



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT MOMBASA
CAUSE NO. 268 OF 2013

M W MCLAIMANT

VERSUS

M F SRESPONDENT

J U D G M E N T

INTRODUCTION

The claimant's suit is brought vide the amended claim filed on 4/11/2013. She alleges that she was employed by the respondents on 1/3/2011 for a 5 year contract which was later converted into permanent and pensionable employment on 12/8/2012. She was also promoted to be a branch manager earning a monthly salary of ksh.60000/-. She however ran into trouble with a customer on 24/5/2013 which led her being subjected to disciplinary process. She was given an opportunity to defend herself by answering structured questions posed to her by a disciplinary panel which reached the verdict that the claimant be warned and redeployed to a recovery officer. The verdict was exercised by warning letter dated 12/6/13.

The claimant accepted the verdict but wrote a letter dated 17/6/2013 responding to the warning letter issued objecting to being labeled as “disrespectful, contemptuous of staff, putting staff at security risk and compromising the core value of the company”. The respondent responded by summarily dismissing the claimant by letter dated 18/6/2013, “for the claimant's disrespectful conduct exhibited during and after the disciplinary action taken against her between 28/5/13 and 18/6/13, following the altercation between her and a customer”.

The claimant prays for payment of employment benefits for breach of the contract by the respondent. She also prays for certificate of service in addition to damages for sexual harassment by the respondents' Managing Director (MD).

The respondent has denied liability by her amended response filed on 13/11/2013. She contends that the summary dismissal was lawful because it was a result of insubordination, absenteeism and failure to obey lawful orders by the employer. In addition, she contends that the dismissal was reached after a disciplinary hearing before a disciplinary committee over an illegal seizure of chattels from a longtime client without any lawful reason.

The suit was heard on 25/2/2014 when the claimant testified as CW1 but the respondent called no witness.

CLAIMANT'S EVIDENCE

CW1 is now a lecturer at the Kenya Institute of Management since December 2013. Previously she was employed by the respondent starting 1/3/2011 where she started as a Senior Micro Finance Officer earning Kshs.35,000/ per month. Due to her excellent services she was promoted to be a Portfolio Quality Champion and later to be a Business Unit Manager (Branch Manager) earning ksh.60000 gross. She served in that capacity at Changamwe and later Kongowea branches upto 19/6/2013 when she was summarily dismissed.

According to her she ran into problems when she refused to buy the company shares floated by the respondent to all her employees. In her opinion it was not worthy to invest in the respondent's shares at a time when she had no money. She also did not see it wise to forfeit her leave in exchange of shares like the other employees because she was pursuing her masters degree at the university. The second reason for her dismissal, according to CW1 was her refusal to give in to the sexual advances by the MD Mr. J K. She contended that between the end of 2012 and April 2013, the MD invited her to his office for no good reason and severally hugged her in addition to inviting her to his house for a weekend on 13/4/2013. That when she declined the invitation for the weekend he hosted her for lunch along Moi Avenue where he told her that he would care for her as a woman. That he further told her that his wife had just given birth.

The claimant rejected the MD's advances and cautioned that she was a born again Christian. CW1 further told the court that after the lunch, the MD told her that he had been expecting her resignation a fact which disturbed her mind. According to her there was no policy in place on sexual harassment although the company had about 70 employees.

The third reason for her dismissal according to the CW1 was an altercation she had with a customer one B N who had defaulted to pay her loan of ksh.67000. On 24/5/2013, CW1 in the company of 3 officers from the respondent visited the said loan defaulter at her house. The defaulter became rude and demanded the claimant and her colleagues to leave her house. When CW1 hesitated, the customer pushed her out arguing that she knew the MD. CW1 called her supervisor who spoke to one of the 3 officers instead of the claimant.

Due to the shock from the attack she went home because it was on a Friday and resumed work on the following Monday. On the following day, 28/5/2013, she was called to the Head office by the CEO where she found all the senior managers who asked her many questions regarding altercation with the customer on 24/5/2013. CW1 contended that she tried to answer the questions but was not allowed to complete the answers. According to her the fate had already been predetermined and that the managers were only harassing her.

On 30/5/2013 CW1 was called for another meeting in the presence of the MD where the same questions were raised but she was not allowed enough time to respond. That on the following day she was questioned again and a decision was reached to give a warning letter and demote her from a manager to a recovery officer. She was however dismissed after refusing to sign the warning letter because it was reflecting wrongly on her character.

She produced letters and emails for promotions and commendations for good work performance. She also produced a letter from a shareholder warning employees against buying shares in the respondent. She also produced an email to her mentor about how the MD had tightly hugged her at the kitchen after avoiding him and went to the kitchen.

She denied ever taking leave without permission. She prayed for declaration that the contract of employment was breached, compensation for unfair dismissal, salary for 19 days worked in June 2013, one year leave, notice pay, certificate of service and damages for sexual harassment plus costs and interest.

On cross examination, she denied calling for a car to carry N's goods but only assessed the goods which she had pledged. She maintained that it was within her powers to do that and denied ever overstepping her mandate. She further contended that she reported the matter to her boss by phone and maintained that it was not her first time to meet a difficult customer. She further maintained that her

relationship with the MD is what caused her to lose her job. She contended that the first day the MD hugged she told him that it was wrong to do that. She contended that she did not report the matter because there was no formal procedure in place for reporting. She further contended that the MD was the senior most officer of the company and as such she could not report him to his juniors. She admitted that she attended 3 disciplinary meetings but contended that she was not allowed to tell her story because she was only asked structured questions.

CW1 denied the allegation that she had an exchange of words with N on 24/5/2013 but only allowed N to explain her default. CW1 admitted that on 10/6/2013 she went to apologize to N only to woo her back as a customer but not to admit any wrong doing. CW1 also admitted that on 20/12/2012 she received a warning letter for being away without leave but she maintained that she had permission to be away. She admitted receipt of the warning letter dated 2/6/2013. She denied ever seeing written statements by N and her colleagues officers Mr. J M and J M during the disciplinary hearing but only saw them when they were filed in defence against this case. She further observed that the alleged statements were not from the alleged authors because they did not bear any signature. She further denied ever being asked to have a fellow employee of her choice accompany her to the disciplinary hearing.

After the close of the hearing the parties filed written submissions.

ANALYSIS AND DETERMINATION

Upon perusing the pleadings and upon careful consideration of the evidence and the written submissions, the following issues arose for determination:

- a. **whether the summary dismissal of the claimant amounted to breach of the contract of employment**
- b. **whether the claimant was sexually harassed by the respondents MD**
- c. **whether claimant is entitled to the reliefs sought.**

The foregoing 3 issues summarizes the issues agreed upon and filed by the parties.

Breach of contract of employment

The claimant produced letter of appointment dated 27/1/2011 which **inter alia** provided for the right to terminate the contract by giving one month notice in writing or payment of salary in lieu of notice. The said notice period never changed even after the various correspondences which upgraded the status and position of the claimant.

The question that arise are in respect of the cause of the dismissal, and whether the dismissal was preceded by a fair hearing. This court observes that the dismissal was reached unilaterally by the MD after the claimant was served with a warning letter which also demoted her.. The said letter was in execution of the decision by the disciplinary committee which the claimant had accepted .

The warning cum demotion letter was signed by the same MD and in employment jurisprudence that was a matter concluded. The court therefore finds the summary dismissal of the claimant after an elaborate proceedings as an afterthought and also breach of the contract of employment. A warning letter and a demotion was enough punishment to the claimant and the MD had no legal right to punish the claimant twice within few days and based on the same grounds which had already been arbitrated upon and brought to a rest. Consequently the answer to the first issue is that the summary dismissal of the claimant by the MD was in breach of the employment contract.

Sexual Harassment.

The claimant has narrated specific dates, places and manner of harassment she received from the MD of the respondent. According to CW1, she protested the harassment to the MD from the first day he hugged her. The claimant never reported the harassment to any person for the reason that the MD was the

senior most officer of the respondent in addition to there being no policy statement put in place by the respondent to cab sexual harassment. According to her the respondent ought to have a policy in place to deal with the vice because she has about 70 employees.

Apart from a general denial of sexual advances by the respondent in paragraph 9 of the defence, there is no specific denial that the MD hugged the claimant at the workplace and invited her to his house for a weekend. There is also no evidence denying of the fact the MD hosted the claimant for lunch on 16th April 2013 or that he had told CW1 that his wife has given birth. To make the matter worse the MD never attended court to testify. Consequently the court is left with the uncontested evidence of the CW1. The court observed the demeanor of the CW1 while on he witness box and did not doubt her testimony even after it was vigorously tested by the counsel for he defence during cross-examination.

Section 6 of the Employment Act gives the meaning of sexual harassment of an employee. An employee is deemed as sexually harassed if the employer of that employee or a representative of that employer or a co-worker:

(a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express:-

(i) promise of preferential treatment in employment

(ii) threat of detrimental treatment in employment or

(iii) threat about the present or future employment status of the employee

(b) uses language, whether written or spoken, of sexual nature

(c) uses visual material of a sexual nature or

(d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employees employment, job performance, or job satisfaction.

This court finds that the MD of the responded sexually harassed the claimant in terms of Section 6(1) (a) (b) and (d) of the Employment Act. The uncontested evidence by the claimant is that the MD indirectly requested her for sexual intercourse when he invited her to spend the whole weekend at his house.

He also harassed her on 16/4/2013 during a lunch date along Moi Avenue when he told her that he could care for her as woman and even told her that his wife had just given birth. Lastly the persistent hugging including a tight hug at the office kitchen was a behaviour of sexual nature which was not only unwelcome to the claimant but which also had the detrimental effect on the claimant's employment, job performance and job satisfaction. According to the claimant she started to avoid the MD and was not free to visit his office whenever he summoned her there. Consequently the answer to the second issue is in the affirmative.

The claimant has maintained that the respondent did not provide a mechanism for reporting sexual harassment. Section 6(2) of the Employment act requires that an employer with more than 20 employees must issue a policy statement on sexual harassment after consulting with the employees or their representatives. One of the key terms to be contained in the said policy statement is the procedure for reporting or lodging complaints on sexual harassment. The respondent shall not benefit from the defence that the claimant did not report the alleged harassment before dismissal. It is the respondent who failed to prepare a machinery for reporting such harassment as required by the law. This should serve as a warning to the employers who have persisted in failure to comply with Section 6 of the employment Act aforesaid.

RELIEFS SOUGHT

In view of the findings above the court makes declaration that the summary dismissal of the claimant from her employment was in breach of her employment contract and also an unfair termination within the meaning of Section 45 of the Employment Act. It was breach because after punishing the claimant by a warning letter and a demotion after a disciplinary enquiry, the respondent was wrong to later dismiss the claimant summarily without fresh hearing or without serving a month notice in writing. On the other hand, the dismissal was unfair because it was not done after a fair hearing as provided for under Section 41 of the employment Act.

The claimant is therefore awarded one month salary in lieu of notice being Ksh.60,000/ prayed. She will also get salary for the 19 days worked in June 2013 being ksh.38000. The prayer for leave and gratuity is answered by the letter dated 16/5/2013 by the respondent advising the claimant that her leave due and accrued gratuity was valued at ksh.21600 and 42,454 net of tax. The said letter was produced by the claimant as an exhibit. The letter also advised the claimant that the said money for the leave and gratuity was credited on her loan account with the respondent. The claimant never disputed the contents of that letter whether before 31/5/2013 as advised or even during the hearing herein. The court will therefore deem that the prayer for leave outstanding and gratuity must fail.

Likewise the prayer for severance pay must fail because the dismissal was not by way of redundancy. On the other hand, it is trite law that compensation for breach of contract is all the earning one is expected to earn during the notice period. That has already been granted above in the form of one month salary in lieu of notice.

The claimant is however awarded damages for sexual harassment by Mr. J K the respondent's MD on diverse dates between December 2012 and 16th April 2013. No judicial precedents were cited to guide the court in the assessment of quantum of damages. The court appreciates that money cannot be deemed as adequate compensation for the mental injury of a sexually harassed employee. The feeling of insecurity from the male boss who can terminate her services by virtue of his position is a terrible experience to a young career woman. That cannot be tolerated under the contemporary legal dispensation.

The court will award ksh.500,000 as general damages to the claimant for sexual harassment. The claimant will also be issued with certificate of service as prayed plus costs and interest.

DISPOSITION

For the reasons and findings above, judgment is entered for the claimant against the respondent in the following terms:

- a. The summary dismissal of the claimant from employment is declared to be in breach of contract and also unfair.
- b. Payment of ksh.598,000.
- c. Issuance of certificate of service.
- d. Costs and interest.

Dated, Signed and delivered this 30th May 2014.

O. N. Makau

Judge