



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1049 OF 2011

BETWEEN

CAROL ADHIAMBO OLELA
CLAIMANT

VERSUS

ASTERISK LIMITED
RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Ombwayo instructed by Andrew Ombwayo & Company Advocates for the Claimant

Ms. Ithondeka instructed by W.J. Ithondeka & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed her Statement of Claim on 30th June 2011. The Respondent filed its Statement of Reply, and a Counterclaim seeking to be paid by the Claimant one month salary in lieu of notice, on 19th July 2011. The Claimant gave her evidence and closed her case on 8th December 2011. The Respondent gave evidence on 12th July 2013 through its Owner Dipen Morarji Rajani, when the hearing closed. The dispute was last mentioned on 29th July 2013 when the Parties confirmed the filing of their Closing Submissions and were advised Award would be delivered on notice.

2. The Claimant’s position is that she was employed by the Respondent around November 2004 as its Sales and Marketing Representative. The Respondent terminated her contract of employment on or about 4th January 2010. She was dismissed verbally by the Director Mr. Rajani. There was no disciplinary process. She did not abscond, and has never received a letter asking her to resume duty. She has not received any demand for notice pay from the Respondent. She was not given any notice, warning or reason for the decision. At the time of termination, she was earning a monthly salary of Kshs. 26,500. She seeks orders against the Respondent in the following terms-:

- a. *A declaration that the Claimant’s dismissal was unfair, unlawful and wrongful;*

- b. *An order that the Respondent produces all relevant employment records of the Claimant;*
- c. *1 month salary in lieu of notice at Kshs. 26,500;*
- d. *12 months' salary compensation for unfair termination at Kshs. 318,000;*
- e. *Service pay at 15 days' salary for every completed year of service; and*
- f. *Costs and interest*

3. Olela states the Respondent is engaged in the business of selling medical and healthcare products. It sells medical equipment and also deals in sale of pharmaceutical products. These are sourced from different countries overseas. Olela marketed the products to Hospitals in Kenya such as Nairobi Hospital, Kenyatta National Hospital and the Agha Khan Hospital. She was required to undergo specific product training, some of which took place overseas. One such training was organized by one of the Respondent's Suppliers Tyco Health care Holdings Inc in conjunction with Covedien European Training Centre. The Organizers met the costs of the Training, which took place between 1st June 2009 and 26th June 2009 at Paris, France. To protect its interests the Respondent compelled the Claimant to commit herself to continue working with the Respondent for two years after each of the overseas trainings. Olela was made to sign Guarantee/Indemnity on 27th May 2009. After she left employment she received demand from the Respondent that she refunds the Respondent the costs of the France training. She states the Guarantee was made solely to safeguard the interest of the Respondent, is unenforceable and void, having been made in restraint of trade. There was no consideration in favour of the Claimant, and her training was aimed at profiting the Respondent's business. The Guarantee was rendered unenforceable. The Respondent had the duty under the Employment Act 2007 and the contract of employment, to provide the Claimant with special training, and had no basis to seek compensation from the Claimant in case she left before the period of two years.

4. The Claimant explained that she was coerced to sign the Guarantee only three days before she left for training in France. Her contract of employment would have been terminated if she failed to sign the Guarantee, and she did not therefore sign of her own free will. She did not initiate the termination, and did not leave work voluntarily. It was the Respondent who terminated the Claimant's contract on 4th January 2010, six months after she returned from the training, and the Respondent ought not in the circumstances, seek to recover damages under the Guarantee. The Guarantee violated the Claimant's fundamental rights under Articles 30 and 36 of the Constitution. The Respondent did not bear the costs of the training. Costs were met by the Organizers. The Claimant states the Respondent failed to show valid reason or reasons under Section 43 and 45 of the Employment Act 2007 in termination of the Claimant's contract of employment, and did not adhere to the provisions regulating fair procedure under Section 41 and 45 of the Act. She asks the Court to reject the Counterclaim; and to grant her compensation and terminal dues as particularized in paragraph two above.

5. Olela told the Court in cross-examination that she worked for another company called Meditek Systems, as at the time of giving evidence. The company was in the business of medical supplies. She had worked for this company for one year, having joined it in February 2010. It is in the same business as the Respondent. She filed her Claim on 30th June 2011 after the Respondent initiated a Claim for damages against the Claimant for breach of the Guarantee. She intended to file her Claim earlier, even before the Respondent took action in pursuit of its own claim. She testified that her Advocates issued demand before the filing of this Claim on 13th June 2011, while the Parties' Advocates had been engaged in correspondence on the breach of the Guarantee, on various dates prior to 13th June 2011. Demand issued seven months after the initial correspondence. It was not true that she took seven months to realize she had a Claim for unfair termination against the Respondent. Her Claim is not an afterthought, brought to avoid paying the Respondent what is due under the Guarantee.

6. Olela testified further in cross-examination that the Respondent required its Employees to sign Guarantee/Indemnity to access training. She refused to sign this in 2008 and was warned she would be dismissed from employment. She conceded that the Respondent incurred expenses in facilitating her training in France. The Respondent paid medical insurance and met the cost of the air ticket and visa. She did not testify that the Respondent incurred no expenses. She understood paragraph 'c' of the Guarantee/Indemnity to mean that if she initiated the termination, she would refund the Respondent its

costs. She used the skills learnt at the training in her subsequent job. A certificate of completion was given to Olela after the training. She denied that this Claim is meant to get the Respondent off her back. She did not leave willingly, and cannot be called upon to pay notice to the Respondent. Olela testified on redirection that her demand letter of 13th June 2011 referred to several correspondences which had passed between the two Advocates. Her Claim was not filed in afterthought. The Respondent did not demand notice pay from her before the Claim was filed. It was mandatory to attend the training. She took up her new job only after she left employment with the Respondent. She is involved in marketing of Theatre Ventilators with her new employer.

7. The Respondent denies that it initiated the termination of the Claimant's contract of employment. After the Xmas vacation in 2009, she failed to return to work. The Respondent came to learn through one of its Clients that the Claimant had taken up employment with Nairobi X-Ray Limited. She terminated her own contract without notice to the Respondent. She is not entitled to the prayers sought. The Guarantee and Indemnity signed by the Parties was in accordance with the law of contract. Training was not mandatory, and the Claimant had the choice not to attend the training, as she had done in the past. She signed the Guarantee and Indemnity voluntarily, and cannot turn around and claim she was coerced into signing. She benefited from the training. It came at no cost to her. Her Claim is aimed at blackmailing the Respondent from pursuing damages arising under the Claimant's breach of Guarantee and Indemnity. She was not in servitude, having received salary for work performed. The Respondent states the Claimant left without notifying the Respondent, and should therefore be ordered to pay one month salary in lieu of notice to the Respondent.

8. Dipen Morarji Rajani testified he owns the Respondent Business. The Claimant was employed by the Respondent as stated in her evidence and pleadings. She was employed on attachment in 2004 on the recommendation of one of the Respondent's Customers. She was formally employed in 2006. Training is expensive for the Respondent's employees, and the Respondent binds its employees through Guarantee/Indemnity not to leave the Respondent's employ for two years after the Training. They are not supposed to work for the competition, having received the benefit of free training from the Respondent. Olela trained in France for about three weeks, with the Respondent meeting the costs of the training. The costs included travel, accommodation, visa, insurance and course fees. She resumed duties and worked for 4 to 6 weeks. At the end of December vacation in 2009, she did not return to work. It was not true that she returned at all in 2010, and was dismissed by the Respondent. The Respondent sought to have the breach of Guarantee/ Indemnity arbitrated in accordance with the arbitration clause. The Claimant declined to appoint an arbitrator, and instead sued the Respondent here in Court. The training was aimed at benefiting both Parties. There are many employees working for the Respondent who have not attended training. She became marketable, and opted to work for a Competitor Nairobi X-Ray Limited, two weeks after she quit.

9. Rajani stated in cross-examination that the Respondent had given the name of the Competitor Nairobi X-Ray Limited in its pleadings. He did not have documents to show the Claimant worked for this Company. He learnt from the field that the Claimant had joined the competition. Rajani also got information from one Sanjay of Nairobi X- Ray. He did not have the Memorandum and Articles of Association of Nairobi X- Ray, to be able to tell its line of business. The Claimant did not report to work on 4th January 2010. It is not true that the Respondent alleges the Claimant absconded, to defeat the Claim. Training was aimed at equipping the Claimant. The Respondent stood to benefit. Eight months earlier, she missed the training because she did not sign the Guarantee/Indemnity. The document was drawn by the Respondent, and signed by the Claimant shortly before she left for the training on 27th May 2009. Training was organized by one of the Respondent's Principal Suppliers. Training was given to employees who represented specific Suppliers' products. She was in Surgical Department, and was the only one representing the particular supplier. The arbitration claim stopped after the Court action was initiated. Clause 9.2 of the Guarantee/Indemnity provides that Parties could resort to Court, if arbitration failed. Rajani did not think Guarantee/Indemnity was unenforceable, subjecting the Claimant to servitude. He stated further in redirection that he knows his Company's Competitors. He has been in business for seventeen years. The Respondent wrote to her on 23rd September 2010, stating that the Claimant had absconded. The entire training cost was about Kshs. 1.5 Million. This was never recovered from the Claimant. The Respondent prays for dismissal of the Claim

The Court Finds and Awards-

10. There are two disputes arising out of the employment relationship, one of which is the subject matter of these proceedings. The Parties agree that the Claimant was employed by the Respondent, a Medical and Pharmaceutical Products Supplier, as a Sales and Marketing Representative, around November 2004. On 27th May 2009, she signed Guarantee and Indemnity with the company, to enable her travel to France from 29th May 2009, for a General Surgery Training Program, organized by Covedien France Holding and Tyco Healthcare a Principal Supplier of the Respondent. The Guarantee/ Indemnity stated under clause 1.1. –

“ The Guarantor [Olela] hereby irrevocably and unconditionally guarantees that in the event that the Guarantor leaves her employment with the Company within a period of two [2] years of the date of the last training obtained by the Guarantor at the Company’s expense [the ‘ Time Period’], then the Guarantor shall pay to the Company on demand all monies and liabilities which are now or at any time hereafter shall have been incurred by the Company in connection with the costs of providing any and all such overseas training to the Guarantor during the period of her employment with the Company.”

11. The Claimant attended training in France for three weeks, culminating in the Certificate of Completion dated 25th June 2009. There is evidence the Respondent met her travel, visa, and accommodation costs. The cost of the course work seems to have been met by the Respondent’s Suppliers. The Claimant paid nothing under the arrangement, her only requirement being to tie herself down to serving the Respondent for a period of at least two years, after the end of the Training. The Claimant returned to her work after completing the training, but did not continue to work for at least two years for the Respondent. She claims the Respondent terminated her contract of employment on 4th January 2010 verbally, while the Respondent states she absconded after the yuletide of December 2009.

12. The Guarantee/Indemnity had an arbitration clause. The Respondent engaged the Claimant seeking to appoint an arbitrator over the dispute relating to breach of the Guarantee/ Indemnity. According to the Respondent, the Claimant did not wish to submit to arbitration, and added the Claim for unfair termination into the mix, to obfuscate the pursuit of damages at the arbitration made by the Respondent. There are two aspects to the dispute: the claim for damages by the Respondent which is the subject of arbitration, and which according to Rajani has stalled due to the Court proceedings; and the Claim in Court initiated by the Claimant in which she states her contract of employment was unfairly terminated. In the Claim before the Court, the Respondent has put in a Counterclaim for one month notice pay, holding the Claimant to have absconded, and thereby terminating the contract of employment without notice.

13. The first question that the Court must resolve is who between the Respondent and the Claimant, terminated the Claimant’s contract of employment? An evaluation of the respective Parties’ evidence persuades the Court to find that it was the Claimant who terminated her contract of employment. Termination occurred at the end of December 2009/ beginning of January 2010. It was six months after the Respondent had sponsored the Claimant to France for Training. Costs were met personally by the Respondent, or through its Supplier whose products the Claimant was marketing and selling. It is unlikely that the Respondent would finance the training of its employee to France, commit its employee to work for at least two years for the Respondent after the end of the training, and verbally terminate the Claimant’s contract only six months after the training, without reason, warning or notice. The Claimant had been in service from 2004.

14. The paper trail buttresses this finding. After termination, the earliest correspondence between the Parties is a letter dated 23rd September 2010 from the Respondent’s Advocates to the Claimant. In this letter, the Respondent wrote that the Claimant left employment without notice, and without any regard to her obligations under the Guarantee/ Indemnity. This was followed up with a letter dated 26th November 2010, in which the Respondent proposed the name of an Arbitrator. The Claimant responded through her Advocates on 19th November 2010, asking to be supplied with employment records. She did not mention anywhere that the Respondent initiated termination. The Claimant’s Advocates wrote again asking for

more documents, including a letter of termination, as proof of termination. There was no mention that the Respondent terminated the contract, but the impression created by the call for termination letter, was that the Claimant was setting the stage for her claim that she did not herself terminate the contract; she was verbally dismissed by the Respondent. The Respondent's Advocates wrote to the Claimant's Advocates on 14th December 2010. It was made clear in this letter that the Claimant resigned from her position. The Respondent took it that the Claimant was avoiding the process of arbitration. The Claimant's reply was in a letter dated 23rd December 2010, in which she did not mention that the Respondent terminated her contract of employment; she instead lamented the lack of supply by the Respondent with the full documents demanded by her, and also stated that it was premature to commence the process of arbitration. There were more letters written by the Respondent in January 2011, calling on the Claimant to participate in the appointment of an arbitrator. The Claimant replied on 22nd January 2011, saying she was expectant and expected to be admitted in hospital for delivery, and could not give more instructions to her Advocates. The Respondent gave the Claimant time. There were subsequent proposals on other names of Arbitrators made by the Respondent, all of whom were rejected by the Claimant. The letter that announced her full intention is dated 13th June 2011, some three weeks before she filed this Claim. She wrote saying that the Industrial Court has the exclusive jurisdiction to hear and determine labour and employment disputes under the Constitution. She claimed that the Court has the authority to appoint a Conciliator or Investigator. Lastly she announced that there was a weightier matter for consideration; the Respondent terminated the Claimant's contract of employment on 4th January 2010. She demanded to be paid terminal benefits and compensation for unfair termination. It was the first time; three weeks before coming to Court, that she alleged the Respondent terminated her contract of employment.

15. This chain of correspondences suggests very strongly, that the Claimant approached the Court with the sole intention of avoiding the arbitration route, which the Parties had committed to under the Guarantee/Indemnity. There is nothing to show the Respondent terminated her contract of employment. Evidence points to the Claimant as the Party who, after training, walked out contrary to the terms of the Guarantee/Indemnity, and went to work for competition. It was only about two weeks after she left, that she started working for the competition. The Court is satisfied the Respondent did not terminate her contract of employment. Her claims for terminal benefits and compensation are without legal and factual foundation. She left of her own volition, and is bound to pay the Respondent notice pay. ***The Court allows the Counterclaim at Kshs. 26,500.***

16. The second aspect of the dispute on the rights and obligations due to the Parties under the Guarantee/Indemnity are not in issue in this dispute. The Respondent did not Counterclaim damages for breach of the Guarantee/Indemnity. There was a valid arbitration clause which takes the matter out of the jurisdiction of the Court. Contrary to the views held by the Claimant, the Industrial Court does not have jurisdiction in labour and employment matters where Parties have opted for a private dispute resolution mechanism on an arbitrable issue. The question whether the Claimant was rightly restrained from rendering her labour to other employers after getting training from the Respondent and its Partners; whether such restraint amounted to servitude; and whether damages are recoverable by either party on breach, are questions which shall be answered at the appropriate forum. These are attractive questions, which the Court has some ready answers to, but is not required to answer in deference to the dispute resolution mechanism chosen by the Parties. The Industrial Court can only take cognizance of the dispute, in the manner contemplated by the arbitration agreement, which is not the case here. The Claimant should submit to the arbitration process, and not seem to want to use the Court to stall a dispute settlement mechanism chosen by the Parties on a particular aspect of the employment relationship. The Court in exercising judicial authority, is guided by certain principles under Article 159 of the Constitution, among them the promotion of voluntary dispute settlement mechanisms such as arbitration. IT IS ORDERED:-

[a] The Claim is rejected in its totality;

[b] The Counterclaim is allowed;

[c] The Claimant shall meet the costs of the Claim; and,

[d] The dispute on the Guarantee/Indemnity shall proceed before an arbitrator appointed by the Parties, or in the absence of their agreement on appointment, an arbitrator appointed through the Chairperson of the Chartered Institute of Arbitrators [Kenya].

Dated and delivered at Nairobi this 23rd day of January 2014

James Rika

Judge