



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1019 OF 2012

SOPHIE K. MURIITHI.....CLAIMANT

VS

FELIX KIRUI T/A SUPREME HEALTH CLINIC.....RESPONDENT

RULING

1. On 16th July 2013, I made an award in favour of the Claimant in the sum of Kshs. 383,550 plus costs. The Respondent then filed an application for review of the award on 18th November 2013. The Respondent's application is based on the following grounds:

- a) That the Claimant's employment contract was based on an illegality in that the Claimant was not a qualified and registered Laboratory Technologist rendering the contract unenforceable;
- b) That the Claimant did not have essential and valid documents to be employed as a Laboratory Technologist;
- c) That the Court erred in awarding the Claimant 3 months' salary compensation for unfair termination when the initial contract was based on an illegality;
- d) That the Court erred in finding that the Claimant was entitled to 4 years' annual leave whereas no evidence had been adduced to that effect;
- e) That the Court erred by failing to take into account and to consider the evidence adduced on behalf of the Respondent;
- f) That the Court failed to appreciate the submissions of the Counsel for the Respondent;
- g) That in all the circumstances of the case, the findings of the Court are insupportable in law or on the basis of the evidence adduced.

2. At the hearing of the application on 30th January 2014, Mr. Bosek for the Respondent submitted that the Claimant's employment was regulated by the Medical Technicians and Technologists Act and since the Claimant failed to prove her registration with the regulating body, her employment was untenable and the contract of employment was void *ab initio*.

3. In opposition, Mr. Nyabena for the Claimant submitted that the Respondent's application did not cite any ground for review as provided by Rule 32 of the Industrial Court (Procedure) Rules, 2010. According to Counsel, the grounds set out in the Memorandum of Review sought to attack the reasoning and findings of the Court and therefore amounted to grounds of appeal.

4. Mr. Nyabena further submitted that from the evidence on record, the existence of an employment relationship between the Claimant and the Respondent was not disputed. Moreover, no evidence of non compliance with Section 19 of the Medical Laboratory Technicians and Technologists Act was produced before the Court. In concluding his submissions, Counsel told the Court that the only matter for rectification in the award had to do with inclusion of salary for April 2012 which was awarded by the Court but was not included in the final tabulation.

Ruling by the Court

5. The power of the Industrial Court to review its own decisions is donated by Section 16 of the Industrial Court Act, 2011 and Rule 32 of the Industrial Court (Procedure) Rules, 2010.

Rule 32(1) provides as follows:

32. ***(1) A person who is aggrieved by a decree or an order of the***

Court may apply for a review of the award, judgment or ruling—

(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law;

6. The main issue taken by the Respondent is that since the Claimant failed to prove her registration with the Kenya Medical Laboratory Technicians and Technologists Board, then her employment with the Respondent was an illegality. To support this assertion, Counsel for the Respondent referred the Court to Section 19(1) of the Medical Laboratory Technicians and Technologists Act.

7. However, what Counsel did not do was to make reference to the entire Section 19 which provides as follows:

(1) No person shall act as laboratory technician or technologist in any health facility in Kenya unless such person is registered under this Act.

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings.

(3) No person shall, while in charge of a health institution or any medical laboratory in Kenya, employ any person as laboratory technician or technologist who is not registered under this Act.

(4) A person who contravenes the provisions of subsection (3) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or to both.

(5) Any person who in an application for registration, willfully makes a false or misleading statement or utters a false certificate, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or to both.

8. A plain reading of Section 19 reveals that the law places an obligation on both the employee and the employer. An employer cannot therefore accuse an employee of contravening Section 19(1) while remaining silent about their own contravention of Section 19(3). In fact, from the penalties imposed on the parties it seems to me that the employer has a greater responsibility to ensure compliance.

9. In the case of ***Stephen Nyamweya and Another Vs Riley Services Limited (Industrial Court Cause No 2469 of 2012)*** this Court held that employment contracts are distinct as against commercial contracts where the parties are presumed to have equal power and capacity. Section 9 of the Employment Act, 2007 places the responsibility of drawing of employment contracts on the employer. In this case, the Claimant was employed by oral agreement but there was no denial that an employment relationship existed and the responsibility of the Respondent as an employer was not diminished by the fact that he failed to issue the Claimant with a written contract of employment.

10. I find it rather strange that the Respondent would avail himself of the services of the Claimant for close to 10 years without raising the issue of her non registration only to turn around and raise this very issue to deny the Claimant her rights. In this regard, the Court observed that the Claimant's non registration was not one of the grounds of termination of the Claimant's employment as set out in the termination letter.

11. With regard to the other grounds raised in the Respondent's Memorandum of Review, the Court finds that they raise matters of appeal which this Court has no power to delve into.

12. In the final analysis, the Respondent's application for review is disallowed and the error in the tabulation of the award pointed out by Counsel for the Claimant is corrected by including the sum of Kshs. 12,075 being the Claimant's salary for the month of April 2012. The final award is therefore Kshs. 430,125 which shall be subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Each party will bear their own costs in this application.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF MARCH 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....***Claimant***

.....***Respondent***