



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 551 OF 2017**

**RAHAB MAKENA GITONGA.....CLAIMANT**

**VERSUS**

**APPRIM CONSULTANTS.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 20<sup>th</sup> March 2017 and filed in court on 1<sup>st</sup> March 2017, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Defence on 27<sup>th</sup> March 2017 to which the Claimant responded on 2<sup>nd</sup> May 2017.
2. At the trial, the Claimant testified on her own behalf and the Respondent called Victor Kinyanjui Kiharo. Both parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that she was employed by the Respondent in November 2013, as a Receptionist/Office Administrator.
4. The Claimant claims to have worked for the Respondent until 14<sup>th</sup> October 2016, when her employment was unexpectedly terminated through a text message sent to her by her immediate supervisor, Harrison Nzioki.
5. The Claimant cites the subject text as follows:

“Hey Rahab! This morning maina has sent me a text to tell you that you are sacked. Yesterday he had documents which needed to be typed and asked where you are and I replied him you attended a burial of your relative. Then he replied “I will sack this lady.”

6. The Claimant avers that the foregoing text was followed by another one sent by the Respondent’s Director, Mr. Maina to the supervisor stating:

“I hope you have told Rahab she has been sacked.”

7. The Claimant states that before going to the burial, she had sought permission from Nzioki, which was duly granted.
8. The Claimant’s case is that the termination of her employment was without valid reason and was unprocedural.
9. The Claimant claims that for the entire period of her employment with the Respondent, she never went on leave.
10. The Claimant seeks the following remedies:

- a. One month’s salary in lieu of notice.....Kshs. 40,000
- b. Leave pay for three years.....120,000

c. Damages for unlawful and unfair termination.....480,000

d. Certificate of Service

e. Costs plus interest

### **The Respondent's Case**

11. In its Memorandum of Defence dated 24<sup>th</sup> April 2017 and filed in court on 27<sup>th</sup> April 2017, the Respondent denies sending the Claimant any text message either through its employee, Harrison Nzioki or its alleged Director, one Mr. Maina. The Respondent denies the contents of the alleged text messages as set out by the Claimant.

12. In the alternative and without prejudice to the foregoing, the Respondent avers that the Claimant absconded her duties and has never reported back to work.

13. The Respondent states that prior to her absconding duty, the Claimant had been paid all her dues, including pay in lieu of leave.

### **Findings and Determination**

14. There are two (2) issues for determination in this case:

a. Whether the Claimant has made out a case of unlawful termination of employment;

b. Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

15. In their final submissions, the parties have raised the existence of an employment relationship as an issue for determination. I think however that this is a non-issue because in its defence, the Respondent accuses the Claimant of absconding duty. How can a person who is not an employee abscond duty?

16. At any rate, under the Employment Act, the duty to issue a contract of employment is placed on the employer. Having failed in this duty, the Respondent cannot raise its failure to defeat the Claimant's claim. This is all I will say on this issue.

17. Back to the issue of absconding duty. The law is now well settled that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting them on notice that termination of employment on this ground is being considered.

18. As held in *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* absconding or deserting duty is not the same as absence without leave, where the employee has the intention to return to work.

19. In its decision in *Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR* this Court stated the following:

**“Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.”**

20. In this case, the Respondent made no effort to reach out to the Claimant, who testified that she had permission from her supervisor to be away for one day to attend a relative's burial.

21. The Respondent therefore failed to prove that the Claimant absconded duty and its whole defence collapses. As a consequence, the only conclusion to make is that the Respondent terminated the Claimant's employment without following due procedure and the termination was therefore substantively and procedurally unfair.

### **Remedies**

22. Pursuant to the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service plus the Respondent's unlawful conduct in the termination transaction.

23. I further award the Claimant one (1) month's salary in lieu of notice.

24. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

25. I therefore enter judgment in favour of the Claimant as follows:

|  |                       |
|--|-----------------------|
| a. 6 months' salary in compensation.....       | Kshs. 240,000         |
| b. 1 month's salary in lieu of notice.....     | 40,000                |
| c. Leave pay for 3 years (40,000/30*21*3)..... | <u>84,000</u>         |
| <b>Total.....</b>                              | <b><u>364,000</u></b> |

26. This amount will attract interest at court rates from the date of judgment until payment in full.

27. The Claimant is also entitled to a Certificate of Service plus costs of the case.

28. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Wesonga for the Claimant

Mr. Njagi for the Respondent