



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1267 OF 2011

RUTH MURAGECLAIMANT

VERSUS

THE STANDARD GROUP LIMITEDRESPONDENT

JUDGEMENT

1. On 29th July 2011, the claimant, Ruth Murage, filed a claim on unlawful termination and breach of contract by the respondent, The Standard Group Limited. The respondent filed their defence on 30th August 2011 and admitted that the claimant was terminated pursuant to the terms of the contract as between them where they gave her one month notice. On 2nd April 2012, the claimant filed a Supplementary List of Documents and after the hearing both parties filed their written submissions on 18th July 2013 and 29th June 2013 for the claimant and respondent respectively.

The claim

2. In the claim, the claimant stated that by an employment contract dated 23rd September 2009, she was employed by the respondent in the Commercial Department and the contract was to expire on 31st September 2011. Under the contract she was to earn a net salary of Kshs.100,000/=, millage allowance Kshs.22,500/= annual medical benefit for herself, two children and a spouse, commissions on sales payable at an average of kshs.157,700/=, monthly airtime of kshs.5,000/=, one month salary in lieu of notice, gratuity pay at 9%.
3. On 1st October 2010 the claimant reported to work and at 2.30pm received a call from the Assistant Commercial Director who requested to see her in a meeting together with the Group Chief Operating Officer where she was briefed about the harsh economic times happening globally and that the respondent was restructuring and reorganising and her position had been abolished. The claimant raised the issue of her contract that was to expire in September 2011 where she was advised that she would be paid for the duration remaining in her contract together with terminal dues and was thus asked to tender her resignation to help prepare her dues.
4. By a letter dated 1st October 2010, the respondent wrote to the claimant in acknowledgement of her resignation letter and that she would be paid one month pay in lieu of notice contrary to the agreed issues at their meeting. The claimant was dissatisfied having been coerced to resign where on 4th October 2010 she wrote to the respondent outlining her dissatisfaction but the respondent failed to give a response despite reminders. She had effectively revoked her resignation with the respondent. On 21st October 2010 the respondent gave the claimant a notice to terminate her employment.
5. The claimant further stated that she had worked for the respondent for over 15 years in various positions and was ready to serve her contract until September 2011 but the respondent maliciously

coerced her to resign on the promise that her terminal dues would be paid up to the end of her contract. That in breach of the contract between the parties, the respondent terminated it and denied her terminal dues. She therefore claimant for;

- a. *A declaration that the termination of the contract was unlawful and contrary to the law;*
 - b. *An order compelling the respondent to pay the claimant all her salary and other terminal dues as particularised in the Claim;*
 - c. *An order that the respondent should pay the claimant general damages and compensation for unlawful termination of services; and*
 - d. *Costs of the suit.*
6. In evidence, the claimant gave her sworn statement that she was employed by the respondent in 1993 as a Sales Executive. In 2007 she was promoted to Business Manager in charge of Rift Valley and was paid on commission of 10% of her sales and on average earned Kshs.300,000/=. In October 2007 she was promoted on a 2 year contract to 2009 which was renewed as Senior Team Leader from October 2009 to 30th September 2011 and signed a new contract with a monthly pay of kshs.100, 000/- per month, commissions, millage, phone allowance, group medial cover, and gratuity at 9% of basic salary. Under the terms and conditions of the contract, either party could terminate by giving the other one month notice or payment in lieu of notice.
 7. She did not complete the 2 years contract as 1st October 2010 she was forced to resign. She reported to work at 7.30 a.m., continued with her duties and at 2 p.m. got a call where she was asked to report to the Board Room at 2.30 p.m. which she did and there found the Assistant Director Mr. Njiru and Mr. Channa and Mrs Nelly Matheka. She was congratulated but later told that due to recession the company was restructuring and therefore her services were not needed. That as a senior employee, she felt this was not true as on the following Monday, she found somebody else on her seat. She had by then worked for the respondent to 15 years. Her contract was not due to expire in another year.
 8. The claimant also stated that she wrote her resignation on trust on the basis that her position no longer existed and had no reasons to believe that she would be betrayed. The letter was dated 30th September 2010 but had written it on 1st October 2010. The respondent acknowledged the resignation immediately on 1st October 2010 where they agreed to pay one month salary in lieu of notice and when she read the letter she realised that she had been arm twisted as the remaining contract period was not to be paid for. If she had willingly resigned, she was the one to pay for notice but the respondent was offering to pay for the notice. She was in shock and therefore decides to revoke her resignation on 13th October 2010 and refused to clear as she realised the meeting held at the boardroom was set to fix her. She had served the respondent without any disciplinary case on her.
 9. That she earned commissions on all sales made, she met her targets 100% and earned the commission dues in full, she was earning millage at Kshs.22,000/=. had annual leave of 21 days per year and millage was paid in arrears. Airtime was given at 5,000/= per month and gratuity was to be at 9%. There was also a medical benefit.
 10. She revoked her letter of resignation upon the realisation that she had been deceived but there was no reply. As a manager she was shocked to learn that there was a restructuring process as she had not been aware before. She therefore claim s that she should be awarded as prayed.

Defence Case

11. It was the respondent's defence that the contract between them and the claimant stipulated at paragraph 4 that either party could terminate by giving one month notice or payment of one month salary in lieu of a written notice. That the respondent never made an offer to the claimant for payment for the remainder of her term of contract where no service had been rendered and that the claimant tendered her resignation which was dully accepted. That by the claimant revoking her resignation, this was irregular as the respondent had already acted on her resignation hence terminating her employment.
12. The respondent also stated that the termination of the contract was pursuant to section 35 of the

Employment Act, they issued the claimant with a Certificate of Service pursuant to section 51 of the Employment Act, and that they did not force the claimant to resign and by this time, they did not owe the claimant any dues. That there is therefore no legal ground to seek a declaration that the termination of the claimant was unlawful and that the Court lacks jurisdiction to grant projected claimants for mileage, medical, commissions and air time as claimed. That the claimant received her gratuity on 6th October 2010 and her termination was fair as under the contract and the claim should be dismissed with costs to the respondent.

13. The defence did not call any witness in support of their case and chose to give written submissions.

Assessment

14. The onus to show there was a dismissal rests on the employee and if successful in doing so, the employer has the duty to show that the dismissal was for a fair reason. In this case the only evidence presented at the hearing was that of the employee which sought to show the existence of reasonable grounds that her fixed term contract had been unfairly terminated.

15. The enquiry that needs to be conducted in the present case is whether the facts as presented by the employee objectively establish that a dismissal had occurred when the employer acknowledged receipt of her letter of resignation with an offer to pay for one month in lieu of notice. The common cause facts before court are that the respondent officers called the claimant to a meeting where she was told there was going to be restructuring and that her position with them no longer existed and she was to be paid for the remainder of her contract term together with other benefits. The claimant also stated that she was in shock but noting that a restructuring means some people have to lose jobs, she took the offered compromise, but was shocked to learn later that somebody else was already on her desk.

16. This evidence was not negated in any material way by the respondent apart from general denials in their statement of claim. The evidence of the employee was not disputed, was sufficient to discharge the onus of showing existence of termination by the employer contrary to the envisaged provisions of section 35 of the Employment Act.

17. It is trite that the common law principle that a fixed term contract expires automatically on the expiry of the date on which the parties agree that it should. However, even where a party wishes to rely on this principle, there is a reasonable expectation that the same can be terminated by either party upon giving one month notice. This seems to have been what the parties herein were contemplating when clause 4 was made a term as under the contract. Where such a provision must apply as to end a fixed term contract, where one party does despite that termination, the court must therefore direct itself to the reason or reasons given for this termination before the end date of such a contract to assess if the same is fair, objective and valid in the circumstance of the case. These aside, the Court must also go further and include an approach involving the evaluation of all the surrounding circumstances, the significance, or otherwise of the contractual stipulation, agreements, undertakings by the employer, the purpose of or reason for concluding the fixed-term contract, inconsistent conduct, failure to give reasonable notice and nature of employer's business. There were similar facts as were under consideration in the Labour Appeals Court for South Africa in the case of ***Dierks versus University of South Africa [1999] 20 IL, 1227 [LC] at 1245.***

18. An employee who has a fixed term contract expects to complete this contract before a new one is issued or in exceptional circumstances the fixed term contract is terminated for a reasonable cause. Did the claimant herein then terminate her contract? What was the effect of the resignation?

19. The claimant stated that when she was called by Mr. Njiru to the respondent boardroom, she met the Assistant Commercial Director together with Mr. Channa the Group Operating Director and Mrs Nelly Matheka the Group Legal Secretary. She said;

On 1st October 2010 I reported to work at 7.30 a.m., I continued with my duties and at 2 p.m. got a call from Njiru who told me to report to the Board Room at 2.30 p.m. ... I found the Assistant Director Mr. Njiru and Mr. Channa and Mrs Nelly Matheka. They congratulated me and Njiru said that that due to recession the company was restructuring and therefore my services were not needed...

20. Here were three (3) senior officers of the respondent, communicating a decision with regard to the claimant's employment. What seems to have preceded this meeting was the claimant tendered her resignation and immediately, the respondent accepted it and offered to pay her one month notice. I find this most strange.
21. Under the terms of the contract between the claimant and the respondent, the party who terminated was supposed to give one month notice or payment in lieu of notice. In this case, the claimant gave her resignation letter first; she did not give notice or payment in lieu of such notice. On the other hand, the respondent accepted the claimant's resignation but offered to pay for one month notice. It therefore goes; there was more to the resignation of the claimant and the offer by the respondent to pay one month notice. This was explained by the claimant to mean that the parties seating at the respondent Boardroom had agreed, due to the 'restructuring', the claimant was to be laid off subject to payment of the remainder of her contract term. She had no reason to doubt this as the respondent was represented by 3 very senior officers they ought to have done better as where there is a 'restructuring' the law lays out clear provisions that must have been adhered to. This does not seem to have been the case as the claimant was the only one affected by this 'restructuring' and it was a sudden thing that had not been earlier communicated to the claimant as a restructuring process ought to be very open and transparent known to majority of employees, those to be affected and those to be retained after the restructuring.
22. The claimant upon realisation that the respondent did not wish to follow the bargain revoked her resignation. This was not accepted. She also found somebody else on her desk. Meaning that all along, the respondent wanted to terminate the claimant but opted to have her tender a resignation so as to lose her contract period and the benefits antecedent to it.
23. This is what is outlined above as a termination that has no fair reason, objective or valid. Nothing prevented the respondent from applying the terms of the contract to give reasonable notice or pay for the notice and let the claimant go. They opted to circumvent the cause of justice and the spirit of the very document as between them – the contract – and have the claimant tender a resignation.
24. The respondent does not claim that the claimant failed to give notice before her resignation. Nor do they seek in counter-claim to be paid this money. A further confirmation that the resignation of the claimant was as she outlined, as being conditional.
25. In evaluating this case, all the surrounding circumstances of it indicate wrong motive on the part of the respondent, termination of a fixed term contract through manipulations of facts at their disposal and not brought to the attention of the claimant. The significance of this was that the claimant was given wrong information about a 'restructuring process' that never was, and was made to resign on an understanding that the remainder of her contract period would be paid. Otherwise, the claimant could not have revoked her resignation so soon thereafter and the respondent failed to respond under the belief that they were safely in possession of the letter of resignation. This is not what an employer should do to an employee who has served for over 15 years. By inviting the claimant to a meeting to share about the 'restructuring' the respondent was in essence terminating the claimant's employment. How this was affected was contrary to the terms as agreed in their contract and the purpose and reason for the same was wrong or unfair, invalid and inconsistent with conduct expected of an employer.
26. As outlined in section 43 of the Employment Act, the court must be satisfied that the reason for termination is proved. This, the respondent failed to do. Under this section;

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

27. There was no evidence by the respondent. I therefore find the termination of the claimant's contract was as the instance of the respondent how failed to apply the reasonableness standard^[1] and I find this to have been an unfair termination. Damages thereto will therefore be assessed.

Remedies

¹ See the case of *Sidumo and Another versus Rustenburg Platinum Mines Limited and Others* [2007] 28 ILJ 2405. Where the Constitutional Court of South Africa outlined in details what the 'reasonableness standard' entails.

28. Where an employment contract provides for the termination of the contract by notice, the measure of damages is the loss of salary for the notice period. Indeed, this must be so where the harm allegedly suffered by the employee relates to the employer's inadequate notice of its failure to give notice at all. In addition, contractual damages must arise from and be related to the breach of contract. In any event, even if this is incorrect, a claimant must mitigate their damages. The claimant stated that she is now running a business, which is a positive measure in mitigation, she did not just sit at home waiting for the court to award, she has put her time into good use.

29. Section 18(5) defines the terms applicable where a fixed term contract is terminated. Upon the termination of a contract of service—

- a. ***by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowances due to him as have not been paid;***

30. The employer must pay all wages earned or payable to the employee. This being a fixed term contract, and the termination having been effected as of 1st October 2010, the claimant should have been paid all earned salaries up to this date together with salary *payable to the employee by effluxion of time* being the end of her contract. To this pay the employer should pay all *allowances due to him as have not been paid*. Allowances not being wages are paid as due. Indeed the claimant in her evidence stated that her allowances were paid in arrears once she earned them.

This was therefore earned as of 1st October 2010 and not to the end of her contract term. The allowances may have been fixed but the same were only due as and when they were earned. I will therefore award the monthly salary of Kshs.100, 000.00 due to the claimant from 1st October 2010 to 30th September 2011. These are 11 months all amounting to Kshs.1, 100,000.00.

31. From the above assessment no allowances are due and I will decline these claims for millage allowances, medical cover, and commissions on sales, and airtime.

32. There is no evidence submitted by the respondent that gratuity has been paid. This is an amount due to the claimant and I will accordingly award the sum of Kshs.108, 000.00.

33. Notice was due in this case or payment in lieu of notice. I will make an award of Kshs.100, 000.00 in this regard.

34. Noting the circumstances of the case and the respondents efforts to circumvent the cause of justice against one of their employee and the duration of over 15 years that she had served, I will award for the unfair termination with a pay of 12 months all amounting to 1,200,000.00.

Conclusion

Judgement is hereby entered for the claimant as against the respondent in the following terms;

- a. **A declaration that the claimant was unfairly terminated**

Award of Kshs.1, 200, 000.00;

- i. **Pay for 11 months all amounting to Kshs.1, 100,000.00;**
ii. **Gratuity at kshs.108, 000.00;**

b. **Costs of the suit; and**

c. **Interest on (a) (ii) above.**

M. Mbaru

Judge

In the presence of

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