



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2383 OF 2017**

***(Before Hon. Lady Justice Maureen Onyango)***

**SAHIHI INTERIOR DESIGNERS LIMITED.....CLAIMANT**

**VERSUS**

**PAULINE MAINGI.....RESPONDENT**

**JUDGMENT**

1. This claim was instituted by a Statement of Claim dated 29<sup>TH</sup> November 2017 and filed in court on 1<sup>st</sup> December 2017. The Claimant also filed notice of motion and a Supporting affidavit sworn by its Human Resource and Operations Manager, Duncan Thugu, sworn on 2<sup>nd</sup> December 2019.
2. The Claimant avers that it employed the Respondent as an Accounts Assistant from 18<sup>th</sup> April 2016. She was promoted in June 2017 to the position of Accountant. That upon her promotion, her performance was dismal and unimpressive leading to her receiving several warning letters. That this poor performance persisted leading to the Respondent being summoned to a meeting on 6<sup>th</sup> November 2017 with the Managing Director.
3. The Claimant avers that the Respondent sent it an unexecuted resignation letter on 6<sup>th</sup> November 2017. She absconded from work from 7<sup>th</sup> November 2017 and thereafter declined, refused, neglected to communicate to the Claimant her reasons for absconding from work.
4. The Claimant avers that the Respondent had declined, refused and/or neglected to hand over the Claimant's files, documents and information (financial and taxation) to the Claimant. It states that part of these documents, files and information had been requested for by the Kenya Revenue Authority.
5. The Claimant avers that it is imperative that the Respondent conducts a handing over of her work, documents, files and information to the Claimant, more so for purposes of handing the same to Kenya Revenue Authority. That failure to submit the information to Kenya Revenue Authority will result in penalization by the Authority.
6. It adds that if the Claimant's wishes were to terminate the employment contract, she is under a legal responsibility to either give a one-month notice, attending her work obligations during said notice or pay the Claimant her one month's salary in lieu of notice.
7. The Claimant avers that the Respondent had also applied for a loan of Kshs.24,600 which she has yet to pay.
8. The Claimant avers that it has to advertise for the Respondent's position thus incurring additional expenses. Additionally, the Claimant avers that the Respondent's conduct is unfair, irregular, unlawful and wrong.
9. As a result of the absconding, the Claimant avers that the Respondent is in breach of her employment contract and as such prays for:
  - a) *The Respondent be ordered to handover all materials (files, documents) and information within her possession, obtained by her due to her job description while she was working with the Claimant*
  - b) *Pays for due as tabulated hereunder:*
    - i. *One month's salary in lieu of notice..... Kshs.25,000*

ii. Pending/unpaid loan amount..... Kshs.24,600

iii. Recruitment Costs ..... Kshs.75,000

c) General Damages

d) Costs of this claim and interest

e) Any other relief that this Court may deem just and expedient in the circumstances.

### Respondent's case

10. The respondent denies the allegation that she had absconded and instead states that she had been dismissed after the Claimant had received her resignation notice on email and refused to accept service of the signed hard copy of the one month's notice. She avers that this dismissal was unfair as she had been diligent in her duties up until her tendering resignation notice.

11. She avers that she did in fact comply with the court orders to do a handover although she had not left with any files belonging to the Claimant. She also states that it was the Claimant who dismissed her summarily and that it cannot therefore purport that the frustration was a creation of the Respondent.

12. She admits being granted a loan of Kshs.40,000/= but avers that immediately after, the Claimant began deducting the same from her salary from January 2017 to October 2017 towards settling the loan. That at the time of filing the suit, the total amount deducted was Kshs.39,000/= and the balance was Kshs.1,000/= which she has paid. She therefore avers that the purported balance of Kshs.24,600/= is not correct and is ill conceived.

13. She seeks that the Claimant be condemned to pay her one month's salary in lieu of notice.

### Counter Claim

14. The Respondent also filed a counter claim against the Claimant in which she raised particulars of illegality, wrongfulness and unfairness of the termination of her employment. These include her termination without payment in lieu of notice, without any formal hearing and valid reasons contrary to section 43 of the Employment Act.

15. She prays that judgment be entered as per section 49 of the Employment Act against the Claimant for:

a) A declaration that the Respondent's decision to terminate the Claimant's employment was procedurally unfair and substantively unjustified;

b) One month's salary in lieu of notice amounting to Kshs.35,000/=;

c) Damages equivalent of 12 month's salary due to unfair termination;

d) Costs of the suit; and

e) Any other relief this court may deem fit and just to grant.

### Claimant's Submissions

16. The Claimant submitted that the Claim stands undefended as the Respondent has not filed a reply to the supporting affidavit sworn by its Human Resource Manager. It relied on the case of **Chrispine Otieno Caleb v Attorney General (2014) eKLR** where the court quoted the case of **Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002** where Lesiit J., citing the case of **Autar Singh Bahra and Another v Raju Govindji HCCC No. 548 of 1998** stated:

*"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."*

17. The Claimant also relied on the case of **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001**, where the Judge, citing the decision in **Chrispine Otieno Caleb** above held that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact and in so doing the party fails to substantiate its pleadings.

18. On the issue of unfair termination or willful absconding, the Claimant relied on Section 35(1)(c) of the Employment Act on the need to give a notice in writing. It further relied on the case of **James Chutha Gathera v Nation Media Group (2013) eKLR** where the Court emphasized the importance of notice period stating that the party serving under such notice has a duty to continue working up and until the last day of the notice.

19. The Claimant relied on the provisions of Section 47(5) of the Employment Act on unfair termination and stated that the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

20. The Claimant relied on the case of **Kipkebe Limited v Peterson Ondieki Tai (2016) eKLR** where the court in upholding section 107 and 108 of the Evidence Act held that whoever asserts must prove.

21. On remedies, the Claimant relied on the case of **John Kinyanjui Gateru v Family Bank Ltd (2016) eKLR** where the court directed the Claimant to pay the loan he had been advanced by the Respondent while in employment.

22. The Claimant in conclusion submitted that it had proved its claim and therefore prays that the same be allowed in totality as prayed.

### **Respondent's Submissions**

23. The Respondent relied on the provisions of Sections 41 and 43(1) of the Employment Act and the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd [2013] eKLR** and submitted that her termination was unfair. She submitted that the cases highlight the importance of being afforded a hearing and an opportunity to respond before termination.

24. The Respondent also relied on the case of **Beatrice Nyambune Mosiria v Judicial Service Commission (2019) eKLR** where the court observed that it not only looks at the reasons but also audits the process and if the process is flawed, then any outcome based on it cannot stand.

25. She submitted that her dismissal goes against the grain of the principles of fair hearing in light of employment law and as set out in the provisions of Section 4(3) of the Fair Administrative Action Act. She also relied on the case of **Kenfreight (E.A.) Ltd v Benson K. Nguti (2016) eKLR** to highlight the concept of fair hearing and the duty of an employer to give reasons before dismissing the services of an employee.

26. The Respondent also relied on the case of **Nation Media Group Limited v Onesmus Kilonzo [2017] eKLR** where the Court of Appeal sitting at Nairobi had the following to say about unfair termination:-

*“Absent of valid and fair reasons and procedural fairness, the termination is unfair and the employee has a right to complain to Labour Office or file a suit in ELRC for redress. The remedies stipulated in section 49 are the same as those available to an employee who has suffered wrongful dismissal.”*

27. On the legal threshold of burden of proof. The Respondent relied on the provisions of Section 107, 108 and 109 of the Evidence Act and on the Supreme Court case of **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR** where the Court comprehensively expressed itself on the concept of burden of proof as follows –

*“[129] The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. [46] Black's Law Dictionary [47] defines the concept as “[a] party's duty to prove a disputed assertion or charge ... [and] includes both the burden of persuasion and the burden of production.” With that definition, the next issue is: who has the burden of proof?*

*[130] The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: “Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*

28. In conclusion, she submitted that she is entitled to the relief that she has sought from this Court as anchored on Section 49 of the Employment Act.

### **Analysis and Determination**

29. I have considered the pleadings and submissions. The issues for determination are the following: -

- (i) Whether the Respondent absconded duty or was unfairly dismissed.
- (ii) Whether the Claimant is entitled to the prayers sought.
- (iii) Whether the Respondent is entitled to prayers sought in the counter claim.

### **Whether the Respondent was unfairly dismissed or absconded duty**

30. The Claimant's case is that the Respondent tendered a resignation letter on 6<sup>th</sup> November 2017 and thereafter absconded duty from 7<sup>th</sup> November 2017. The Respondent on the other hand avers that she tendered a resignation letter on 6<sup>th</sup> November 2017 in hard copy which was signed but the Claimant rejected the same following which she tendered an unsigned soft copy. That the Claimant was upset at her resignation and informed her that her employment had been terminated for undue conduct and that the dismissal was immediate. That this was communicated in the office WhatsApp Group.

31. The Claimant attached a copy of screenshot of the WhatsApp message of 10<sup>th</sup> November 2017 where a person going by the name “Njoroge Sahihi” wrote –

*“Good Afternoon Team, Pauline left the Business. Please join me in wishing her well in her further endeavours.”*

And a reply from one Oscar Designer *“All the best Pauline, be well and go with God.”*

32. From the same WhatsApp message at annexure “PM17” Respondent’s documents, it is clear that the message was from the Claimant’s Managing Director who signed the Respondent’s letter of appointment as Njoroge Njihia, Managing Director.

33. A person who has absconded duty is not wished well in future endeavours by the Managing Director of the employer, three days after the alleged absconding of duty. This is not consistent with a dismissal.

34. It is clear from the foregoing that the Respondent’s version of events that led to her leaving employment is the correct position. I therefore find that the Respondent did not abscond duty, but was in fact dismissed by the Claimant soon after handing in her resignation.

35. It is further clear from the witness statement of DUNCAN THUGU, the Human Resource and Operations Manager of the Claimant dated 13<sup>th</sup> September 2018 that the reasons this suit was filed against the Respondent by the Claimant is the suspicion that she had reported tax irregularities by the Claimant to KRA.

### **Whether Claimant is entitled to the prayers sought**

#### **(i) Pay in lieu of notice**

36. The Claimant prayed for one month’s salary in lieu of notice which it is not entitled to having been the one who terminated the employment of the Respondent.

#### **(ii) Refund of Kshs.24,600**

37. The Respondent has adduced evidence in her replying affidavit to prove that the entire loan of Kshs.40,000/- advanced to her by the Claimant was recovered from her salary by the Claimant and at the time of her dismissal there was a balance of only Kshs.1,000/- which she has since paid.

38. I find that the Respondent does not owe the Claimant the amount claimed in the sum of Kshs.24,600 or any other sum on account of the loan advanced to her in the sum of Kshs.40,000/-.

#### **(iii) Recruitment Costs**

39. The Claimant further claimed Kshs.75,000 recruitment costs. It is not clear and the Claimant has not explained how recruitment costs by an employer can become a liability of an employee.

40. In any event having found that the Claimant is the one who dismissed the Respondent, she cannot be liable for costs of recruitment.

#### **(iv) General Damages**

41. No submissions were tendered by the Claimant to justify award of general damages or the injury in respect of which the general damages are sought.

42. The prayer for general damages is dismissed for want of proof.

### **Respondent’s Counter Claim**

43. In her counter claim, the Respondent prayed for service pay, one month’s salary in lieu of notice, compensation and costs.

44. Having found that she was dismissed unfairly by the Claimant, she is awarded one month’s salary in lieu of notice at **Kshs.35,000/-**.

45. She is not entitled to service pay by virtue of Section 35(6) of the Employment Act as she was a Member of NSSF as is evident from the pay slips she filed in Court. The averment that the Claimant did not remit NSSF for 18 months is a complaint that should be made to NSSF which has the statutory mandate and machinery for recovery thereof.

46. Having been unfairly dismissed, I award the Respondent 3 months’ salary as compensation, taking into account the totality of the circumstances under which she left employment, the Claimant’s conduct and the length of service of the Respondent, including all relevant factors under Section 49(4) of the Employment Act.

### **Conclusion**

47. In conclusion the claim herein is dismissed with costs to the Respondent.

48. Judgment is entered on the counter claim as follows –

(i).. Pay in lieu of notice..... Kshs.35,000.00

(ii).. 3 month's salary compensation..... Kshs.105,000.00

**Total award is..... Kshs.140,000.00**

(iii) The Claimant shall pay the Respondent's costs on the counter claim.

(iv) Interest shall accrue at court rates from date of judgment.

49. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF JULY 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court 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 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

**MAUREEN ONYANGO**

**JUDGE**