



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO 2093 of 2011

(Before: D.K.N.Marete)

JACQUELINE KWAMBOKACLAIMANT

Versus

INTERNATIONAL ENERGY TECHNIK LIMITEDRESPONDENT

JUDGEMENT

By a memorandum of claim dated 9th December, 2011 and filed on 13th instant this matter was brought to court. The issue in dispute is;

‘Unlawful termination of employment contract’

The respondent denies the claim vide his response dated 20th January, 2012 and prays that the same be dismissed with costs.

The claimant’s case is that on 17th August, 2005 the respondent employed her as a secretary for a period of one year – see Annexure marked A-1. This employment was confirmed on 8th February, 2006 – see Annexure A-2. The contract was thereon renewed without interruption and break and on 18th February, 2011 this was renewed for two years from 1st January, 2011 to 31st August, 2013 – see Annexure A-6.

On 30th November, 2011, the respondent terminated the employment without any valid reason and in contravention of Article 41 of the Constitution of Kenya, 2010 that guarantees an employee a right to fair labour practices and also restrains unfair termination of employment. She particularly relied on Article 41 of the Constitution and Section 45 of the Employment Act, as follows;

a. *Article 41 of the Constitution states that:*

“Every person has the right to fair labour practices”.

b. *Section 45(1) of the Employment Act No. 11 of 2007*

“No employer shall terminate the employment of an employee unfairly”.

Sub-section 41(4)

A termination of employment shall be unfair for the purposes of this part

- i. “.....
- ii. ***It is found that in all circumstances of the case, the employer did not at in accordance with justice and equity in terminating the employment of the Employee”.***
- c. *The Claimant contends that she was unfairly terminated, she has never had any prior warning regarding her competency and performance at work and the due legal process was never followed as per the rules of Law and Natural Justice.*
- d. *The employment was terminated without a fair procedure and/or opportunity to be heard being accorded to her as required by Law. – Attached is a copy of certified copies of the termination latter marked A-7.*

The claimant contends and submits that the termination of employment was unfair, there having never had any prior warning regarding her competency and performance at work or even pursuance of due legal process in her termination of employment. She prays for;

- a. *Compensation for reminder of the contract period from 1,12,2011 to 31.8.2013 @ 42,000/= per month totaling to Ksh.882,000/=.*
- b. *Leave accrued and to be earned up to the end of the contract period of 64 days in the sum of Kshs.119,570/=.*
- c. *In the alternative to (a) above, the Court to award damages for breach of contract of employment.*
- d. *Certificate of Service to be issued to the Claimant in terms of the Employment Act, 2007.*
- e. *Cost of this suit.*

The respondent admits having employed the claimant but denies unlawful termination of her employment contract. He puts the circumstances leading to her termination as follows:-

2. Response

- a. *The Respondent admits having employed the claimant as a secretary on 17.8.2005. It also admits that the contract of employment was renewed severally the last such renewal having been made on 18.8.2011. The Respondent however says that besides the contract of employment the relationship between the parties was also to be governed by its general terms and conditions of employment of employees which the Claimant duly accepted. A copy of the said terms and conditions is attached to the Response.*
- b. *According to the employment contract the Claimant’s designation was that of a secretary in the Respondent’s PDP Department (hereinafter referred to as ‘the Department’). The contract also provided that besides her secretarial duties the Claimant could also be assigned other duties by her superiors in the Respondent Company.*
- c. *The Respondent says that at the time of her employment the Department had a head of department and a sales representative with whom the Claimant was to work. These left the employment of the Respondent in 2007 and 2008 respectively. In accordance with the terms of contract the claimant was requested on several occasions by the General Manager to undertake other duties particularly in sales and client relations so as to shore up the revenue of the department. These requests were verbal but were declined by the Claimant.*
- d. *As a consequence the business of the Department slowed down and in view of the Claimant’s refusal to undertake other duties it was difficult to sustain her employment.*

- e. *The Respondent admits terminating the Claimant's employment. It says that the Claimant was called to the General Manager's office on 30.11.2011 and the above issues were explained to her. She was also requested if she had any representations to make on the issue. At the time the termination letter had not been signed. She did not make any representations on that day. Instead she requested for some time and took the unsigned termination letter with computations of her terminal dues attached to it. She went home with it and brought it back the following day. Even then she did not make any representations. Instead she requested the General Manager to sign the letter. The General Manager did so and gave her a copy hereof. She however refused to pick the cheque for termination dues.*
- f. *The Respondent therefore denies that the termination was unfair as alleged. It says that the same was informed by the operational requirements of the Respondent of which the Claimant was made aware and advised on how to rectify the situation by undertaking additional duties. It was also terminated in accordance with the terms of contract between the parties. The Respondent also gave the Claimant an opportunity to make representations on the matter but she declined to do so.*

The claimant was in view of the above warned of the intention to terminate her services and even served with a termination letter and computation letter which she was asked to answer but did not. She came back and requested the respondent's General Manager to sign the termination letter. She has refused to pick the cheque for terminal dues and to date the same is held by the respondent. The respondent therefore prays that this claim be dismissed with costs.

The matter variously came and on 5th June, 2012 was heard on the claimant's case. The claimant, CW1 - Jacqueline Kwamboka duly sworn testified in evidence and reiterated her case as expressed in her statement of claim. She further testified that she was not aware of a financial crisis in her employer company and neither had there been retrenchment and redundancies in the establishment. On cross-examination, she said that she was not involved in the termination or even her views sought.

Pilley only called her and told her that the termination was with immediate effect. She on examination testified that the letter of termination was accompanied by a cheque for termination dues and that she had done her work well in all departments deployed to.

She also sought to rely on her witness statement dated 9th December, 2011.

DW-1- Rajesh Pilley testified on defence while adopting his witness statement dated 20th January, 2011. He also reiterated the defence as per the statement of defence. On cross-examination he further testified that the claimant's services were terminated three months after the final renewal of contract and this was the eventualities and economic realities of the day-economic hardships.

At the close of the hearing, parties agreed to undertake written submissions to dispose off the matter and this was allowed by court.

The issues for determination therefore are:-

1. Was the termination of the claimant's employment wrongful, unfair and unlawful?
2. Was this a fixed term contract?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of the case?

The 1st issue for determination is whether the termination of employment was wrongful, unfair and unlawful. The claimant's case is that her termination of employment was unfair and unlawful. The respondent denies this and submits that the termination was due to the claimant's refusal to actively involve herself in the PTE department thereby leading to its unsustainability and therefore her termination. She would not be accommodated in an uneconomical venture.

As submitted by the claimant, she is entitled to her fundamental right to fair labour practices in

accordance with Article 41 of the Constitution of Kenya, 2010.

Article 41 on Labour relations;

41. (1) *Every person has the right to fair labour practices.*
- (2) *Every worker has the right –*
- (a) *to fair remuneration*
 - (b) *to reasonable working conditions*
 - (c) *to form, join or participate in the activities and programmes of a trade union;*
 - (d) *to go on strike*
- (3) *Every employer has the right-*
- (e) *to form and join an employers organization; and*
 - (f) *to participate in the activities and programmes of an employers organization*
- (4) *Every trade union and every employers' organization has the right-*
- (a) *to determine its own administration, programmes and activities;*
 - (b) *to organize; and*
 - (c) *to form and join a federation.*
- (5) *Every trade union, employers' organisation and employer has the right to engage in collective bargaining.*

Further, S.45 of the Employment Act, No. 11 of 2007, the so called authority on unfair termination of employment clearly sets out parameters for unfair termination of employment;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

- (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*
 - (c) *that the employment was terminated in accordance with fair procedure.*
- (3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*
- (4) *A termination of employment shall be unfair for the purposes of this Part*

where-

a. *the termination is for one of the reasons specified in section 46; or*

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial Court** shall consider-*

a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

e. *the existence of any previous warning letters issued to the employee.*

Section 41 of the said Employment Act, 2007 cites the procedural aspects of termination and these are binding on all employers and employment relationships.;

41. (1). *Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

(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.

These provisions of the law cater for the substantive and procedural aspects of termination of employment and anything short of this is not only fallacious but unacceptable.

In the circumstances of the instant case, these were not met and therefore presenting a case of unfair termination of employment. I therefore find a case of unfair and unlawful termination of employment and hold as such. This answers issue No.1 above.

The 2nd issue for determination is whether the claimant's contract was a fixed term contract. It is not in dispute that the claimant was employed on 17th August, 2005 and a confirmation of employment made on 8th February, 2006. It is also not in dispute that the claimant's contract was renewed periodically until 18th August, 2011 when this was extended for two years from 1st September, 2011 to 31st August, 2013. This is the troubled contract that was never completed. This to me, amounts to a fixed term contract as provided for in law and I hold as such.

The 3rd and other issue for determination is whether the claimant is entitled to the relief sought. She is.

Having scored highly on the issue of unfair termination, the claimant automatically qualifies for the relief sought. The only issue for determination in the circumstances is the amount awarded in such relief.

On considered scrutiny of the circumstances of the case, I am inclined to award and compensate the claimant as follows;

1. Compensation for reminder of the contract

period from 01.12.2011 to 31.8.2013, 21

months @ 42,000/= per month.....Kshs. 882,000.00

2. 3 months compensation for unfair termination

Of employment = 3 x 42,000.00Ksh. 126,000.00

Total

Kshs.1,008,000.00

3. The respondent is ordered to issue a certificate of service to the claimant.
4. The cost of this cause shall be borne by the respondent.

Dated, delivered and signed the 4th day of March, 2014.

D.K.Njagi Marete

JUDGE

Appearances

1. **Mr. Wanjohi instructed by Theuri Wanjohi & Company Advocate for the claimant.**
2. **Mr. Moseti instructed by K. Moseti & Company Advocates for the respondent.**