



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 417 OF 2015**

**IRENE AKOTH.....CLAIMANT**

**VERSUS**

- 1. TOBIAS SEE**
- 2. MITCHELL J.B. MENEZES**
- 3. BOB PATRICK MADANJI**
- 4. PAUL OTIENO**
- 5. VIPUL KAKKAD**
- 6. SUNAY PATEL**
- 7. NIYAM SHAH**
- 8. PALS WAGNAAR**
- 9. KEN AMALEMBA**

*(All sued as officials of*

**NYANZA CLUB MANAGEMENT COMMITTEE).....RESPONDENTS**

**JUDGMENT**

1. This claim by the claimant is against Nyanza Club Management Committee as constituted at the time the cause of action arose on 30<sup>th</sup> March, 2015, when the claimant's employment was terminated by the club.
2. At the hearing of this suit I had disclosed to the parties that I was a member of Nyanza Club but I did not consider that to be a hindrance to me hearing and determining this matter unless any of the parties had any objection to my doing so. No objection was raised by the advocates for the parties following that disclosure.
3. The suit by the claimant seeks the following reliefs: -
  - (a) Declaration that termination of employment of the claimant was unlawful and unfair.
  - (b) Payment of severance pay.
  - (c) Compensation for the unlawful and unfair dismissal.
  - (d) Aggravated damages.
  - (e) Costs and interest.

4. The respondents filed a statement of defence on 14/1/2016 in which they deny all the particulars of claim and put the plaintiff to strict proof thereof.
5. At the hearing of the suit on 11/7/2018, Mr. Ngala for the respondents told the Court that the suit is not sustainable since the respondents are no longer members of the management committee of the club.
6. The Court granted leave to the claimant to identify the correct office holders of the Nyanza Club Management Committee and amend the Statement of Claim accordingly.
7. The matter however proceeded to hearing on the same date and C.W.1, the claimant, Irene Akoth testified in support of her case.
8. C.W.1 told the Court that she now worked at Sovereign Hotel as Night Auditor. That the respondent club employed her on 1/3/1997 as an Administration Assistant and served in different positions until 31/3/2015. At the time of termination C.W.1 was the club manager which position she testified she took up in 2014. C.W.1 produced a letter of appointment as Club Manager.
9. C.W.1 testified that she earned a monthly salary of Kshs.50,000. The claimant produced exhibit 2 in support of that assertion.
10. C.W.1 testified further that her employment was terminated by the respondent for gross misconduct for failing to send some employees on leave. C.W.1 told the Court that there was a delay in doing that which delay she had explained to the management committee. C.W.1 stated that she had to re-arrange the shifts hence the delay.
11. C.W.1. received a show- cause Letter dated 25/1/2015 and responded to it on 27/1/2015 and explained the reasons for delaying sending the employees on leave. The Show Cause and the response were produced as exhibits '3' and '4' respectively.
12. C.W.1 testified that on 27/1/2015, she appeared before the Legal and Human Resource Committee of the club where she explained her case.
13. The committee ruled that C.W.1 to proceed on her accrued leave as per letter marked exhibits '5'. C.W.1 handed over to the General Manager who had been employed the same month the case was going on.
14. That the office of General Manager was created in February, 2015. C.W.1 testified that the duties of the general manager were the same as those she did. That this created duplication of functions. C.W.1 testified that she was to report to the General Manager.
15. That on 10/3/2015, C.W.1 resumed work and on 30/3/2015, C.W.1 received the letter of termination. C.W.1 was paid one-month salary in lieu of notice. C.W.1 issued the respondent with a demand letter dated 2/7/2018.
16. C.W.1 testified that the termination was based on false grounds. C.W.1 stated she was effectively rendered redundant by being replaced by a general manager and should be paid severance pay accordingly. C.W.1 stated that her dismissal was constructive and that the letter of termination was just a pretext.
17. C.W.1 was cross-examined by Mr. Ngala, Advocate for the respondent and restated that her termination was wrongful and unfair. That as manager she had justification to delay sending some employees on leave and that was part of her mandate as manager.
18. The respondent did not call any witness to rebut the testimony by C.W.1. The evidence by C.W.1 is therefore not contradicted. The Court finds the testimony of the claimant credible, consistent and reasonable. The Court finds that it was within the prerogative of the claimant as the club manager to manage the leave schedule of the club employees and the allegations made against her did not constitute misconduct as provided under Section 44 of the Employment Act, 2007.
19. The respondents have failed to adduce any evidence as mandated by Section 43(1) and (2) of the Employment Act, 2007 to demonstrate that they had a valid reason to terminate the employment of the claimant.
20. To the contrary, the claimant has proved on a balance of probabilities in terms of Sections 107 and 108 of the Evidence Act, read with Section 47(5) of the Employment Act, that she was wrongfully, unlawfully and unfairly retrenched from the position of Club Manager and replaced by another club manager before she was wrongfully terminated on false grounds.
21. The Court finds that this termination is deemed as retrenchment within the meaning of Section 40 of the Employment Act 2007.
22. The claimant suffered loss and damages and was not compensated for the loss. The claimant mitigated her loss by obtaining a lower position at Sovereign Club. She lost career progression in management of the prestigious Nyanza Club.
23. The Court considers similar cases of **Ken Freight East Africa Limited -vs- Benson K. Nguti, Civil Appeal No. 31 of 2015** in which the Court of Appeal upheld compensation of 12 months' salary for wrongful dismissal due to the long period of service by the claimant. The Appellant had worked for over 14 years:
24. The case of **Juliet Ndanu -v- East African Growers Limited** in which Maureen Onyango, J. awarded the claimant 12 months' compensation for wrongful dismissal. The claimant had served for 11 years, and the case of **Wilfred Bukech Opwake -vs- Ready Consultancy Co. Limited** in which the claimant was awarded 12 months' compensation though he had worked for 3 years as a casual worker and the case of **D.K. Njagi -vs- Teachers Service Commission** in which Rika J. awarded the claimant 12 months' compensation for

being retired in public interest after many years of service.

25. The Court upon consideration of all factors above and the case law awards the claimant the equivalent of 12 months' salary in compensation for the unlawful and unfair termination of employment in the sum of **Kshs.(50,000 x 12) 600,000.**

26. In the final analysis the Court enters judgment in favour of the claimant against the respondents including their successors and assignees in office as follows: -

(a) Kshs.600,000 being 12 months' salary in compensation for the unlawful and unfair termination of employment (*Constructive retrenchment*).

(b) Kshs. 450,000 being severance pay for the constructive retrenchment disguised as a termination for misconduct.

(c) Interest at Court rates from date of judgment till payment in full.

(d) Costs of the suit.

Total award Ksh. 1,050,000.00

27. For the avoidance of doubt, the claim for payment of punitive and/or aggravated damages is rejected for lack of proof.

**DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2021**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

Appearances

M/s Akinyi Odhiambo for claimant.

Mr. Ngala Owino for respondent

Chrispo: Court clerk.