



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1101 OF 2011

BETWEEN

RITA GAKII GITOBU CLAIMANT

VERSUS

TELKOM KENYA LIMITED RESPONDENT

Rika J

Court Assistant - Mr. Kidemi

Mr. Kipkorir instructed by KTK Advocates for the Claimant

Mr. Munyu instructed by Iseme Kamau & Maema Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed her Statement of Claim on 12th July 2011. She was employed by the Respondent, on 10th January 2005, as the Business Development Executive, earning a salary of Kshs.54,156 per month. Her contract was terminated by the Respondent in a letter dated 22nd March 2011. She claims termination was unfair and unlawful, and based on gender and/or racial discrimination. At the time of termination, she earned a salary of Kshs.267,500 per month. She prays for the following Award against the Respondent:-

- (a) Loss of salary from 23rd March 2011 to the expected retirement date of 3rd October 2038.
- (b) Loss of bonus and additional benefits
- (c) General Damages for discrimination.
- (d) Exemplary and/or aggravated damages.
- (d) Costs

(e) Any other additional reliefs this Court deems fit to grant.

2. The Respondent filed its Statement of Reply on 29th September 2011. It agrees to have employed the Claimant on 10th January 2005, in the position of Business Development Executive (Data). By the time she left she had risen to the position of Value Added Services (VAS) Manager - Content and Marketing Operations. She neglected her duty, and the Respondent took disciplinary action against her. Termination was for reasons related to performance of work, not any other reasons. There was no gender or racial consideration. The Respondent is an Equal Opportunity Employer. She is not entitled to any of the prayers in her Claim. The Respondent prays for the dismissal of the Claim with costs.

3. The Claimant testified, and rested her case on 25th July 2013. The Respondent did not call Witnesses, and adopts its Pleadings, Submissions and Documents on record.

4. The matter was last mentioned in Court on 6th November 2014, when Parties confirmed the filing of their Closing Submissions, and the file forwarded to the Trial Judge in his new Station at Mombasa, for preparation of the Award.

5. The Claimant testified she received a letter to show cause why disciplinary action should not be taken against her by her Respondent. The letter, dated 16th February 2011, was the first disciplinary letter received by her in her entire service with the Respondent.

6. The Respondent alleged the Claimant had failed to discharge her duties to the required standards. This was said to result in poor delivery of services to Customers.

7. Gitobu explained she was involved in a Product Meeting on 15th February 2011. She was to make presentation on 2 Products. Before she could finish her first presentation, the Respondent's CEO curtly stopped her, and told her she had been fired.

8. All Heads of Departments attended the Product Management Meeting. The Product Manager made presentation before the whole team, which included the CEO, and the team determined if the Product goes out. The Claimant was not a Product Manager. Her Line Manager had requested her to make the presentation.

9. The CEO stopped the Claimant, complaining that the Claimant and her team had been presenting same Product, which had not been launched in the market.

10. The Claimant had presented other Products before. She was not aware of any problems between her and the CEO. She had a good working relationship with him.

11. The CEO was Half-French and Half-Lebanese. The Claimant felt she was discriminated against on the basis of her gender and/or race. She was a Woman among Males; an African among French Managers; and 90% of the Departmental Heads were French.

12. The Respondent is the Successor to Kenya Posts and Telecommunications Company Limited. The Claimant was to retire at the age of 60 years. Under her terms and conditions of service she was to attain mandatory retirement age in 2038.

13. She answered the letter requiring her to show cause. She provided documents she had attached during her presentation. All required documents, signed by all Departmental Heads, were availed. She was not aware which document she failed to attach, as alleged in the first accusation contained in the letter to show cause.

14. The second accusation was that she failed to take accountability for Customer Journey. She and her team had given to the Shops, Users' Guide. Some technical issues were outstanding. She had advice from the Technical Department on what needed to be done. The accusation about 'Plug and Play' was baseless. The Claimant had already made presentation on this to the same Board.

15. She was called to appear before the Anti-Corruption Committee after her presentation. She was not told why she was summoned to appear before this Committee. She then received the suspension letter and ultimately, the termination letter.

16. The Respondent's Human Resource Policy required the Respondent to give the Claimant a warning. Warning would emanate from the Line Manager. She deserved to be told what she did wrong. She would then give her explanation, receive formal charges, before being heard by the Disciplinary Committee. She never appeared before a Disciplinary Committee.

17. She has not been able to secure a permanent job after termination. She worked in a small field, where Top Managers of different potential Employers, knew each other.

18. Respondent's annexure. TKL3, is not an official document. The Respondent alleged loss of revenue. The Claimant was not handling the concerned EVDO Product, as of the date of termination. She had been re-deployed in a vertical movement. At the time she handled EVDO, it was performing very well. TKL3 shows losses. Official document on this, could only originate from the Finance Officer. She received commendation letter from the Respondent. This would not have been the case, if she was causing loss of revenue to the Respondent.

19. She was employed by Wananchi Online Limited on a consultancy of 3 months, after termination. Subsequently, she was employed under another consultancy arrangement, by a company in Haiti called Cellulaire d' Haiti. She did not secure regular employment.

20. On cross-examination, the Claimant testified she holds MBA, and B. Comm degrees, in Marketing and Strategy. She, at the time of giving evidence, consulted for a company called Microconcell International France, assisting in retail management.

21. Her contract with the Respondent had a termination clause. She expected to work throughout her lifetime at the Respondent. She had taken a 50% pay cut on joining the Respondent.

22. The e-mail dated 24th January 2011 related to data handover. The Claimant was the Manager in charge of Data Products before this date. The Data she presented in February 2011 was developed under her management. There were issues pending to be sorted out but the Product did not fail. The Product was not running at a loss. She did not delay the Product for 1 year.

23. The CEO informed her she had been fired. There was no evidence she was orally fired on 15th February 2011. She was given the letter to show cause on 16th February 2011. Her explanation was considered. She received the letter of suspension on 25th February 2011.

24. Women formed about 40% of the Staff. The Claimant felt she was fired because she is a Woman. Her feeling was based on the manner she was talked at. If the Product was presented by a Man, perhaps it would have been taken differently. All Top Managers were White. She conceded she had not given evidence of racial discrimination.

25. The Disciplinary Committee comprised 2 French persons and 7 Kenyans. It is not true she failed to appear after being granted the opportunity to do so. She did not get the consultancies immediately after termination. It is true she was unable to secure a permanent job.

26. The Claimant submits she is entitled to:

(a) Loss of Salary, Bonus and Benefits at Kshs.86,870,000

(b) General Damages for Discrimination at Kshs.5,000,000

(c) General Damages for unlawful termination at Kshs.5,000,000

(d) Exemplary and/or Aggravated Damages at Kshs.5,000,000

(e) Cost of the Suit

27. The Respondent states the Claimant was called upon to make a comprehensive T4 presentation to the Board. It was expected she would hand over the Product to the Offer and Services Team. T4 presentation was intended to review Product after it had been launched, focusing on revenue achieved and Customer experience.

28. The Product had not achieved the expected revenues. Shortcomings attributed to the Claimant included:-

- (a) Product was not 'Plug and Play' as had been proposed by the Management in its development.
- (b) The Customer journey and experience was poor with respect to the Product, with an inadequate Users' Guide.
- (c) Friendly User Policy had not been put in place.
- (d) The Claimant delayed internal cabling, and failed in outsourcing of ADSL.

29. These failures amounted to negligence of duty. She was requested to show cause, in a letter dated 16th February 2011. She responded in detail on 18th February 2011. The Disciplinary Committee requested for time to enable the Human Resources Department study the Claimants Response. She was suspended with effect from 25th February 2011.

30. During investigations the Claimant was availed an opportunity to defend herself, but declined.

31. The Disciplinary Committee met on 15th March 2011, found the Claimant's defence unsatisfactory and confirmed the charges against the Claimant were true. Her services were terminated in a letter dated 22nd March 2011 for negligence of duty.

32. The Respondent's position is supported by the Witness Statement of Mr. Fred Gituku, Respondent's Head of Human Resources, attached to the Response as TKL6. The Claim is unmeritorious, the orders sought unjustified, and the Claimant has no reasonable cause of action against the Respondent. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

The court finds:-

33. It is undisputed that: the Claimant was employed by the Respondent with effect from 10th January 2005, in the position of Business Development Executive (Data) earning a salary of Kshs.54,156 per month; she was variously commended, given salary increments and bonuses based on her good performance during her service; she served in several positions, and was the Value Added Services (VAS) Manager. Content and Marketing, as of 22nd March 2011, when the Respondent terminated her services; and her last salary was Kshs.267,500.

34. The questions the Parties wish the Court to answer, in determining the issues in dispute are these:-

- (a) Whether the Claimant left employment through gender and/or racial discrimination.
- (b) Whether the termination decision was justifiable and fair.
- (c) Whether the Claimant merits anticipated salary, bonus and additional benefits, general damages for discrimination, general damages for unlawful termination, exemplary and/or aggravated damages, and costs

35. In Paragraph 7 of the Statement of Claim, the Claimant states gender and/or racial discrimination, and not work performance, was the reason for termination. She undertook to lead evidence to support her assertion.

36. Her evidence was this:-

- (I) The CEO is Half-French, Half-Lebanese.
- (ii) She felt termination was based on gender and racial discrimination.
- (iii) She was a Woman among Males, an African among French Managers.
- (iv) 90% of Heads of Departments were French at the time.

37. Challenged under cross-examination, she explained that:-

- (I) She thought she was sacked because she is a Woman.
- (Iii) She thought so because of the manner she was talked at.
- (iv) If the Product was presented by a Man, may be it would have been treated differently.
- (v) All top Managers were white.
- (vi) She did not present to the Court evidence of racial discrimination.

38. In the ***Industrial Court of Kenya at Nairobi, Cause Number 1831 of 2011 between David Wanjau Muhoro v. OL Pejeta Ranching Limited (2014) e-KLR***, the Court held that in a claim for discrimination, the Claimant must show *prima facie* evidence of discrimination. The Claimant must by preponderance of evidence establish a *prima facie* case of discrimination. Once such case is established, the Respondent must introduce evidence of legitimate nondiscriminatory reasons for its actions. The Court must be vigilant not to conclude too hastily that an Employee has been discriminated against on the ground of race, merely because disparity of treatment coincided with racial disparity (refer also to the South African case ***Raol Investments (pty) Limited t/a Thekwini Toyota v. Mandlala [2008] [L] 267 [SCA]***).

39. The evidence of the Claimant in paragraphs 36 and 37 above, is too tenuous to build a *prima facie* case of gender and/or racial discrimination. The Claimant testified she felt or thought there was discrimination against her. A *prima facie* case must go beyond mere feeling or thought. The Claimant did not for instance mention any Comparators among her Colleagues, who were in similar position to her, and who were treated differently from her. It is not enough that she was a Woman among Men, or an African among French Managers. The Claimant needed to draw the mind of the Court to specific discriminatory acts. She says she thought she was discriminated against because of the manner she was talked at. There was no evidence of the words spoken to her, connoting gender and/or racial discrimination, that would enable the Court call upon the Respondent to explain its position. There was nothing done or said by the Respondent, which suggests the presence of discrimination.

40. The Respondent elicited evidence from the Claimant on cross-examination, that further weakened the Claimant's claim on discrimination. The Women employed by the Respondent comprised about 40% of the total staff. She conceded she presented the Court with no evidence of racial discrimination. There was no pattern or practice of gender and/or racial discrimination, revealed to exist at the Respondent. The Court is satisfied the Claimant was not discriminated against by the Respondent, based on her gender and/or race. ***The claim for General Damages for Discrimination at Kshs.5,000,000 fails.***

41. The ***Court of Appeal of Kenya in Kenya Revenue Authority v. Menginya Salim Murgani (2010) e-KLR, citing Rookes v. Barnard [1964] 1 ALL ER 367***, established that there are only two categories of cases, in which an award of exemplary damages, could serve useful purpose:

- (a) In the case of oppressive, arbitrary or unconstitutional action by the Servants of Government; and
- (b) In the case where the Respondent's conduct is calculated to make a profit for himself, which might well exceed the compensation payable to the Claimant.
42. The Claimant's evidence did not show any of these ingredients, which would warrant her to be paid by the Respondent, exemplary and/or aggravated damages. ***The prayer for exemplary and/or aggravated damages of Kshs.5,000,000 is declined.***
43. Was termination justifiable and fair? Section 43 and 45 of the Employment Act requires the Employer to show valid reason or reasons for termination, while Section 41 demands the Employer observes procedural fairness, in making the decision.
44. Termination occurred on 22nd March 2011.
45. Should the Court find termination was unfair, it is guided in granting remedies to the Claimant, by Section 49 of the Employment Act 2007, and Sections 12 and 15 of the Labour Institutions Act 2007 in force at the time of termination.
46. The Respondent informed the Claimant in the letter dated 16th February 2011, that the Claimant had failed to discharge her duties to the required standards. This failure resulted in poor delivery of services to the Customers.
47. Specifically the Respondent charged that during the T3 presentation of outsourcing and internal cabling of ADSL, the Claimant did not provide all the pre-requisite documents for the product launch.
48. The second accusation was that the Claimant, as the Marketing Manager responsible for Data Services, failed to take accountability for the poor Customer journey and experience in respect of EVDO product. She lastly was said to have failed to review the Product 3 months after relaunch. These failures, according to the Respondent, amounted to gross misconduct, for which the Respondent contemplated disciplinary action against the Claimant.
49. She was asked to submit her response within 48 hours.
50. She replied on 18th February 2011. On the first allegation, the Claimant answered that she gave the pre-launch checklist, which was the main pre-requisite for any T3. It was signed and approved by all stakeholders. Other documents were produced during the T3 presentation. Where omitted, the Claimant gave her explanation for the omission.
51. On Customer journey, the Claimant outlined steps she had put in place, to ensure good Customer journey. A detailed Users' Guide was in place. There were issues pending from the technical end. The Claimant had handed over Data Portfolio, and Customer experience journey reviewed by Marketing Manager – Offers and Services, from 4th February 2011.
52. Her response to the EVDO service was that it was 'Plug and Play' functionality. On installation, the software was usually configured to a specific port. The TTM review of the service was to be done within 3 months from the date of the Launch. This was to be done on 8th February 2011 by the Product Manager – Data. The Claimant was requested by Head of Marketing and Strategy to do the presentation because of her experience of the Product. She did the T4 presentation, with action plans supposed to be taken by the Marketing Manager – Offers and Services.
53. The Claimant concluded her Response with the observation that: allegations of gross negligence were unfounded, baseless and ill-motivated; the allegations flew in the face of her 6 year record; the allegations were malicious and false; and the letter to show cause ought to have been withdrawn from her file.

54. The Respondent wrote to the Claimant the letter dated 25th February 2011, suspending the Claimant, with the advice that *“during this time, Management will consider the issues raised in your defence document”*
55. The Respondent then issued the Claimant the termination letter dated 22nd March 2011. Her defence was found to be unsatisfactory. She was found to have wilfully neglected to take action to correct poor Customer journey and experience; failed to implement outsourcing of ADSL and delayed internal cabling; and failed to put in place friendly user policy for ADSL. The Respondent stated it invited the Claimant to make a presentation in her defence, which opportunity she rejected. She was found guilty of gross negligence, and termination decision made, effective from 22nd March 2011.
56. There were 2 sets of minutes of Disciplinary Committee Meetings, exhibited by the Respondent as TKL4. The first was on 25th February 2011. This meeting determined that in light of the Claimant's huge defence document, her case be deferred pending thorough analysis of the document by the Human Resource, and the Claimant's, Departments.
57. The second meeting of the Disciplinary Committee is captured in the minutes marked as TKL5 in the Respondent's Bundle. The meeting was held on 15th March 2011. There are no inputs of the Human Resource, and the Claimant's Departments, captured in the minutes. It is stated *“charges against the Officer were confirmed to have been correct and decision to terminate upheld”*
58. The Claimant testified she did not fail to appear before the Disciplinary Committee on invitation. The Statement of Mr. Fred Gituku clarifies that the Claimant failed to appear before the Investigation Department. There does not seem to have been any invitation to the Claimant to appear before the Disciplinary Committees, in the minutes supplied by the Respondent.
59. There was no evidence apparent on the face of the minutes, to explain why *“the charges against the Officer were confirmed to have been correct and decision to terminate upheld.”*
60. The Disciplinary Committee, on the 15th March 2011, did not refer to the analysis carried out by the Human Resource, and the Claimant's, Departments, in understanding her huge defence document. There was no specific rebuttal of the explanations given by the Claimant. There was no Investigation Report exhibited before the Disciplinary Committee.
61. In the view of this Court the failure by the Respondent to discount the explanation given by the Claimant, on the specific charges made by the Respondent against the Claimant, left the allegations contained in the letter to show cause just that: mere allegations. There was no analysis carried out by the Respondent to give the reasons stated on the suspension letter, and subsequently in the letter of termination, the semblance of fair and valid reasons.
62. The meeting of the Disciplinary Committee of 15th March 2011 referred to *'decision to terminate upheld.'* When was this decision made, so as to be upheld on 15th March 2011? It would seem the Claimant had been pre-judged.
63. The Court is satisfied that the Respondent did not discharge its obligation under Section 43, 45 and 47(5) of the Employment Act 2007.
64. Similarly, the Respondent did not accord the Claimant an opportunity to be heard before the Disciplinary Committee. It was not relevant that she was invited by the Investigator to appear before him/her, and failed to do so. Section 41 of the Employment Act 2007 requires the Employee to be granted an opportunity to be heard before the Disciplinary Committee, in the company of a Colleague of her choice or a Shop Floor Trade Union Representative if unionized. The minutes of the Disciplinary Committee proceedings portray a fundamental departure from this statutory minimum disciplinary standard.
65. ***The Claimant is entitled to compensation for unfair termination, which the Court allows at the***

equivalent of her 12 months' gross salary, calculated at Kshs.267,500 x 12 = Kshs.3,210,000

66. The Claimant prayed for General Damages of Kshs.5,000,000 for unlawful termination. She did not justify this assessment, in a labour market where compensatory awards are capped at a maximum of the equivalent of an employee's 1 year gross monthly salary, for unfair termination.

67. The Respondent did not call evidence in this trial, and seems to have had no justification in ending the Claimant's service. Procedural fairness was absent from the process, and the Claimant's career was interrupted, through no fault of her own. Termination would not have been necessary, and this litigation would not have been necessary, if the Respondent paid heed to the Laws governing termination of employment.

68. Guided by Section 12(8) (now repealed) of the Labour Institutions Act 2007, and Rule 28 of the Industrial Court (Procedure) Rules 2010, the Court grants costs of the Claim to the Claimant. There shall be no order on interest.

69. The claim for loss of salary, bonus and additional benefits is not well founded in law and fact. The Claimant's career was interrupted, but she has shown herself to be a highly qualified and resilient person, securing consultancies home and abroad. She has moved on, and to grant her salaries she would have earned for the rest of her life, while she is not rendering any labour to the Respondent, would be against the principle of a **fair go all round**. The 12 month salary in compensation has been granted, upon taking into account among other things, under Section 49(4) of the Employment Act 2007, the reasonable expectation of the Employee as to the length of time for which her employment might have continued but for termination.

70. The prayer for anticipated bonus is misplaced. Bonus is a variable incentive pay, which is based on performance. Even if it was invariable, the Claimant would not be entitled to receive un-earned bonuses. This is a discretionary pay, meant to incentivize the Employee and cannot be demanded as a matter of right. A demand for bonus pay must be preceded by evidence of a Bonus Plan, the contract providing for bonus pay, and evidence of Good Performance either by the Employee or generally, by the Employer. The future performance of the Respondent is unknown, the anticipated performance of the Claimant is unknown, and apportionment of bonus payment would be difficult to ascertain.

71. The Claim for anticipated salary, bonus, and benefits is declined.

In sum, IT IS ORDERED:-

(a) The Claim for loss of salary, loss of bonus and additional benefits; the Claim for general damages for discrimination; and the Claim for exemplary and/or aggravated damages are rejected.

(b) Termination of the Claimant's contract of employment was unfair, both in substance and procedure.

(c) The Respondent shall pay to the Claimant 12 months' gross salary in compensation, calculated at Kshs.3,210,000.

(d) The said sum be paid within 30 days of the delivery of this Award, and subject to PAYE tax deduction.

(e) Costs to the Claimant

(f) No order on the interest.

Dated and Signed at Mombasa this 3rd day of December 2014.

James Rika

Judge

Dated, Signed and delivered at Nairobi this 16th day of December 2014.

Nzioki wa Makau

Judge