



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1416 OF 2018

BETWEEN

NISHA NILESHBHAI BHAVSAR.....CLAIMANT

VERSUS

KENSALT LIMITED.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Kisilu Wandati & Company Advocates for the Claimant.

Boniface Masinde & Company Advocates for the Respondent.

JUDGMENT

1. The Claimant filed her Statement of Claim on 2nd October 2018.
2. She states, she was employed by the Respondent on 1st February 2010 as Executive Secretary, on a salary of Kshs. 63,418 monthly.
3. She worked hard, and her work, was rewarded with salary increments. In 2018, she received 2 salary increments.
4. But on 10th August 2018, she was informed by Respondent's Administration Manager, Bipin Vaghjiani, while he dropped her from work, that her contract had been terminated. No reasons were given to justify termination. Her monthly salary at the time of termination, was Kshs. 305,000.
5. Termination was well-orchestrated to reward her replacement, Kalpesh Pindoriya, who was employed immediately the Claimant left. She was issued a written letter of termination dated 14th August 2018. No reason in justifying termination, was given.
6. She was not asked to show cause, or heard, before termination.
7. She was not paid house allowance or provided reasonable housing accommodation. She worked for 8 years.
8. She seeks the following orders against the Respondent: -
 - a. Declaration that termination was unfair.
 - b. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 3,660,000.
 - c. 1-month salary in lieu of notice at Kshs. 305,000.

- d. Salary for days worked in August 2018 at Kshs. 132,167.
- e. Anticipatory salary up to 29th February 2020 when her contract was to lapse, at Kshs. 5,662, 833.
- f. House allowance at 15% of the gross salary at Kshs. 2,231,193.
- g. 22 days of annual leave at Kshs. 223,667.
- h. Certificate of Service.
- i. Costs and interest.
- j. Any other suitable relief.

9. The Respondent filed its Statement of Response on 17th January 2019. It is not denied, that the Claimant was employed by the Respondent on terms pleaded by the Claimant. Salary increment was standard practice, applying to all Employees, and was not performance-based. The Claimant's performance deteriorated. Her contract was terminated for gross misconduct.

10. There were express and implicit terms, governing the Parties' relationship. Among these was that she would serve loyally and diligently; she would obey all instructions; she would maintain trust and confidence; she would act competently and skilfully; and would not neglect her duties.

11. She breached these terms. She spent most of her time on personal matters; she reported late to, and left earlier from, work; she failed to update the Managing Director on all matters relating to the collapsed solai dam; she did not maintain cleanliness of office; she failed to inform the Managing Director about scheduled meetings; she gave inappropriate instructions on use of Managing Director's vehicle; she was generally a poor performer; and her conduct undermined productivity.

12. She was issued notice to show cause, before termination. She did not honour notice to show cause, due to her belligerency and delinquency. The Respondent had strong and valid reasons justifying termination. Termination had nothing to do with Pindoriya.

13. The Claimant was offered terminal dues, which she declined.

14. The Claimant Nisha, and Respondent's Administration Manager Bipin Mavji Vaghjani, gave evidence on 28th October 2021, closing the hearing.

15. The Cause was last mentioned on 30th November 2021, when the Parties confirmed filing and exchange of Final Submissions.

16. The Claimant adopted as her evidence, her Witness Statement and Documents. She restated the circumstances of her contract's termination. She added that the Respondent told her she was sitting and stargazing in the office. She sought clarification from the Director. All she received was a termination letter. She did not have warning letters. Termination letter did not indicate reason. It is not true that she spent most time at the office loafing about. She was always picked and dropped home by her colleagues, so it is not true that she reported to work late and left early. She updated the Managing Director on solai dam all the time. She performed her role to the best of her ability.

17. She was offered terminal dues at approximately Kshs. 468,000. There was no breakdown. She was not paid for 14 days worked in August 2018. She was not given or paid notice. She had 22 pending annual leave days. She was on limited-term contract, to expire in March 2020. She expected to work until expiry. The contract was terminated prematurely. She wishes to be compensated, and to have her Certificate of Service.

18. Commendably, Mr. Masinde for the Respondent, before cross-examining the Claimant, conceded that there was no hearing prior to termination. This rare brand of lawyering, is to be encouraged.

19. On cross-examination, the Claimant told the Court that she currently works in a family business. She has been at it, for 1 year, from October 2020. Between August 2018 and October 2020, she was a housewife.

20. She was offered Kshs. 468,000 as an exit package. Breakdown was shown to include notice, leave and salary for days worked. The Claimant was sorry she had not seen the breakdown. She was only aware of the cheque. At page 45 of her documents, the Claimant intimated reason for termination. She stated that she had used the Director's car to go for lunch. She did not instruct the Driver Barasa, to pick Bipin. The Respondent owned solai dam, which collapsed. She was assigned duty to monitor the after-effects and appraise the Managing Director. She updated him orally. Her salary was indicated to be all-inclusive in the contract. The contract had a termination clause. She was remunerated in accordance with her role. Redirected, she testified that she updated the Managing Director on solai dam, and there was no complaint that she did not.

21. Bipin adopted his Witness Statement and Documents on record in his evidence. On cross-examination, he told the Court that reasons indicated in his Witness Statement, were not stated in the letter of termination. These reasons were not communicated to the Claimant. She worked for 8 years. Her contract was to expire in 2020. Either Party could terminate on notice. Terminal benefits offered did not consider the period left in her contract. Bipin did not have proof of the allegations against the Claimant, contained at paragraph 5 of the Statement of Response. There was no evidence that the Claimant spent most of her time on her own business. There was no proof that the Claimant reported to work late, and left early.

22. The issues are, the Respondent having conceded there was no hearing, whether termination was based on valid reason; and whether the Claimant is entitled to the remedies sought.

The Court Finds: -

23. There is no dispute on the employment history, and terms and conditions of service, of the Claimant.

24. It is conceded that the Claimant was not afforded a hearing. ***Termination procedure was unfair, under Section 41 and 45 of the Employment Act.***

25. The letter of termination is dated 14th August 2018. It simply states that Respondent's Management had made a decision to terminate Claimant's contract, with effect from 13th August 2018. No reasons are given. All reasons pleaded by the Respondent in the Statement of Response, and in the evidence of Bipin, fall with the realm of conjecture. There are no reasons given in the letter of termination.

26. The conjectural reasons were discounted by Bipin in his evidence. He stated in his cross-examination that he did not have evidence of the allegations pleaded at paragraph 5 of the Statement of Response. There was no proof that the Claimant reported to work late and left early. There was no evidence of involvement in personal business. The conjectural reasons do not have the semblance of validity.

27. In the end the Court is entitled to conclude that termination was unfair, on account of lack of procedural fairness under Sections 41 and 45 of the Employment Act, and lack of substantive justification under Sections 43 and 45 of the Employment Act. The Respondent did not discharge its evidential burden under the law above, read with Section 47[5] of the Employment Act. The Claimant has discharged her evidential burden under Section 47[5] above, proving that unfair termination occurred.

28. ***It is declared that termination was unfair.***

29. Anticipatory salary is declined. The Court in granting the Claimant compensatory award, has taken into account that the Claimant had a balance of 2 years in her contract, and that she expected to serve to the end of her contract.

30. The pay slips described Claimant's salary as basic. The various contracts she served under, described it either as gross, or confusedly, as basic gross. The pay slips and the contracts are inconsistent. Salary can never be paid at a basic gross, because basic is what is paid, less all allowances, while gross is basic and all allowances put together. The terms basic and gross are antithetical. Salary is a term of the contract and the law bids the Court, whenever there is ambiguity in the contract, to resolve that ambiguity in favour of the Employee. The ambiguity must therefore be resolved in favour of the Claimant, Nisha.

31. House allowance is based on a minimum of 15% of the basic salary, under the General Wage Order. 15% of the Claimant's basic salary of Kshs. 305,000 for 8 years, would result in a sum of Kshs. 45,750 monthly, Kshs. 549,000 annually, and Kshs. 4,392,000 in 8 years. The Claimant prays for Kshs. 2,231,193, which is about half of the preceding figure. She did not earn Kshs. 305,000 in monthly salary throughout. Employment remedies are not always mathematically correct, but the underlying objective is, adequate enforcement of the benefits contemplated by the Employment Act. There is no exactitude always, but it can fairly be accepted, that the amount of Kshs. 2,231,193 is fair and adequate house allowance in arrears. ***The prayer for house allowance in arrears is granted at Kshs. 2,231,193.***

32. The Respondent did not discount the prayer for 22 days of unpaid leave, at Kshs. 223,667. There are no documents supplied to the Court by the Respondent on Claimant's annual leave portfolio, discounting the Claimant's evidence. ***Annual leave claim is granted at Kshs. 223,667.***

33. The Claimant Nisha, worked for 8 years. There were no warning letters in her employment record. Her record was clean. She expected to see her contract through to the year 2020. She was denied at least 24 months' earnings. She did not contribute to the circumstances, leading to premature termination of her contract. Termination was not based on valid reason, or reasons. The Respondent concedes there was no hearing. It was a most unfair termination, warranting the maximum compensation allowable in law for unfair termination, under the Employment Act, equivalent of 12 months' salary. Having concluded that the Claimant was entitled to house allowance, and having granted house allowance over a period of 8 years at Kshs. 2,231,193, it follows that the base rate for purposes of compensation, must include the adopted monthly house allowance. Monthly house allowance over a period of 96 months, would be Kshs. 23,241. Added monthly basic salary of Kshs. 305,000, the monthly gross is Kshs. 328,241. Equivalent of 12 months' salary would result in Kshs. 3,938,892. ***The Claimant is awarded equivalent of 12 months' salary in compensation for unfair termination at Kshs. 3,938,892.***

34. Notice pay is based on monthly remuneration, not basic pay, which, adopting the above formula, would result in 1- month salary in lieu of notice, at Kshs. 328,241. ***The Claimant is allowed the prayer for notice at Kshs. 328,241.***

35. The Claimant received the letter of termination on 15th August 2018. Termination of a contract of employment takes effect on the date the Employee is made aware of the decision. Effective Date of Termination [EDT] was 15th August 2018. ***The Claimant merits and is awarded, half salary for August 2018, at Kshs. 164,120.***

36. *Certificate of Service to issue.*

37. *Costs to the Claimant.*

38. *Interest allowed at court rates from the date of Judgment, till payment is made in full.*

IN SUM, IT IS ORDERED: -

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: house allowance in arrears of 8 years at Kshs. 2,231,193; annual leave at Kshs. 223,667; compensation for unfair termination at Kshs 3,938,892; notice at Kshs. 328,241; and salary for August 2018 at Kshs. 164,120- total Kshs. 6,886,113.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Interest allowed from the date of Judgment at court rates, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 11TH DAY OF MARCH 2022.

James Rika

Judge