



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 738 OF 2012

MARILYN AUMA OCHADA.....CLAIMANT

VERSUS

NYANZA REPRODUCTIVE HEALTH SOCIETY.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent on account of the termination of her contract on 1st December 2011. She sought payment of notice, leave days, leave allowance, salary increment, payment for the balance of her contract, cost of the suit and any other relief the Court may deem fit to grant.
2. The Respondent was opposed and stated that the Respondent terminated the Claimant's contract for just cause. The Respondent averred that the Claimant was evaluated and found to have been underperforming and thus was dismissed.
3. The Claimant represented by Mr. Bosire testified on 6th June 2013 and stated that she was employed as Accounts Assistant in March 2009 and was promoted to Accountant thereafter but was laid off without notice by the Respondent in December 2011. She earned 69,300/- a month. She said that she was not given prior warning and was given a letter declaring her redundant on the evening of 30th November 2011. She stated that previously she had not had any issue with performance and had carried out her duties with diligence. She thus sought payment of the balance of the contract which was to run from 3rd March 2008 to 31st July 2012 as well as 1 month's notice, leave dues for 22 days, leave allowance (50% of salary), 5% salary increase. She testified that she was psychologically prepared to work until the end of the contract. She viewed the termination as malicious.
4. The Respondent represented by Mr. Mbaluto called Ferdinand Kizito Osama the Human Resource Manager of the Respondent. He testified that the Claimant was terminated for just cause as her performance was found wanting. He said that the Claimant could be terminated by being given notice in writing or on payment of a month's salary in lieu of notice. According to the personnel records she was underperforming and had been warned about the same by the Respondent. He stated that the Claimant was to be paid the notice, days worked and any outstanding leave days. He said the contract cannot be completed as the Respondent terminated the contract as her performance was poor. He confirmed that at the time the Claimant was earning 69,300/-. The Claimant was not paid her dues as she had not cleared with the Respondent. He opined that as regards redundancy the law was followed.

5. Mr. Mbaluto intended to call one other witness but the day for the same came and there was no witness and counsel did not attend either. The Court therefore closed the defence case and parties were to file submissions.
6. The Claimant filed written submissions on 16th October 2013 while the Respondent did not file any submissions. The Claimant *inter alia* restated her case and added that redundancy has to be in accordance with Section 40 of the Employment Act 2007.
7. I have carefully considered the pleadings of parties, the evidence adduced both orally and documentary, the submissions filed by the Claimant and find that indeed the Claimant was terminated for reasons stated on the letter of 1st December 2011 to be poor performance. Her termination was stated to be a declaration of redundancy by the Director Dr. Walter Obiero the author of the letter in question. She claimed she was not given notice and the plain reading of the letter indicates that indeed she was not given notice as the termination was to take effect immediately. The Respondent's witness who joined the Respondent in January 2013 testified that the Claimant was entitled to pay for the days worked and the leave days accrued but had not cleared with the Respondent. He did not however produce any records to show the Claimant was paid the salary for November 2011.
8. The Claimant in her submission relied on the cases of **Fredrick Ngari Muchira & 99 Others v. Pyrethrum Board of Kenya Cause 16 of 2013** (unreported) and **KPAWU v. James Finlay (K) Ltd Cause 24 of 2013** (unreported) and urged the Court to find in her favour. The 2 decisions though of a Court of equal jurisdiction and thus persuasive are not relevant for this case. The first related to a redundancy declared by the Pyrethrum Board while the second related to hospital services by James Finlay Ltd and the declaration of redundancy affecting the Claimant's members. As will be apparent in the decision I have reached, there is no redundancy claim that the Claimant can succeed in.
9. The Claimant was earning a sum of Kshs. 69,300/- a month. She agreed that she could be terminated on payment of notice or after a written 30 day notice prior to termination. She got none and would therefore be entitled to the payment of a month's salary in lieu of notice. If a redundancy is to be declared, the employer is required under Section 40(1)(b) to notify the employee and the Labour Officer. There is no evidence that the Labour Officer was informed. The letter used the word redundancy but in effect was a letter of summary dismissal. The definition of "redundancy" under the Employment Act is under Section 2. Section 2 defines it thus:-

"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;
10. The Respondent services of the Claimant were not deemed superfluous, indeed the letter identified the reason for the termination as poor performance as encapsulated in the November appraisal. The termination was not an abolition of office. The Respondent was therefore not required to notify the Labour Officer. The Claimant conceded that the score in the appraisal was below average. She avers that she was coerced to sign the appraisal. That took place on 10th November 2011 and there is no record she protested the appraisal process or the coercion she alleges. I find that there was just cause to terminate her services as a result of her poor performance.
11. The Claimant is however entitled to the safeguards in the contract and her terminal dues. She is entitled to the leave days earned, pay for days worked. Regarding the increment, the Memo communicating the same was very explicit. The increment was upto a maximum of 8%. This means that the increment could be as little as 1% or as high as 8%. She got 3% and I would be out of order if I interfered with the exercise of discretion by the Respondent in awarding the increment. I would only do so if the Respondent capriciously awarded the increase to the detriment of the Claimant. No evidence was led and no caprice has been detected. As regards the

balance of contract, there is no compelling reason to find that the Claimant was entitled to serve the balance of the contract. Though she was psychologically prepared to serve the entire contract, there was no guarantee and the legitimate expectations she had have to be tempered by the reality which is inherent in the freedom to contract between the parties. She would therefore not be entitled to recover under this head. She proved a substantial part of her claim and is entitled to recover from the Respondent in terms of this judgment.

12. In the final result, I enter judgment for the Claimant for:-

- a. 1 month salary in lieu of notice – Kshs. 69,300/-
- b. Salary for days worked
- c. Leave pay for 21 days (69,300/30x21) Kshs. 48,510/-
- d. Leave allowance – Kshs. 34,650/-
- e. Costs of the suit

It is so ordered.

Dated and delivered at Nairobi this 9th day of January 2014

Nzioki wa Makau

JUDGE