



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 758 OF 2012
MILKAH KHAKAYI KULATI.....CLAIMANT
VS
SANDSTORM (AFRICA) LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of a Memorandum of Claim dated 27th April 2012 and amended on 31st July 2013 is for wrongful dismissal and failure to pay terminal benefits. The Respondent filed a Reply which was amended on 31st October 2013. The Claimant testified on her own behalf and the Respondent called its Managing Director, Mark Robert Stephenson and Thomas Odhiambo Nduku, a private investigator. Mr. Khalwale appeared for the Claimant and Mr. Odera Were for the Respondent.

The Claimant's Case

2. The Claimant was employed by the Respondent in September 2009 as an Accounts Assistant at an initial monthly salary of Kshs. 25,000 which was progressively adjusted to Kshs. 100,000 as at the time her employment was terminated in March 2012. In the course of her employment, the Claimant was assigned additional duties which placed her at the level of a senior manager in the Respondent's establishment.

3. On 9th September 2011, at about 7 pm, the Respondent's Managing Director, Mark Stephenson asked the Claimant to report for duty on Saturday, 10th September 2011. On arriving at the office as instructed, the Claimant found a Mr. Byorn who was a friend of Stephenson. Byorn called Stephenson who was said to be at the Respondent's shop at Diani, South Coast and handed over the phone to the Claimant.

4. Stephenson notified the Claimant on phone that she had been placed on a 7 days' suspension with immediate effect and instructed her to hand over company property in her possession to Byorn. The Claimant handed over a lap top computer together with the password as well as office keys. She also gave her mother's telephone number to Byorn and was then escorted out of the Respondent's premises. She was not allowed to collect her personal effects nor was she paid her dues.

5. On 7th November 2011, the Claimant wrote to the Respondent inquiring on the status of her employment and the Respondent wrote back on 11th November 2011 confirming the Claimant's suspension pending advice from the District Criminal Investigations Officer (DCIO) in Diani.

6. On 14th November 2011, the Claimant's Advocates wrote to the Respondent asking for half salary during the suspension. On 3rd December 2011, the Respondent paid to the Claimant Kshs. 112,500 being suspension pay for September, October and December 2011 and on 10th April 2012, the Claimant's Advocates wrote to the Respondent asking for suspension pay for December 2011, January 2012, February 2012, March 2012 and April 2012.

7. Thereafter, the Claimant moved the Court and on 21st August 2012, the Court ordered the Respondent to pay to the Claimant Kshs. 131,250 being suspension pay for December 2011, January 2012, February 2012 and half of March 2012 at Kshs. 37,500 per month. The Claimant's employment was terminated on 17th March 2012.

8. The Claimant's claim is as follows:

- a. A declaration that the termination of her employment was wrongful and unfair
- b. 12 months' salary in compensation for unfair termination.....
Kshs 1,200,000
- c. One month's salary in lieu of notice.....Kshs 100,000
- d. Half salary for September 2011 to March 2012.....Kshs
264,628
- e. House allowance for 31 months @ 15,000 per month.....Kshs
465,000
- f. Overtime.....Kshs 200,000
- g. Gratuity for 31 months.....Kshs 100,000
- h. Certificate of service
- i. Costs

The Respondent's Case

9. In its amended Reply, the Respondent admitted having employed the Claimant as Operations Manager in charge of finished goods stores and purchasing among other duties. On 10th September 2011, the Claimant was suspended pending investigations on allegations of suspected theft and fraud.

10. From the investigations, the Claimant was found to have stolen a sum of Kshs. 1,416,635 from the Respondent. The Claimant was subsequently charged in criminal case number 364 of 2012 which was pending in Court in Kwale.

11. It was the Respondent's case that the Claimant was not entitled to any payment before conclusion of the criminal case because the Respondent was likely to suffer prejudice since the Claimant had not demonstrated ability to repay the sums stolen in the event of a conviction against her. Further, the Claimant had not offered any security against damages that might be occasioned to the Respondent.

12. The Respondent denied authorising the Claimant to hand over any company property to Byorn. The Claimant further stated that the Claimant had declined to pick up her letter of suspension from the Respondent's office and that following the theft she had absconded prompting the Respondent to hire an investigator to trace her. The Respondent was therefore justified to terminate her employment.

13. In response to the claims for house allowance and overtime, the Respondent stated that the Claimant's salary was all inclusive and that the Claimant was not entitled to any overtime compensation.

Findings and Determination

14. The main issue for determination in this case is whether the termination of the Claimant's

employment was substantively justifiable and procedurally fair. Section 45 (2) of the Employment Act, 2007 provides that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility ; or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure.

15. The Claimant was suspended verbally on 10th September 2011 and by letter dated 11th November 2011, the Respondent's Managing Director, Mark Stephenson confirmed the suspension as follows:

“You were suspended from your employment with Sandstorm (Africa) Ltd on 10th September 2011, between 12.30 pm and 1.00 pm, pending an investigation into possible theft/fraud. I was at our Diani Beach shop at the time where two arrests were being made as part of the same case, so I was left with no choice but to communicate your suspension by telephone rather than in person. (It was important for the integrity of the investigation that the Diani arrests and your suspension were actioned simultaneously.)

I made it clear that we needed to clear the way for an audit to take place and given your position as Operations Manager in charge of finished goods stores and purchasing (amongst other things), it was important that you be able to stand back to allow the auditors to do their work.

At the time of writing the position is this: the investigation has taken some time, however, we are now in no doubt that criminal activity has indeed taken place within the company and we have firm evidence of your involvement. On this basis your suspension still stands while the Company awaits the advice of the investigating officer and the DCIO Diani. Should criminal charges be brought then your employment will be terminated with immediate effect, however should we be advised otherwise then we will fulfill our obligations as your employer, but until we receive the advice of the investigating officer and the DCIO Diani we are entirely in their hands.”

Yours sincerely

Mark Stephenson

Managing Director

cc District Labour Officer (Nyayo House)”

16. This letter also made reference to the suspension letter issued on 12th September 2011 but which the Claimant declined to collect from the Respondent's office as instructed by Mark Stephenson.

17. The Claimants' employment was eventually terminated by letter dated 17th March 2012 which states *inter alia*:

“On 15th March 2012 you were formally charged with Stealing by Servant contrary to Section 281 of the Penal Code Cap 63 Laws of Kenya (Court File Number 264/12) and a warrant of arrest was also issued due to your failure to present yourself to Court and even to the Police Stations at Dagoretti DCIO office and Ukunda DCIO office, despite repeated formal requests by them to do so.

I have now clarified the matter with DCIO Diani and he has advised me that on the basis of the charge that it is correct that you be dismissed, and this letter should be taken as formal advice of the same.

Yours sincerely

MARK STEPHENSON”

18. From the Respondent's letters dated 11th November 2011 and 17th March 2012 which I have quoted extensively it seems to me that the deciding factor as to whether to terminate the Claimant's employment or not was institution of criminal charges against her.

19. In the case of ***Wilberforce Ojiambo Oundo Vs Regent Management Limited [2013] ECLR*** this Court held that in the same was an employer is not required to await the outcome of a criminal trial before taking disciplinary action against an employee, the employee's rights cannot be held in abeyance pending the outcome of a criminal trial. Once an employer decides to initiate an internal disciplinary process against an employee that process must be completed irrespective of the status of the criminal proceedings.

20. In the words of Mark Stephenson, the Respondent was entirely in the hands of the investigating officer and the DCIO Diani. Having accepted to place itself in this position, the Respondent was not at liberty to drag the Claimant along by keeping her in suspense pending the outcome of investigations over which neither the Respondent nor the Claimant had any control.

21. From the record, the Claimant's suspension was to allow investigations into suspected theft/fraud. The actual findings of the investigations were not presented to the Court. Additionally, the private investigations by Thomas Odhiambo Nduku appear to have been embedded into the police investigations, leaving any independent investigations by the Respondent doubtful. It seems to me that the Respondent abdicated its responsibility as the Claimant's employer to the police. For the foregoing reasons, I find that the Respondent failed to establish a valid reason for termination of the Claimant's employment.

22. I will now examine the procedure adopted by the Respondent in effecting the termination. The Claimant was accused of theft/fraud which would fall under gross misconduct. Section 41 of the Employment Act, 2007 establishes the procedure for handling cases of misconduct as follows:

- a. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the

explanation;

- c. That the employer has heard and considered any explanations by the employee or their representative.

23. The Respondent made a general statement that the Claimant did not cooperate in the investigations. However, apart from the failure to collect the suspension letter which the Claimant

ascribed to her fear of being harassed by the Respondent, no specific incident of non cooperation was cited to the Court.

24. At any rate there was no evidence of the Claimant having been taken through a disciplinary process akin to what is prescribed in Section 41 of the Employment Act and I therefore find that in terminating the Claimant's employment the Respondent failed to follow due process.

25. Overall I find the termination of the Claimant's employment unfair for want of substantive justification and procedural fairness and award her 4 months' salary in compensation. I also award her 1 month's salary in lieu of notice. In view of my finding on the legality of the termination of the Claimant's employment, her half salary withheld during the suspension period is payable.

26. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides that:

1. ***An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

2. ***This section shall not apply to an employee whose contract of***

service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective

agreement which provides consolidation of wages as provided in paragraph (a).

27. According to the Claimant's payslip for the month of August 2011, her basic salary and gross salary was the same at Kshs. 100,000. The item described as house allowance was blank.

28. For some unexplained reason, the Claimant was not issued with an employment contract and as was held by Mbaru J in the case of ***Robai Musinzi Vs Safdar Mohamed Khan [2012] eKLR*** where an employer fails to document the terms and conditions of employment, it is left to the Court to interpret these terms. From my analysis of the evidence presented to the Court, I did not find any expressed intention that the Claimant's salary was inclusive of house allowance.

29. In the written submissions filed on behalf of the Respondent, Counsel submitted that the claim for house allowance is statute barred by dint of Section 90 of the Employment Act and is therefore not payable. To my mind the failure to pay house allowance would fall under a continuing injury or damage within the meaning of Section 90.

30. The Claimant's employment was terminated on 17th March 2012 and she filed her claim on 7th May 2012, well within the 12 months' limitation period set for continuing injury or damage under Section 90. The Court therefore finds the claim for house allowance meritorious and awards house allowance at 15% of the

Claimant's basic salary. The resultant figure of Kshs. 115,000 is adopted as the Claimant's salary for purposes of this claim. The claims for overtime and gratuity were not proved and are dismissed.

31. Ultimately I make an award in favour of the Claimant in the following terms:

- a) 4 months' salary in compensation for unfair termination.....Kshs 460,000
 - b) 1 month's salary in lieu of notice.....Kshs 115,000
 - c) House allowance(30 months &17 days).....Kshs 458,500
 - d) Half salary for September 2011 to 17th March 2012.....Kshs 377,583
- Total.....Kshs 1,411,083**

The Claimant is also entitled to a certificate of service.

I further award the Claimant the costs of this case.

This Award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF MARCH 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*