



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 20 of 2013

EUNICE MWANYALO

CLAIMANT

v

THE CHAIRMAN, KENYA TRANSPORT ASSOCIATION

RESPONDENT

JUDGMENT

1. Eunice Mwanyalo (the Claimant) filed a Memorandum of Claim on 15 October 2010 against The Chairman, Kenya Transport Association (the Respondent) and the issue in dispute was stated as *wrongful termination of Claimant from her employment by the Respondent*. The Respondent filed its Response on 30 November 2010.

2. It appears from the record that the Cause proceeded ex parte in the absence of the Respondent who later on sought and got orders that the ex parte proceedings taken by Justice Kosgey (as he then was) be set aside. The proceedings were set aside and I heard the Cause afresh on 29 April 2013. Each party called one witness.

Case for Claimant

3. The Claimant testified that she was employed by the Respondent by letter dated 19 November 2008 as an Executive Officer at a salary of Kshs 66000/- and that previously she had been employed as a receptionist in 2002 by the Respondent. She also testified that vide letter dated 1 September 2010 the Respondent terminated her services with a promise to pay one month salary in lieu of notice and six accrued leave days.

4. Prior to the termination, the Respondent had entered into another employment contract with the Claimant through a letter dated 7 May 2010 in which her remuneration had been set at US \$ 2000 per month though she was being paid in Kenya shillings.

5. Regarding her termination, it was the case of the Claimant that on 1 September 2010, three officials of the Respondent came to the office and asked her to resign but she did not accept the request as a result of which the officials retreated and caused the termination letter to be written to her.

6. As to the reason given for the termination, the Claimant stated that the letter made reference to paragraph 11 of her contract dated 7 May 2010. The letter also made reference to her unsatisfactory performance. She stated that the termination was wrongful and that her life had not been easy since then.

7. She further testified that she was never issued with a warning letter.

8. On cross examination, the Claimant admitted that the termination letter stated she would be paid one month salary in lieu of notice, that the Respondent was registered under the Societies Act during her employment and that she was a member of the National Social Security Fund.

9. She further stated that after her termination she was employed one month later by a company called NAVISAT TELEMATICS and that this company had been contracted by the Kenya Revenue Authority to introduce an electronic cargo tracking system. The Claimant denied that she had arranged a sensitization workshop for the Respondent's members with this company.

Case for the Respondent

10. The Respondent called one Paul Kirwa Maiyo, Chairman of Kenya Transporters Association Ltd, who confirmed that indeed the Respondent terminated the services of the Claimant and the reasons were conflict of interest and incompetence based on clause 11 of the contract letter.

11. As far as the conflict of interest was concerned, the witness stated that its membership was opposed to the introduction of the electronic cargo tracking system and that the Claimant was assisting NAVISAT TELEMATICS to reach out to its members despite the fact that the Respondent had secured a court order to stop implementation of the system.

12. Regarding the incompetence of the Claimant, it was the case of the Respondent that the Claimant had simply risen through the ranks from being a receptionist to Executive Officer and she could not cope with the qualifications and demands of the office due to her background and that eventually an advertisement went out and the Claimant was replaced by someone with a Higher Diploma.

13. The witness further testified that the Claimant had failed to hand over properly and had not gone to collect her dues.

14. On cross examination the witness stated that Kenya Transporters Association Ltd was formed after the filing of the suit and that its mandate was broader than that of the Respondent.

15. The witness also stated that the Respondent did not carry out any formal staff appraisals, issue any warning letters and that the letter of termination did not refer to conflict of interest and that the termination was based on the contract of service and that the leave records produced were a complete record of the Claimant's leave.

16. Concerning the surrender of petty cash voucher of Kshs 15,142/- the witness admitted that it was not raised with the Claimant earlier but only on 30 September 2010. This is after the termination.

17. Both parties filed their submissions outside the agreed and directed timelines but I have considered the submissions

Issues for determination

18. Having looked at the pleadings filed by the parties, the evidence and supporting documentation and submissions made by the parties, the issues which arise for determination, in my view are

(i) Legal capacity of Respondent to be sued

(ii) Whether the Claimant has established she was terminated

(iii) Whether the Respondent complied with the procedural requirements of section 41 of the Employment Act and if so,

(iv) Whether the Respondent discharged the evidential burden in sections 43 and 45 of the Employment Act by

- (a) proving the reasons for termination
- (b) proving the reasons were valid
- (c) proving the reasons were fair

(v) Appropriate remedies on finding unfair termination

19.I will discuss the issues under the headings indicated above.

Legal capacity of Respondent to be sued

20.In the Response filed on 30 November 2010, the statement of Paul Maiyo filed on 29 November 2012 and in oral testimony the Respondent urged that the Respondent is an entity not known in law and therefore the case is unsustainable.

21.The initial offer of employment to the Claimant dated 19 November 2008 was done on the letter head of Kenya Transport Association, Mombasa Branch. The agreement dated 7 May 2010 was on a letter head of Kenya Transport Association and the termination letter was on the letter head of Kenya Transport Association, Mombasa Branch.

22.The Certificate of Incorporation of Kenya Transporters Association Ltd produced by the Respondent show the it was incorporated as a company limited by guarantee on 14 September 2011.

23.Prior to the Registration, it was the unchallenged testimony of the Respondent's witness that Kenya Transporters Association was registered under the Societies Act.

24.The Claimant in her submissions filed on 23 May 2013,urged that section 41 of the Societies Act allowed the bringing of a suit against a representative of a society. Unfortunately, the Claimant has misapprehended the applicability of section 41 of the Societies Act. The section is applicable where criminal offences are in issue.

25.The legal position as regards suits against registered societies is trite and notorious if I may say so. The position was reiterated by Justice Maraga in the case of *Geoffrey Ndirangu & 5 others v Chairman of Mariakani Jua Kali Association & 2 others* (2005) eKLR that the officials should be named and therefore it is not enough to merely cite their titles.

26.The same legal principles have been upheld or followed in the authorities cited by the Respondent, *Simu Vendors Association v the Town Clerk City Council of Nairobi & 2 others* (2005) eKLR and *Eritrea Orthodox Church v Wariwax Generation Ltd* (2007) eKLR.

27.In my view the situation is no different in claims arising within employment contract law. The Claimant was acting on the advice of learned counsel and I cannot treat this as a mere procedural technicality. He could have applied to amend the statement of Claim when the Respondent raised the plea but he did not. During the hearing, the issue was raised again but the leaned counsel for the Claimant did not bother to do the right thing. If the Claimant was a lay man acting in person I would have allowed an amendment even during the hearing stage if an appropriate application had been made.

28.In the circumstances I need not discuss the other four issues I identified as emerging for determination, but do strike out the Memorandum of Claim without an order as to costs. The Claimant may bring a fresh suit if she so desires.

Delivered, dated and signed in open court in Mombasa on this 31st day of May 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Onyango instructed by A.I.

Onyango & Co. Advocates

for Claimant

Mr. Kiingati instructed by Kairu Mbuthia &

Kiingati Advocates

for Respondent