respondent had kshs.300, 000.00 in the account and the Claimant consumed all this by September 2013. The Respondent had to put in more cash to sustain the office. The Claimant salary was negotiated so that she could work and bring more business but she failed. She could not even raise her own salary by October 2013. By November, the Respondent had no cash to pay the Claimant as he had eaten all savings.

11. That on 16th to 31st October 2013 the Claimant was not at work. She was to give her daily log stating what she did on a daily basis and to send an email on daily basis. The witness went to the office but the Claimant was not in. on 31st October 2013 the Claimant attended her last meeting. On 16th October he called the Claimant but she was not in the office. The Claimant later wrote an emails stating that she was remorseful for not being in the office and promised to change. The issue of being involved in an accident was only known at the meeting held on 31st October 2013. On 4th November 2013 the Claimant resigned, she sent notice to the Respondent chair and copied to the witness.

12. When the Claimant absconded duty, this amounted to summary dismissal. The Respondent discussed this absence from work and agreed that under the law, such was a matter for summary dismissal. When the Claimant would report to work she remained very hostile. On 7th November 2013 a meeting was held with the Claimant to discuss her performance and it was noted that the chad issues with the respondent treasurer and they never seemed to agree. It was resolved that the claimant should be issued with a 14 days' notice so as to have paid her salary. That the Claimant was never advised not to report to work as she was required to do a handover but from 7th November 2013, she never reported at the office. The Respondent also realised that the claimant had problems in managing finances. She kept on borrowing from staff and did not pay. When the claimant resigned, the Respondent informed the Minister for labour as when the cleft Chase bank, the previous employer, she had issues with then too. The claimant is still keeping the property of the Respondent and has not handed over – lap top; cash book; and packing fees of Kshs.18, 000.00 or the receipt in payment.

13. That even without looking at what the claimant is seeking from the Respondent under section 44 of the Employment Act, when the claimant absconded duty from 16th to 31st October 2013, this amounted to summary dismissal. But the Respondent allowed the Claimant to resign instead. The Respondent is ready to pay the legal dues owing. The respondent is however seeking to have the lap top back; petty cash book and parking fees receipt or the cash equivalent.

Submissions

14. In submissions, the Claimant stated that upon employment she was not issued with an employment contract. Without issuance of such a contract it is not possible to know the terms of engagement as under section 10(7) of the Employment Act requires. That termination of employment is regulated under section 35 of the employment Act where any party can give notice to the other. Certificate of service is due under section 51 of the Employment Act and this the claimant should be granted together with unpaid salaries for October and November 2013.

15. The respondent on the their part submitted that under section 19 (1)(c) of the Employment Act, an employer may deduct from an employee's salary an amount not exceeding one day's wages in respect of each working day for the whole which the employee without leave or other lawful cause is absent from work. The Claimant failed to proof as to being present at work from 16th to 31st October 2013. Such absence was without due cause, notice or knowledge of the Respondent and hence should not be paid for. Upon resignation, the Claimant only worked for 16 days in October and 2 days in November and is only entitled to pay for the 18 days worked in both months. noting what the cis keeping in terms and the Respondent property, such property once handed back, the legal dues shall be payable.

16. That under section 42 of the Employment Act, an employee on probation can be terminated on 7 days' notice or with pay. As the Claimant resigned while on probation, she is only entitled to 7 days' pay and not 30 days' pay.

Determination

17. A Written contract is the fodder for employment relationship. Such written document enables each party to the employment relationship to know the terms and conditions of such employment. So important is such a document that sections 9 and 10 of the Employment Act is fully dedicated to the subject of what should go into an employment contract. Be that as it may, where parties are not able to immediately write such an employment contract, such should not wait for more than two months. Section 10(1) is mandatory and provides that;

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].

18. A written contract of employment therefore becomes a vital document to issue to an employee and this also serves to help the employer such as the Respondent herein to make reference where there is a dispute. In this case not such document was issued. I take issue with the respondent's witness Mr Vincent Ambwao who testified that noting the circumstances under which the cleft Chase Bank, they opted to send a notice to the Minister for labour about her resignation and absconding duty. However, there lack the foundational document to even go that far as informing the labour Officer or the Minister. There was not Employment Contract in the first instance! Such only works to the advantage of an employee as whatever is contested must be construed from the perspective of the employee who lacked a written contract. Such a document though avoided by a majority of employer, it works to their total disadvantage.

19. In this case, from the evidence of the claimant, she was verbally allocated duties and an office. Without a written contract, I take it the Claimant commenced her work and continued to undertake perform her duties with diligence. There is not record to challenge such work and where there was poor performance, such should have been brought to her attention in writing and in terms of section 41 read together with 43 of the Employment Act. It is within these circumstances of her diligent service that the Claimant opted to resign from her position by giving notice of 30 days on 2nd November 2013. Such resignation was accepted by the respondent. With such acceptance, the Claimant served her notice of 30 days. There is no record to controvert such notification.

20. Both parties admit that the Claimant was to serve on probation for 6 months commencing July to December 2013. Probation periods are regulated under the provisions of section 42 of the Employment Act. Within such a period, both parties to an employment relationship can terminate the same on short notice or pay in lieu of notice. However, parties can agree on longer periods of notice in writing. In this case, while the Claimant was on probation, she resigned from her position. She opted to issue a notice of 30 days instead of the legal minimum at 7 days or 14 days as noted by the Respondent witness. Such resignation, being at the instance of the claimant/employee, it was at her disposal to state the notice period. This could have been based on the legal minimum at 7 days, or 30 days or two months as this was an option available to the claimant. Upon receipt of such notice, the Respondent as the employer equally had the option to accept the notice issue conditionally or unconditionally. The Respondent had also, at all material times from July to December 2013 to terminate the employment of the con 7 days' notice of without notice subject to payment in lieu of such notice. It therefore cannot be upon the Respondent to decide the notice period upon which the Claimant notification was to run for. The time given was an option available to both parties. The application of section 42 of the Employment Act was for use by either party.

21. I take it then, once the Claimant resigned, such resignation upon being accepted by the respondent, she was at the service of the Respondent until the end of the notice period. The notice was to lapse on 30th November 2013 and where the Claimant was released without any due cause or written notification, she remained the employee of the Respondent until 30th November 2013 and is entitled to the salary due for such a period.

22. The Respondent has contested that the Claimant remained absent from work without due cause or notice from 16th to 31st October 2013. Indeed the Claimant confirmed that after 16th, it followed a weekend and on 20th October she was involved in an accident and was not able to resume duty until the meeting held on 31st October 2013. The Claimant explained such absence and noted that she did not apply for compassionate leave as the accident was a personal challenge she had to deal with. However in employment, leave of absence is essential. An employee has a duty to inform the employer of their whereabouts. When unwell, sick or indisposed, an employee is allowed to inform the employer to their circumstances through a third party and within a reasonable period. Section 30 of the Employment Act gives more emphasis that;

(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

23. Once such information is shared, such an employee upon resumption of duty can only be paid full salary;

*... subject to production by the employee of a **certificate of incapacity to work signed by a duly qualified medical practitioner** or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.*

24. Therefore, an employee will not be allowed to simply be absent from duty and state that they had an accident. There must be communication of any incapacity so as not to be able to attend work/duty or be at the duty station and beyond such reporting, upon resumption of duty, the subject employee must produce a certificate of incapacity from a qualified medical practitioner. Such procedures insulate the employee from an action of gross misconduct for absconding duty and the employer has a sufficient reason for the absence of such an employee. Where the employee is therefore absent and fails to report or produce the certificate of incapacity, such should form a good ground for misconduct.

25. That said, even where such a good ground exists, the employer is to issue notice to the employee as under section 41(2) of the Employment Act thus;

*(2) Notwithstanding any other provision of this Part, an employer shall, **before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.** [Emphasis added].*

26. It is therefore not sufficient that an employer has noted the absence of an employee and knows that an employee is of poor performance, before termination on the grounds of absence without due cause or poor performance, notice is due. This nature of termination is fundamentally different from termination while an employee is on probation. As set out above, the employer or indeed the employee are at liberty to terminate the employment relationship during the probation period without assigning any reason/s thereto and on short notice. In this case, the employer sat back, did nothing until the employee took the initiative and issued her resignation notice

27. That said, for the period the Claimant knowingly and without due cause remained out of her office, the period she remained addressing her personal challenge after being involved in an accident, such period should not be compensated by the respondent. The Claimant was simply away from work and failed to communicate her circumstances to the employer which was her duty to do so. She should not be made to receive pay due to her own making. Salary due from 21st October to 31st October 2013 shall be deducted from the salaries due. The sick period absence should have been communicated to the Respondent in writing. See **Peris Nyambura Kimani versus Delbit Group Ltd, petition No. 63 of 2014** where the Court held that;

An employee who is sick and requires sick leave must produce a certificate of incapacity signed by a qualified medical practitioner or a person acting on the practitioner's behalf. Section 30(2) envisage an employee who becomes sick and is not able to apply as under section 30(1), such an employee shall cause the employer to be notified as soon as reasonably practicable of their absence due to the sickness and the reasons for it.

28. In Jane Wangari Njoroge versus EN Pertet t/a Joliday Nursery School, Cause No.1600 of 2011 the Court held that;

... This notice must be in writing and if the employer so requests produce a certificate of her medical condition from a qualified medical practitioner

29. The respondents admit that they will pay the Claimant her legal dues subject to her handing over their

property in her custody. Back to the non-issuance of the employment contract – where the Claimant commenced work without a record of what she was taking over, a schedule of assets or work tools she was taking over, it becomes the word of the Claimant against that of her employer. The Claimant was emphatic that she left all the tools in her possession while in employment at the Respondent office. There was no log for her to indicate what she held and what was handed over to her to enable her hand over back. It is not lost to the Court that most employees now work with certain tools such as a lap top, phone, pens and paper, but it is the duty of the employer at all time to ensure that every employee whatever the rank they are supervised in their duties and whatever tools are handed over to the employee must be on a schedule to avoid loss, wastage, security and the like. Once the Claimant was allowed to have a free hand at her work, such freedom without accountability through a written contract ends in a scenario such as this one. There was nobody to take responsibility at the end of the day. It is not clear what kind of lap top was handed over to the Claimant to enable the Court direct for its return.

30. That said, the respondent, where they were owed by the claimant, the rules of pleadings which have not changed for this Court was to file a counter-claim. This was to enable the Claimant to respond to the claims set out in evidence and where there was no plausible defence, the alleged detailed goods be quantified and the equivalent claimed. Such a counter-claim is not part of the pleading herein. Even with the best application of section 19 of the Employment Act, there being no written document upon which the Court can make a basis to make any lawful deduction, to address the issue of the missing lap top, petty cash book or the packing fees or the receipt thereof as submitted by the Respondent would be a miscarriage of justice. Such will not be granted herein.

Remedies

31. The claimant seeking for her salaries due for October to November 2013. Such amounts are claimed at Kshs.89, 608.00 per month instead of Kshs.120, 000.00 per month, the salary due to the claimant. I take it that the Claimant has her good reasons to set out her claim as hereinabove stated. Such salary is due for October and November 2013, save that it should be paid less 11 days' (120,000.00 less 11 days) pay all being Kshs.179,216 less 44,000.00 all being Kshs.135,216.00.

32. A certificate of service is due under the provisions of section 51 of the Employment Act, such a certificate should issue unconditionally.

Judgement is hereby entered for the Claimant for the sum of Kshs.135, 216.00 together with costs. A certificate of service should be issued within 7 days.

Orders accordingly.

Delivered in open court at Nairobi this 17th day of December 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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