REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2049 of 2011

AGNES YAHUMA DIGO.....CLAIMANT

VS

PJ PETROLEUM EQUIPMENT LIMITED.....RESPONDENT

AWARD

Introduction

By a Statement of Claim dated 18th November and filed in Court on 5th December 2011, the Claimant sued the Respondent for unfair and unlawful termination of employment as well as failure to pay terminal benefits.

The Respondent filed its Memorandum of Defence on 29th February 2012 and the matter was heard on 14th and 29th November 2012. Mr. Nyaribo instructed by Muthaura, Mugambi, Ayugi & Njonjo Advocates apperared for the Claimant while Mr. Musyoka instructed by Onesmus Githinji & Co. Advocates appeared for the Respondent. The Claimant and the Respondent's witness, Peter Mugambi gave sworn evidence and the Advocates for both parties filed written submissions.

According to the Claimant, she was headhunted by the Respondent for the position of Supply and Trading Manager, Petroleum Division, sometimes in early April 2011. She was then interviewed by the Respondent's General Manager on 7th April 2011. At the time of her interview, the Claimant was on maternity leave from her previous employer. According to the Claimant, it was agreed between the Respondent and herself that she would be granted one hour in the morning and one hour in the afternoon to nurse her baby.

A letter of appointment was executed by the parties on 9th May 2011 by which the Claimant was employed in the position of Supply and Trading Manager, Petroleum Division at a gross monthly salary of Kshs. 300,000 (the letter of appointment is marked Appendix 1 in the Claimant's documents).

The Claimant's employment was subject to a three months' probation period and her job description was to be discussed with her as part of her comprehensive orientation programme. The decision on confirmation of the Claimant's appointment was to be communicated by the Respondent not later than seven days before expiry of the probation period. This, according to the Claimant, was never done.

The Claimant worked for the Respondent until 1st September 2011, when she was summarily dismissed. It was the Claimant's case that on the said date, she was summoned by the Respondent's Group Managing Director, Peter Mugambi to a meeting where the issues of the Claimant's failure to keep office hours and to bring in fuel supply business to the Company were raised. The Claimant stated that none of these issues had been raised with her previously.

In response, the Claimant notified Peter Mugambi that she was a nursing mother and that she had agreed with the General Manager, Evans Obuya who was her immediate supervisor right at the interview stage that she could take one hour in the morning and one hour in the afternoon to nurse her baby. No questions on this arrangement had arisen during the entire period of the Claimant's employment with the Respondent.

It was the Claimant's case that the failure to engage sufficient number of fuel suppliers was due to the Respondent's failure to secure sufficient and acceptable Letters of Credit coupled with default in making payments to suppliers. The Claimant had raised these issues with the General Manager and the Managing Director who had indicated that they were addressing the issues (letters from suppliers and e mail correspondence between the Claimant and the Respondent are marked Appendix 5 in the Claimant's documents).

Upon giving her explanation to the Respondent's Managing Director, the Claimant was immediately issued with a letter of termination of employment dated 30th August 2011, two days before the meeting between the Claimant and the Respondent's Managing Director. The letter gave the reasons for the Claimant's termination as the Claimant's failure to keep company working hours and failure to bring fuel supply business to the Respondent.

The termination letter went on to state that the position held by the Claimant had been scrapped (termination letter is marked Appendix 6 in the Claimant's documents). The Claimant testified that on 30th August 2011 between 2.00 and 4.00 pm, the time when the Managing Director found her absent from her office, she had gone to see her doctor for medical attention, a fact that was within the knowledge of the Respondent's General Manager. The Claimant maintained that she was not given an opportunity to respond to the allegations against her. Further, she was not paid her terminal dues following the termination of her employment.

The Claimant therefore claimed the following:

a) 12 months' salary as compensation for unfair termination.....Kshs. 3,600,000

b) Certificate of service

c) Prorata leave

d) Costs of the suit

e) Any other relief the Court may deem just to grant

In the written submissions filed by Counsel for the Claimant, the claim for unremitted PAYE, NSSF and NHIF deductions was abondoned. A claim for house allowance, though not specifically pleaded was alluded to in the course of the proceedings.

The Respondent's Case

In its Memorandum of Defence, the Respondent denied that the Claimant was headhunted. Rather, the Respondent had sent word within the industry for potential candidates for the position of Supply and Trading Manager. The Claimant then expressed her interest in the job by taking her curriculum vitae to the Respondent.

The Claimant was subsequently employed by the Respondent effective 12th May 2011, following an interview by the General Manager on behalf of the Managing Director. The General Manager did not report to the Managing Director that the Claimant had asked for flexible working hours to enable her nurse her baby. Such a request would have required the personal written approval of the Managing Director since it would have serious operational implications. Peter Mugambi, the Respondent's Managing Director testified that if this arrangement had been brought to his attention, he would not have

employed the Claimant since the position she held was crucial and the Company could not afford to allow her to be away for 2 working hours every day.

The Claimant's letter of appointment expressly provided that the Claimant's working hours would be 8.00am-1.00pm and 2.00pm-5.00pm from Monday to Friday and 8.00am-12.00pm on Saturday. The Claimant accepted the letter of appointment and did not seek any amendment. The arrangement between her and the General Manager for flexible working hours was not documented.

The Respondent contended that the Claimant was answerable to both the General Manager and the Managing Director. The Claimant's main duty was to source for petroleum suppliers and agents worldwide, which duty she failed to discharge. According to the Respondent, the Claimant's performance was unsatisfactory and consequently, she was not confirmed. The Respondent did not notify the Claimant of its decision not to confirm her. Peter Mugambi admitted in cross examination that he had on 6th August 2011, sent an electronic mail to the Claimant and her colleague Angela in which he had recognised the Claimant's efforts towards securing products while acknowledging that the failure was due to factors beyond the Claimant's control.

In response to the Claimant's allegation that her failure to secure fuel suppliers was actuated by the Respondent's lack of the required financial resources, the Respondent produced letters of offer from Equity Bank and CfC Stanbic Bank on account of lines of credit in favour of the Respondent. Peter Mugambi told the Court that the Claimant never negotiated for any fuel supply deal that the Respondent was unable to finance. With regard to the letters on default of payment to suppliers by the Respondent, the witness testified that all the letters related to local products and not overseas suppliers. The Claimant could not therefore rely on lack of funds as a justification for her failure to perform her duties.

On the issue of the Claimant's working hours, Peter Mugambi testified that he learnt that the Claimant was reporting for duty late when he looked for her. He therefore wrote an electronic mail to the General Manager on 29th July 2011 in which he raised the issue of late reporting by the General Manager and his staff. There was no response to this mail and there was no improvement.

On 30th August 2011, Peter Mugambi went to the Petroleum Division at 2.00 pm to find out what the problem was. The Claimant was away and the General Manager had no explanation for her absence. By 5.00 pm the Claimant had not reported and the Managing Director decided to dismiss her. On 1st September 2011, the Managing Director met with the Claimant to communicate to the Claimant the Respondent's decision to dismiss her. It was the Respondent's case that the Petroleum Division was closed because the professional staff employed to run it, inclusive of the Claimant, had failed to do their work.

Findings and Determination

The first question for determination in this case is whether the Claimant was on probation when her employment was terminated. It was the Respondent's case that due to the Claimant's poor performance she was not confirmed in her appointment. Clause 1(e) of the Claimant's letter of appointment provided that:

Your employment shall be subject to probationary period of three (3) months. On the satisfactory completion of the probationary period you will be confirmed in employment. The Company's decision will be communicated not later than seven days before the end of the probation period.

The Claimant's probation period would have come to an end on 12th August 2011 and in the express terms of the letter of appointment, the Claimant had a legitimate expectation that the Company's decision would be communicated to her at least seven days before 12th August 2011. This was not done and the Claimant continued working.

Since the Respondent failed to adhere to the express terms of the letter of appointment issued by it to the Claimant the same Respondent cannot come to Court and say that in fact the Claimant was not confirmed. The Respondent is estopped from opening up the issue of the Claimant's probation at this stage. I

therefore find that the Claimant was in fact confirmed upon lapse of her probation period on 12th August 2011.

Having settled the issue of the status of the Claimant's employment at the time of her termination I will now deal with the question whether the termination was undertaken within the law. Closely related to the Claimant's termination was the issue of her working hours. The Claimant told the Court that at her recruitment she requested and was granted flexible working hours by the Respondent's General Manager. According to this arrangement, the Claimant would report for work at 9.00 am in the morning and 3.00 pm in the afternoon in order to allow her time to nurse her baby. This arrangement was not documented and the Respondent's Managing Director, Peter Mugambi testified that he was not aware of such an arrangement.

Clause 2 of the Claimant's letter of appointment provided that:

Office hours will be 8.00 am-1.00 pm and 2.00 pm -5.00 pm Monday to Friday and 8.00 am-12.00 pm on Saturday. Within this general framework, some adjustment is at times made to comply with client's working hours. Overtime worked will not be remunerated.

The import of this provision is that any adjustment in working hours would be towards increasing rather than reducing them. However, the Claimant consistently maintained that there was a special arrangement between her and the Respondent's General Manager allowing her two working hours every day for the purpose of nursing her baby.

Clause 12 of the Claimant's letter of appointment provided as follows:

This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements, written or oral between the parties hereto. No change, modification, addition or termination of this agreement or any part thereof shall be valid unless in writing and signed by the parties hereto.

The letter of appointment was signed by Evans Obuya, the General Manager whom the Claimant claimed had acceded to her request for flexible working hours. The notion of flexible working hours (popularly known as flexi hours) is not strange in employment practice. However, organizations which practice flexi hours usually have a guiding policy on the matter. Flexi hours is not a matter to be agreed upon between an employee and their supervisor. It is a policy matter whose perimeters are to be set in some form of policy document.

At any rate even if it were true that there was indeed an arrangement for flexi hours between the Claimant and the Respondent's General Manager, the said arrangement was clearly superseded by the written letter of offer in line with Clause 12 cited above. I therefore find that there was no agreement for flexi hours between the Claimant and the Respondent and that consequently the Claimant's absence from work for two hours every day was unathorised and was therefore an act of misconduct on the Claimant's part. In similar vein, absenteeism from work on medical grounds ought to be documented in good time. The medical certificate issued by Dr. Mucheru-Wang'ombe dated 12th October 2011 apparently to confirm the Claimant's whereabouts on 30th August 2011 between 2 pm and 4 pm was obviously obtained for the eyes of the Court and its evidential value is therefore compromised.

I will now deal with the issue of the Claimant's performance prior to her termination. The Claimant told the Court that she had done her best within a difficult background of the Respondent's dented image within the industry arising from failure to meet financial obligations to suppliers. The Respondent on the other hand maintained that the Claimant alongside other professional staff in the Petroleum Division had contributed to the Respondent's woes. Specifically, by failing to keep working hours the Claimant had rendered herself incapable of selling off existing stock and/or accessing fresh supplies.

Staff performance management is crucial for organizational success. In this case there was no evidence that there was any performance management system in place. Indeed the Respondent's witness, Peter

Mugambi admitted that the Claimant had not been given any targets. Even worse, the Claimant had no written job description.

In the case of **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010)** the Court stated thus:

The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.

There was no evidence of any appraisal of the Claimant's performance at any stage. An employer who fails to manage the performance of their staff lacks the moral authority to tell staff that they have underperformed. On this basis, I have rejected the Respondent's claim that the Claimant's performance was poor. Even if both the Claimant and the Respondent were to blame for the eventual closure of the Respondent's Petroleum Division, the bigger blame lay with the Respondent. That being the case, the only ground on which the Claimant could be indicted was her failure to keep working hours for which I have already found her culpable.

The effect of my findings thus far is that the Respondent did indeed have a fair reason to terminate the Claimant's employment. Put another way, there was substantive justification. The question which remains is whether the procedure adopted by the Respondent in terminating the Claimant's employment was fair. Was there procedural fairness?

The Employment Act, 2007 in Section 41 sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(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 the 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***

In the case of **Anne Atieno Sadieda Vs Lavage Laundrette & Drycleaners (2011 eKLR)** Rika J held that:

> ***Substantive justification does not take away the duty by employers to avail***
>
> ***procedural fairness to affected employees***

It is not in dispute that the procedure established in law was not followed in the case at hand. On this score therefore, I find that the termination of the Claimant's employment was unfair for want of fair procedure.

Before addressing the issue of remedies, I need to deal with a document filed by the Claimant on 22nd November 2011, after she had closed her case. I dealt with the unprocedural manner in which both parties introduced further documents in the course of the proceedings and no party has been penalised for this. However, the document submitted by the Claimant, being a confidential letter dated 6th February 2012, from the Permanent Secretary, Ministry of Energy to the Director General, Energy Regulatory Commission asking for cancellation of the Respondent's licence, among others caught the attention of the Court.

There was no explanation as to how the Claimant accessed a confidential letter on the Respondent written after she had left the Respondent's employment. Parties must come to equity with clean hands and in my view the production of this letter has soiled the Claimant's hands. As a result and in spite of my finding that procedural fairness was lacking in the termination of the Claimant's employment, I decline to award any damages for unfair termination. I however convert the Claimant's termination from a summary dismissal to a normal termination and award her one month's salary in lieu of notice.

I now turn to the claim for house allowance. Clause 3 of the Claimant's letter of appointment gave her gross monthly salary as Kshs. 300,000. The normal meaning of gross salary as opposed to basic salary includes house allowance and other allowances payable on a monthly basis. The claim for house allowance is therefore misplaced and is hereby dismissed. Since the Claimant had worked for more than two months, she is entitled to prorata leave at the rate of 1.75 days for every completed month of service in accordance with Section 28(1)(b) of the Employment Act.

The net effect of this award is as follows:

a) Kshs, 300,000 being one months pay in lieu of notice

b) 7 days leave

The Respondent is directed to issue the Claimant with a certificate of service in the format set out in Section 51(2) of the Employment Act.

Each party will bear their own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF FEBRUARY 2013

LINNET NDOLO
JUDGE

In the Presence of:
.....Claimant

.....Respondent