



Raichenah v Young Women’s Christian Association Of Kenya (Cause E499 of 2022) [2024] KEELRC 13626 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 13626 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E499 OF 2022**

**B ONGAYA, J
JUNE 28, 2024**

BETWEEN

MOLLY KAARI RAICHENAH CLAIMANT

AND

YOUNG WOMEN’S CHRISTIAN ASSOCIATION OF KENYA RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated 07.07.2022 through Fredrick Ogamba Advocates. The claimant pleaded as follows:
 - a. She was employed by the respondent per contract dated 18.06.2021 as a Program Officer. She served a probation period of 6 months and was confirmed in appointment effective 05.01.2022 per letter dated 20.12.2021.
 - b. The claimant became aware of a relevant training on fundraising and requested the supervisor that she attends the training. The supervisor did not respond, the claimant wrote a reminder on 08.03.2022, and the supervisor asked the invitation to the training be forwarded. The claimant forwarded by an email but no response was received. The claimant construed silence as consent to attend.
 - c. The claimant was invited to a disciplinary hearing because of absence from duty and negligence. Her performance was discussed together with the alleged absence.
 - d. The contract of service was terminated by the letter dated 17.03.2022. The minutes of disciplinary hearing dated 17.03.2022 show the termination was because of performance and not absenteeism or negligence.
 - e. The claimant suffered emotional trauma and inability to meet financial obligations.
2. The claimant prayed for judgment against the respondent for:



- a. A declaration the termination without following procedure amounted to unfair, wrongful, unprocedural and illegal termination.
 - b. Payment of 12-months' compensation Kshs. 1, 020, 000.00.
 - c. Any further relief that is fit and just.
 - d. Costs of the suit.
 - e. Interest.
3. The respondent appointed Carrey Joseph Advocates to act in the matter and filed the memorandum of response dated 14.09.2022. The respondent pleaded as follows:
- a. The respondent admitted employing the claimant as pleaded in the memorandum of claim.
 - b. After email of 28.02.2022, the claimant requested to attend the training but the supervisor asked for further information. By email of 08.03.2022 at 4.13 pm, the claimant shared an invitation letter and the CV of the consultant scheduled to carry out the training. The request to attend the training was not approved because it had come very late on eve of the training.
 - c. After confirmation, the claimant appeared to struggle with assigned work.
 - d. The claimant failed to understand her job description, declined to sign the same, and instead proposed to be re-assigned. She had founded an NGO known as Anani and failed to separate the culture from that of the respondent.
 - e. At the start of 2022 she failed to report at work on official opening on 04.01.2022 and claimed to be indisposed. She thereafter presented questionable treatment documents including a laboratory report dated 04.01.2022 showing she was sick with COVID 19 . It was from Equity Afia Ngong Road under patient No. EQA-03600-780 stamped 10.02.2022. A sick off sheet showed different patient No. 03600-4066 signed by Dr. Victor K.O and dated 07.01.2022 and stating he had been seen on 06.01.2022 for review on 14.01.2022. Another sick off presented was dated 14.01.2022 with patient no. EQA – 03600 -780 giving her further 7 days.
 - f. On 17.01.2022 she wrote an email to supervisor stating that she was still unwell and for further test on 21.01.2022.
 - g. A sick chit of 20.01.2022 from a different hospital granted her 7 days' break without details of her ailment. It was by Aga Khan Hospital expiring on 27.01. 2022. She then presented another sick of dated 27.01.2022 showing Dr. Omwenga had reviewed her on 03.02.2022.
 - h. The claimant reported at work on 10.02.2022 with no COVID 19 clearance certificate. A report from the initial laboratory bearing a different patient no. showed that she was COVID 19 negative.
4. Based on her unsatisfactory performance and conduct, a letter to show cause dated 09.03.2022 issued levelling absenteeism and negligence of duty. She was invited for disciplinary hearing on 14.03.2022. On 09.03.2022, she was scheduled for performance appraisal but she failed to report on duty. She was heard on 14.03.2022. She was dismissed. As at dismissal, the applicable human resource manual was the one-dated 2015 and not 2022 which had not been operationalised.
5. The respondent prayed the suit be dismissed with costs.



6. The reply to response was dated 21.11.2022. The claimant stated that it was within her job description to attend the training and after training she reported at office same day at 3.00pm. she signed her job description on 16.03.2022 and never assigned herself new roles. Her engagement with Anani was no issue as she had disclosed the same at recruitment interview. She went to hospital initially on 04.01.2022 and being not responsive to medication, she went again on 07.01.2022 for review and Dr. Victor K.O attended to her. She was later referred to other doctors in other hospitals. Her last review by Dr. Omwenga at Aga Khan Hospital was on 03.02.2022. She resumed on 07.02.2022 upon lapse of her sick-off days. On 10.02.2022, she requested a print of her tests, which was done and reflected the same 10.02.2022. In any event, she was not privy to the operations of the hospitals she had attended. The first time her supervisor mentioned about the CV of the trainer was on 09.03.2022.
7. The claimant testified to support her case and the respondent's witness (RW) was Milka Akinyi Ochieng. The Court has considered all material on record and the final submissions filed for parties.
8. The Court returns as follows:
 - a. The parties agree that they were in a contract of service.
 - b. The contract of service was terminated by the letter dated 17.03.2022 effective 18.03.2022.
 - c. Was the termination unfair? The allegations in the letter to show cause were two. First, the supervisor had not given her permission to attend the training. Second, she proceeded on leave on assumption she had been authorized to do so. The Court finds that those two grounds of termination amounting to absenteeism have been established as genuine per section 43 of the *Employment Act*, 2007 and were fair per section 45 of the Act as they related the respondent's operational requirements and the claimant's conduct. By her own evidence, the claimant testified that without a formal permission, she assumed that silence of her supervisor meant permission to go for the training. The Court finds that she was not given the permission at all. Further, throughout the period she says she was on sick offs, the claimant appears to have notified the respondent and the treatment record substantially confirms she was on valid sick off. Thus, the Court finds she was absent without permission only on occasion of the training and not during the sick offs. As for negligence of duty, of particular concern was the allegation on the assignment relating to International Women Day activities. RW testified that the claimant had not placed on the claimant on mandatory procedural Performance Improvement Program (PIP). Thus, the 2nd allegation of poor performance cannot be said to have been established by the respondent as genuine and valid. The claimant's grievance letter at R157 confirms that she had not been afforded a fair chance per the respondent's staff performance management system at page C67-84.
 - d. On procedure, the respondent appears to have complied with the due procedure of a notice and a hearing per section 41 of the *Employment Act*.
 - e. The Court returns that the termination was not unfair because of absence without permission on the date the claimant attended the training without permission. However, the claimant came back to the office immediately the same day of the training. In the circumstances, each party will bear own costs of the suit.

In conclusion, the suit is hereby dismissed and each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 28TH JUNE 2024.

BYRAM ONGAYA



PRINCIPAL JUDGE

