



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1199 of 2012

ROSEBELL WAMBUI MUTHEECLAIMANT

VERSUS

FREIGHT IN TIME LTD.....RESPONDENT

Rika J

Cc. Elizabeth Anyango

Mr. Ndumu Kimani instructed by Ndumu Kimani & Company Advocates for the Claimant

Mr. Ondiegi for the Respondent.

ISSUE IN DISPUTE: UNFAIR TERMINATION

AWARD

1. Rosebell Wambui Muthee filed her statement of claim on 20th July 2011. The Respondent company Freight In Time Limited, filed its statement of reply on 5th October 2011. The Claimant testified and closed her case on 9th February 2012. The Respondent called Jignesh Ghelabhai Desai, Group Financial Controller, who testified on 28th March 2012 when the proceedings came to a close.
2. The Claimant filed her closing submissions on 31st May 2012, while the Respondent did so on 4th June 2012. The dispute was last mentioned in Court on 26th October 2012, when parties were advised the Award would be delivered on notice.

Claimant's Case

3. Rosebell testified that she was employed by the Respondent as an Accountant, in a written contract of employment dated 12th August 2008. The Respondent is a Cargo Transport Company. She was posted to Rwanda, and earned a monthly net salary of Kshs.50,000. Her gross monthly salary was Kshs.71,408.
4. The Respondent is based in Nairobi, with branches in the East African Region. She reported to the Rwanda Branch on 15th August 2008. The contract of employment stipulated it was subject to the Kenya

Employment Act.

5. She was required to have Rwandese resident visa and work permit. Jignesh Desai, the Group Financial Controller wrote to the Director of Immigration Services in Rwanda, identifying the Claimant as an employee of Freight In Time Kenya Limited, and asking the Director to accord the Claimant all the necessary support. It was incorrect for the Respondent to deny that Rosebell was its employee. She told the Court she was the key person in Rwanda. She did not know of another entity called Freight In Time (FIT) Rwanda Limited.
6. On 11th January 2011, the Claimant applied for maternity leave. By 1st March 2011, she was almost due. She applied for maternity leave on 1st March 2011. She made the application through an electronic mail to the management in Nairobi. On the same date, the Respondent replied in a letter notifying the Claimant of termination of her contract of employment. The reason given in the notice of termination signed by Jignesh Desai, was that the Respondent was reorganizing its business in Rwanda. The entire Branch would be reconstituted. She was required to hand over office by 20th March 2011. The contract provided for not less than two months' notice from either party. She was compelled to leave Rwanda one week before she was due for delivery. As a result she miscarried.
7. Cross-examined by Mr. Ondiegi, she stated that she was employed by Freight In Time Limited. The letter of employment states, she was employed by FIT Rwanda Limited. She was employed on 12th August 2008. There was no pay roll number. She told the Court that she is familiar with accounting. VAT was paid in Rwanda by FIT Rwanda Limited. The Rwandese Company did not operate on its own. She was not paid terminal benefits. She left Kigali Rwanda on 9th March 2011. She copied the electronic mails to her own email account because she needed to have evidence in the contemplated Court action. The letter of employment is dated 12th August 2008. She started work on 15th August 2008. She did not have any visa or work permit. Her employer advised her to return to Kenya every three months. She at one time was arrested by the Immigration Authorities in Rwanda. It was after the arrest that the Respondent wrote the letter dated 1st February 2010, asking Immigration Authorities in Rwanda to accord the Claimant all the requisite assistance. She acquired Rwandese resident visa in September 2010. All operations were managed from Kenya. VAT certificate was in the name of FIT Rwanda. Termination followed her application to go on maternity leave. She testified that she had not witnessed any other employee's contract terminated on account of pregnancy.
8. Rosebell considered her contract to have been unfairly terminated after she had expressed her wish to proceed on maternity leave. She prays the Court to grant her pay in lieu of notice at Kshs.100,000; annual leave pay at Kshs.50,000; 12 months' gross salary in compensation for unfair termination at Kshs.856,896; costs; and interest.

Respondent's case

9. Jignesh testified that the Claimant worked for the FIT Rwanda Limited. The company is registered in Rwanda. The Claimant's contract was terminated in 2011. A strategic decision was taken by the company to close the Rwanda office. Jignesh went down to Kigali and consulted with Rosebell. Her terminal benefits were computed. She rejected what was computed. Jignesh conceded he wrote the letter to Rwandese Immigration Authorities after changes in that country's laws, requiring foreigners to have resident permit. Termination was not on account of the Claimant's pregnancy. Jignesh told the Court his company employs 160 employees; some have been pregnant for consecutive years. No-one has ever been victimized on account of pregnancy.
10. On cross-examination, Jignesh testified that he wrote the letter dated 1st February 2010 to the Immigration Authorities in Rwanda. He wrote truthfully. The letter says Rosebell was an employee of Freight In Time Limited, Nairobi. It says she was seconded to Kigali, Rwanda. It was written by Freight In Time, and signed by Jignesh. Freight in Time Rwanda Limited, is part of the Group. The employment letter was issued by Freight In Time Limited, Kenya. It does not have the name Rwanda. The contract

refers to the Kenyan Employment Act. Jignesh told the Court it was only the gross misconduct clause, that adopted the Kenya Law. Maternity leave application was not addressed to Jignesh. Termination was in March 2011. It was not after Jignesh received the Claimant's electronic mails. The letters were addressed to the Country Manager in Rwanda. The case should be heard in Rwanda. The witness expected Rosebell to pick her dues from Rwanda. Re-directed by Mr. Ondiegi, Jignesh testified that the letter of employment refers to Freight In Time Rwanda. Salary was payable in the Rwandese currency. Tax records were listed in Rwanda. The Respondent asked the Court to dismiss the claim.

Submissions

11. The Claimant submitted she was an employee of the Respondent not of its Rwandan Affiliate. She was in Rwanda, and it was natural to receive her salary in Rwandese Francs. Her contract was governed by the Kenyan Law. Jignesh received copies of the Claimant's application for maternity leave. She clearly demonstrated that she was unfairly terminated, is entitled to annual leave days, and two months' salary in lieu of notice.

The Respondent replied that termination was not based on the Claimant's pregnancy. She had given the Respondent information about her pregnancy much earlier than 1st March 2010. She did not file any report with the Rwandese Authorities or the Kenya Ministry of Labour under Section 47 (1) of the Employment Act 2007. She was given 1 month notice of termination. She cannot claim 2 months' salary in lieu of notice. She has never made any efforts to claim her terminal benefits. The Respondent relied on the decisions of *Cliff S. M. Lirovars V. Owners of Motor Vehicle "Dhiran" (1995) e-KLR and Barclays Bank of Kenya Limited V. Joseph Mwaura Njau (2006) eKLR* both from the Court of Appeal of Kenya, where it was held that damages for unlawful dismissal, are hinged on the notice period. The claim for 12 months' salary in compensation is grossly exaggerated.

The Court Finds and Awards:-

12. Rosebell was employed by Freight In Time Limited, Kenya. She was designated as the Accountant, and posted to Kigali in Rwanda on 15th August 2008. The Respondent asked the Court to find that the Claimant was not its employee and that she was an employee of a separate entity called Freight In Time (FIT) Rwanda Limited. In the evidence of Jignesh Desai, the Claimant should have pursued her claim in Rwanda, against the Rwandese outfit.

13. The Court does not accept this position. Freight In Time Kenya Limited is the parent company to the Rwandese Company. It controlled FIT Rwanda Limited. Rosebell reported to the Group Financial Controller. When her contract of employment was terminated, she was advised the Rwandese outfit was being re-organized. It was to be reconstituted. The Claimant was employed from Nairobi. She is a Kenyan and so is the Respondent Group Financial Controller who supervised her. The contract of employment referred to the application of the Kenyan Employment Law in regulation of summary dismissal. There is no suggestion that the Rwandese employment law could be invoked in regulation of the other aspects of the contract. The Rwandese Company was controlled from Nairobi.

14. The Court finds the connecting factors preponderantly favour the Kenyan Courts as the proper place for trial. The two companies may be regarded as a single entity. The Court is entitled to disregard corporate separation, and exercise a prescriptive jurisdiction. There are sufficient factors connecting the parties to Kenya. The interest of the parties is best served by the Kenyan Jurisdiction. Both of the principal witnesses who gave evidence are resident in Kenya.

15. Globalization enables companies to do business in multiple jurisdictions. In redressing employment wrongs occurring in multiple jurisdictions, Courts are entitled to disregard corporate separation. The multiple layers of insulation created by businesses should not be allowed to disable enforcement of employment rights across borders. Freight In Time Kenya Limited, and Freight In Time Rwanda Limited are economically integrated and employment liability attaches to the enterprise. The Court is convinced the Claimant brought the proper Respondent to Court, and the Industrial Court of Kenya, is the proper forum for the trial.

16. Section 29 of the Employment Act 2007 grants female employees three months of maternity leave with full pay. This is in addition to any period of annual leave or sick leave as the case may be. The employee is required to give not less than 7 days' notice to the employer. If the employer requires, the employee shall avail a medical certificate before leave can be approved. Pregnant employees are not to be denied maternity leave, or delayed in taking such Leave.

17. There are electronic mails exchanged between the Claimant and the Respondent, indicating she had wished to proceed on maternity leave as early as January 2011. For some undisclosed reasons, this was deferred to 1st March 2011. She wrote to the Respondent, re-applying to take leave effective from 1st April 2011. The Respondent did not write back to say anything of the maternity leave. The Group Finance Controller wrote back on 1st March 2011, terminating the Claimant's contract of employment, on the basis that the Respondent was re-organizing its business in Kigali Rwanda. Rosebell believes termination was on the ground of her pregnancy, and she was discriminated against.

18. There was no notice given by the Respondent to the Claimant of its intention to close down Rwanda in re-organization. There was no sufficient notice of termination, stipulated at two months' in the contract of employment. A company that is restructuring does not just wake up in the morning and terminate contracts of serving employees. This Court has held in many decisions that employees are entitled to notification of redundancy; consultation; fair selection criteria; and proper notice of termination once selected. An employee should not be selected for other hidden reasons or reasons, otherwise the redundancy decision becomes a colourable exercise.

19. It was not reasonable of the Respondent to terminate the Claimant's contract, on the same day she renewed her application for maternity leave. She was compelled to travel a week before the delivery of her baby. She lost the baby. She had applied for maternity leave earlier in January 2011. There was a delay in responding to her notice to proceed on maternity leave. When Jignesh Desai replied on 1st March 2011, the same day the Claimant renewed her maternity application, it was to terminate the Claimant's contract. She travelled back to Kenya on short notice, and lost her baby. The circumstances of termination persuade the Court to uphold the evidence of the Claimant that she lost her job, on account of pregnancy.

20. Section 5(3) of the Employment Act 2007 prohibits direct or indirect discrimination of employees by employers on among other grounds, pregnancy. Female employee's pregnancy, or any reason connected with her pregnancy does not constitute fair reason for dismissal, or for the imposition of a disciplinary penalty under section 46 of the Act. The Constitution of Kenya outlaws direct or indirect discrimination based on pregnancy, under Article 27(4). The right to have a family is similarly protected under Article 45 of the Constitution. The Kenyan Law recognizes the need to have family friendly workplaces. The conduct of the Respondent in its treatment of the Claimant violated these protections.

21. The Court was not persuaded by the Respondent that termination was fair, and based on valid reason or reasons, as required under sections 43 and 45 of the Employment Act 2007. The procedure and substantive justification were most wanting. *The Claimant is entitled to compensation, which the Court Awards at 12 months' gross salary as prayed, at Kshs.856,896.* Her contract provided for termination through a written notice of two months, or two months' salary in lieu of notice. The Claimant was given 1 month notice of termination, after she had renewed her application for maternity leave. She prayed for 2 months' salary in lieu of notice. *The Court Awards 1 month basic salary at Kshs.50,000.* Leave records are employment records, which by Law, are held by employers. The employee testified she is owed 21 days of annual leave. It was for the Respondent to avail the leave records to the Court, to show the Claimant had taken her annual leave, or sold her days to the Respondent. On a balance of probability, the Court finds the Claimant is entitled to the prayer for leave. *She is Awarded 1 month basic salary at Kshs.50,000 in annual leave.* The Court of Appeal decisions relied on by the Respondent state the law on unlawful termination in the 1990s. The concept of unfair termination had not been introduced into the employment relationships in Kenya, at the time. Employment was at-the-will of the employer. Although the Industrial Court recognized the concept of unfair termination, Civil Courts upheld the position stated in these decisions of the 1990s. The Employment Act 2007 has altered the position. Compensation is not pegged to notice pay. In sum, the Court Orders:-

- (a) Termination of the Claimant's contract of employment was unfair;**
- (b) The Respondent shall pay to the Claimant a total of Kshs.956,896 in compensation and terminal benefits, within 30 days of delivery of the Award; and**
- (c) Costs to the Claimant.**

Dated and delivered at Nairobi this 8th day of February 2013

**James Rika
Judge**