



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 77 OF 2011

NORAH KILONZO MUASYA.....CLAIMANT

VERSUS

FEDERATION OF KENYA EMPLOYERS.....RESPONDENT

JUDGMENT

1. This case was filed in 2011 and was heard in part by Mukunya J. (as he then was) and upon the establishment of the Industrial Court under the new dispensation was set for hearing a few times before the case was finally allocated to me. After direction that the part-heard be heard and disposed of by me I set the hearing of the suit to 31st March 2014. At the hearing Mr. Mbobu appeared for the Claimant while Mr. Burugu appeared for the Respondent.
2. The Claimant testified that she is presently jobless having lost the job she had held on 19th October 2010. She was the Chief Confidential Secretary/PA to the Executive Director Mrs. Jacqueline Mugo the current Executive Director of the Respondent. She stated that she had worked for 15 years in the same office and was familiar with operations of the business of the Respondent and the need to keep matters confidential. In July 2010 she was told to handover to an executive Assistant, which she did, and was required to work with the new Executive Assistant. She took 10 days leave and upon reporting on 2nd September 2010, found the new Executive Assistant seated in the office she had occupied over the years. The new executive assistant told her to see the HR Officer who had newly been appointed. She went and saw the HR Officer and was told to vacate the office. No reasons were given save that the person who wanted her to vacate was the Executive Director who was not in at the time. She did not get any letter but moved as directed to a desk she was shown. She sat at the open working station and kept asking for a new letter for the new duties and the HR Officer kept telling her to wait for a response from the Executive Director. She sat there for 1 month, 18 days and got work from everybody else except the Executive Director. She performed the tasks assigned to her. She never saw the Executive Director and had no access to her. Around the month of August, she received email from the new Executive Assistant that indicated she had been re-deployed to new position of Administrative Officer. The emails were not signed. She awaited further communication but there was none and around 20th August, she forwarded the emails to her personal email address for safe-keeping. On 1st October she decided to see the HR Officer to find out the genuiness of the emails. The HR Officer asked her to forward the mail to her and the Executive Director. Still there was no communication and on 7th October, she received a Notice to Show Cause letter for being found in possession of confidential information. She replied on the same day stating how these emails came to be in her email without her asking for them. There was no communication from Executive Director until

19th October when she received the termination letter signed by Executive Director. After receipt of the letter she attempted to see the Executive Director to find out why she was terminated for a mistake she had not committed. She was told to go home but before leaving she wrote an appeal but it was fruitless. She was referred back to the Executive Director. She denied that she did not serve with dedication for the 15 years she spent in the same position. She had received 2 recommendations from current Executive Director and previous Executive Director for my good work. There was no explanation by the Executive Director and HR Officer. The Executive director never gave any indication except when she gave me instructions to hand over to new Executive Assistant. She denied that she received any confidential information and that what she got was email sent to her. It was unsigned and it was addressed to me. It had no seal. She denied that she ever applied pressure to receive the email. She was not even on talking terms with the new executive assistant. She denied that she circulated the email and testified that she sent it to her personal email address in about 6 days for safe-keeping. She did that because she sensed danger. She thought the office email which could be accessed by anyone could be deleted. She denied that she subverted the Executive Director and that she sent an email to the Respondent's Chairman as she was not able to see Executive Director and needed to be rescued. When she was asked to show cause yet executive assistant was not asked to show cause. The Executive assistant is the one who sent me the email leading to termination. She stated that she had no control over what is sent to her. She thus prayed for her October Salary, leave days accrued per the procedure at FKE, one-month notice, the cost of this suit and compensation. Her salary was Kshs. 75,000/- a month. She also sought severance pay which is for 15 days for each year worked amounting to Kshs. 1,478,100/=.

3. She was Cross Examined by Mr. Burugu and testified that she had worked for a month before leaving when Valarie the new executive assistant reported. Valarie was not her friend and she had no idea why Valarie sent her the email. She had no prior communication with Valarie before the emails were sent to her. She testified that she exercised great prudence upon receiving the email. She stated that she did not know these were confidential email. She sent them to her personal email to ensure that no one would tamper with them. Mr. Burugu put it to the witness that her apprehension is what caused her to pester Valerie to send her the emails to which the Claimant replied that was incorrect and Valarie would be lying if she says the Claimant pestered her. She testified that she was never told anything about her redeployment. She stated that she was told she would be working with the new Executive Assistant and thus knew she would be retained. She was made to believe she would continue to work with the new executive assistant. She testified that according to the title of the emails, her deployment was a promotion. According to the emails she was not to be demoted. She conceded these were not given to her by the company. She testified that she could not state whether the Respondent had any good intention but if we are to go by the emails and if they were genuine it would seem they had good intentions.
4. In Re-Examination by Mr. Mbobu she testified that she was treated very unfairly because services were terminated for a wrong she did not commit and no one wanted to give her audience and she just saw a letter terminating my services.
5. Mr. Burugu at that point applied for an adjournment as his witness had changed employment and could not secure attendance. Mr. Mbobu was not opposed and the Court exercised its discretion and allowed Mr. Burugu's application for adjournment. The case was to proceed for further hearing in May. On 15th May when the matter was due to be heard further, Mr. Obura appeared for the Respondent. He stated that he had looked at the claim by the Claimant and he was willing to concede part of the claim such as the prayer for compensation for 12 months. The Respondent was thus willing to concede that prayer, the prayer for salary in lieu of notice, claim for days worked and leave days due. The only issue that was remaining was the issue of severance pay and for this if there was no agreement there would be submission on it to bring the case to an end. Though the Claimant was ready to proceed, Mr. Kenyatta holding brief for Mr. Mbobu accepted the concessions and was eager to be heard on the claim for severance pay. The Court accepted the concession as the suit had been compromised to the Claimant's advantage. Parties were to file submissions on the issue of severance pay. The Claimant filed a Notice to act in person on 30th

May 2014 and she proceeded to file her submissions on 4th June 2014. The Respondent filed submissions on 12th June 2014.

6. In her submissions, the Claimant submitted at length on issues which had been settled by the concession by the Respondent and as such are not due for consideration by the Court. On severance pay she submitted that Section 35(5) of the Employment Act applied to her case as the Section provides that *an employee whose contract of service has been terminated under subsection 1(c) shall be entitled to service pay for each year worked, the terms of which shall be fixed*. She submitted that on the strength of the decision in **Spicers Eastern Africa Limited v Azad G. Ismail [2006] eKLR** she was entitled to severance pay as she had not waived her claim on it or behaved in a way to suggest that she wished to waive it. She also made submissions on reinstatement to her former position.
7. The Respondent in their submissions stated that the issue was settled as far as the consent on the concessions made by the Respondent. For this the Respondent relied on case law – **Brooke Bond Liebig (T) Ltd v Mallya [1975] EA 266**, **National Bank of Kenya v James Orenge [2005] eKLR** and **Diamond Trust Bank of Kenya Ltd v Ply and Panels Ltd and others [2004] 1 EA 31**. The Respondent thus submitted the Claimant was confined to the unresolved issue of severance pay. The Respondent conceded that the cheque for the sums due was prepared but was not forwarded to the advocates for the Claimant due to the disagreement between the Claimant and her advocates. The Respondent submitted that the issue of reinstatement the Claimant had introduced in her submission was not permissible as she was bound by her pleadings. Regarding the severance pay, the Respondent submitted that the Claimant was not entitled to it as she was not declared redundant nor was her termination equivalent to redundancy. The Respondent submitted that severance pay was claimable by virtue of Section 40(1)(g) of the Employment Act. On service pay, the Respondent submitted that the Claimant was covered under a scheme as set out under Section 35(6) of the Employment Act and was thus not entitled to it.
8. It is trite law that a consent cannot be resiled from unless fraud, undue influence or coercion to obtain it is demonstrated. In the premises the only issue open for determination is the severance pay.
9. Regarding severance pay, the amount is claimable where an employees termination is due to redundancy declared. Redundancy is defined under Section 2 of the Employment Act as **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**. In the Claim before me, in order for the Claimant to qualify for payment of severance pay she had to prove that the loss of employment was due to her services being superfluous. In the Claim, it was the Claimant's case that she was terminated for an alleged breach of confidentiality arising from emails sent out to her by the new executive assistant. She was given a letter to show cause and a termination followed on 19th October 2010. That to my mind is far from the purview of Section 40 as read with Section 2 of the Employment Act. She would not be entitled to obtain relief under this head of the claim in the circumstances.
10. Contrary to submissions by the Respondent that the Claimant was introducing a new claim regarding her reinstatement, her Memorandum of Claim filed on 26th January 2011 has a prayer b) at page 6 thereof where the Claimant seeks to be reinstated to the position she was or re-engagement in work comparable to that in which she was engaged before termination or other reasonably suitable work at the same wage level. In the premises, this was an issue she could rightly seek relief for and could as a consequence make submissions on. However, the prayer was abandoned upon concession to the 12 months compensation as well as the litany of reliefs the Respondent conceded.
11. In view of the foregoing, I will enter a Judgment for the Claimant against the Respondent as

follows:-

- a. 12 months compensation Kshs. 909,600/-
- b. One month salary in lieu of notice Kshs. 75,800/-
- c. Salary for October 2010 Kshs. 75,800/-
- d. Leave days accrued and not taken Kshs. 24,003.80/-
- e. Certificate of service in terms of Section 50 of the Employment Act
- f. Costs of the suit.

Statutory deductions in terms of Section 49(2) shall apply to the sums in paragraphs a), b), c) and d) above.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of September 2014

Nzioki wa Makau

JUDGE