



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1197 OF 2017**

**FAITH JEDIDA NJOKI.....CLAIMANT**

**VERSUS**

**BID WOOD SUITES HOTEL LIMITED.....RESPONDENT**

**JUDGMENT**

**I. INTRODUCTION**

1. In a memorandum of claim dated 23<sup>rd</sup> June 2017 and filed in Court on the same date the Claimant prays for:-

- a) Gratuity @ 15 day's pay per year for two years – Kshs.109,075.00;
- b) Maximum compensation for unfair termination (12 month's salary);
- c) Damages caused due to loss of employment – Kshs.3,000,000.00
- d) Certificate of service;
- e) Cost and interest.
- f) Total – Kshs.417,975.00

2. Upon service of the claim the Respondent entered appearance on 17<sup>th</sup> July 2017 and filed a response to the claim on 19<sup>th</sup> July 2017, dated 14<sup>th</sup> July 2017.

3. In the response to the claim, the Respondent denies Claimant's claim in toto and prays for dismissal of the same with costs.

4. After the close of pleadings, the matter was certified ripe for hearing on 3<sup>rd</sup> May 2021. Subsequently, the matter was listed for hearing on 29<sup>th</sup> July 2021 and the hearing proceeded before this Court.

**II. HEARING**

5. When the matter came up for hearing on 29<sup>th</sup> July 2021 the Claimant (CW1) testified alone in support of her cause. On the other hand, the Respondent called two witnesses (RW1 and RW2) in support of their position. All the witnesses testified in chief, were cross examined and re-examined on the said hearing date.

6. At the close of the oral testimonies, counsel for both parties agreed to address the Court by way of written submissions, which were duly filed and served.

7. It is the Claimant's case that she was engaged by the Respondent as a Human Resource manager on 12<sup>th</sup> November 2014. That subsequently, the contract was reduced into writing vide a contract dated 28<sup>th</sup> May 2015.

8. The Claimant testified that on 12<sup>th</sup> October, 2016 she was summoned by the newly appointed General manager Leopold King who

informed her that he had identified a team that he wanted to work with and that the Claimant was not part of that team. The Claimant testified that the meeting was held in an apartment occupied by the said new General manager and not in the office or the work place, and was also attended by finance controller and the head of security.

9. The Claimant testified that after she was informed by the new General manager of his intention not to work with the Claimant, that she was then unceremoniously escorted out of the premises by the head of security after the Claimant declined to resign as requested by the new General manager in that meeting. The Claimant stated that she was very embarrassed as she was escorted out “as if I was a criminal”.

10. The Claimant stated that she had not been served with a letter of intention to terminate or dismiss her and that she had not been served with the agenda of the said meeting.

11. The Claimant stated that no reasons were given for her dismissal, no hearing was held, and that up to now she has no idea why she was dismissed. She further stated that she was not paid her dues and that only a sum of Kshs.141,341/= was paid which she received on without prejudice basis.

12. The Claimant admitted that a certificate of service was issued to her by the Respondent and that she now has a new job. However, she insisted that she has not been paid her dues following what she considers to be unlawful and wrongful dismissal. She therefore prayed that the Court finds in her favour as per the memorandum of claim.

13. On the other hand, while the Respondent admits that the Claimant was their employee, the Respondent alleges that the Claimant was lawfully and procedurally dismissed and paid all her dues. The Respondent also alleges that a certificate of service was issued to the Claimant and consequently the Respondent argues that the cause lacks merits and prays for dismissal of the same with costs.

### **III. ISSUES FOR DETERMINATION**

14. The Claimant’s counsel filed in Court a list of issues dated 18<sup>th</sup> June 2020. However, in view of the fact that counsel for Respondent did not agree or consent to the said issues the Court has to frame the issues afresh based on the pleadings, oral testimonies, and the submissions.

15. After a careful evaluation of all relevant materials in this cause this Court considers the following to be the issues for determination: -

- (i) For what period was the Claimant an employee of the Respondent?
- (ii) Was the dismissal or termination of the Claimant by the Respondent lawful both in substance and procedure?
- (iii) If the dismissal or termination was wrongful and hence unlawful, is the Claimant entitled to the reliefs sought?
- (iv) Who meets the costs of this cause?

The Court shall deal with each of the above issues in the following paragraphs of this Judgment.

### **IV. EMPLOYMENT**

16. Employment contracts unlike other types of contracts, are unique. This is because unlike a contract for supply of goods, an employment contract has a “personal” aspect whereby an employee supplies labour in return for wages or salary. Unless a contract of employment offends the constitutional and statutory provisions relating to the same, Courts have absolutely no business in creating contracts of employment between willing parties who have the requisite capacity to enter into such employment contracts. Employment contracts may be oral or written and the Employment Act No. 11 of 2007 (the Act) provides for the bare minimums of the terms and conditions that apply in such contracts.

17. In this cause the relationship between the Claimant and the Respondent is governed by the contract that the parties willingly executed on 29<sup>th</sup> May 2015. This document was produced by the Claimant as exhibit 1 during her testimony in Court. In item 1 of the said contract, it is very clear that the Claimant was engaged from November 12<sup>th</sup>, 2014. There is nothing illegal about the contract and as such this Court has no business interfering with the intentions of the parties. No fraud, coercion or duress has been alleged and proven by either party and as such the Court has no difficulty in finding the answer to the first issue.

18. From the foregoing paragraph, it is by now clear that the employment contract between the Claimant and the Respondent run from November 12<sup>th</sup>, 2014 and the same remained in force until 12<sup>th</sup> October, 2016 when the Claimant was dismissed by the Respondent from that employment. It is not disputed by either party that the relationship between the two parties ended on the said date of 12<sup>th</sup> October, 2016.

### **V. DISMISSAL**

19. As stated in an earlier part of this Judgment, the Claimant testified that on 12<sup>th</sup> October, 2016 she was summoned and informed by the new general manager that the Claimant was not part of a team that the new general manager had selected to work with. The Claimant was then requested to agree to termination but she declined. She was then escorted out of the premises by the head of security. Also present during the meeting was the finance controller.

20. The Claimant stated that until that point, she had not been issued with a termination letter or even a letter inviting her to the said meeting

disclosing the agenda for discussion. She also stated that she had no disciplinary issues with the Respondent and she therefore categorically stated that she was dismissed summarily without due process and no lawful reasons were given for that dismissal.

21. The particulars of the unfair dismissal are pleaded in paragraphs 8 to 13 of the memorandum of claim and the Claimant testified in Court in support of her statement of claim.

22. In cross-examination, the Claimant admitted that she had received a sum of Kshs.141,341/= allegedly in settlement of her dues but she adduced that she received the said sum on without prejudice basis. She also admitted that a certificate of service had been issued by the Respondent but she was not clear as to whether she had collected or received the same.

23. On their part, the Respondent called two witnesses (RW1 and RW2). Interestingly none of the two witnesses had attended the meeting in which the Claimant was dismissed. The Respondent opted not to call the general manager Leopold King, or the head of security, or the finance controller as witnesses, notwithstanding that they had all been mentioned as present during the said meeting. The Respondent did not tender minutes of the said meeting as rebuttal to the evidence adduced by the Claimant. There is a presumption in law that if a party fails to call material evidence or witness that such a party would have been expected to tender, such evidence is deemed to have been against such a party; see section 119 of the Evidence Act (Cap 80).

24. The witnesses that the Respondent called to testify did not aid their case in respect of the dismissal or termination. They did not add value to Respondent's case because none of them attended the meeting where the dismissal occurred and no minutes were produced in respect of that meeting. In the circumstances, the Court finds that the evidence by the Claimant on what transpired during the said meeting stands as the same was not shaken even in cross-examination. Instead of addressing relevant issues RW1 and RW2 dealt on extraneous issues that they could not substantiate such as temperament of the Claimant at work, her relationship with other employees, all intended to attack the character and disciplinary record of the Claimant. Unfortunately, no evidence was tendered in support of those wild allegations and it is not the character of the Claimant that was on trial.

25. The Court is therefore left with the evidence that the Claimant was dismissed or terminated because the new general manager had selected a team to work with and which the Claimant was not part of. For many reasons, this cannot be a good ground for dismissal or termination. This amounts to wrongful dismissal or unlawful termination that is unknown to the law.

26. The law on termination and dismissal is to be found in sections 35, 40, 44, 45 and 46 of the Act. Other than death, which naturally terminates a contract of employment, an employee may be lawfully dismissed or terminated on the basis of redundancy or misconduct. Depending on severity of the misconduct, the employer may decide to summarily dismiss an employee for gross misconduct.

27. The question then becomes, on what basis was the Claimant terminated or dismissed by the Respondent? To answer this question the Court shall look into the substantive law and then speak to the procedural fairness of the process adopted by the Respondent.

## **VI. SUBSTANTIVE FAIRNESS**

28. In their pleadings, oral testimonies, and written submissions, the Respondent has not alluded to any reasons for dismissal or termination of the Claimant. On the other hand, the Claimant in her pleadings, oral testimony and written submissions has asserted that she was dismissed after a new general manager informed the Claimant that she was not part of the team that he had picked to work with. After the Claimant refused to accede to resignation, she was escorted out of the work place by the head of security and effectively dismissed summarily, terminated, or in whatever other manner her employment with the Respondent came to an abrupt end.

29. The Court has deliberately used the words termination and dismissal in the foregoing paragraph because due to the gross illegality of reasons given for the ending of the employment relationship between the Claimant and the Respondent, there is no legal terminology under the Act that may be attributed to the same. It is not alleged that there was misconduct or gross misconduct on part of the Claimant, it was not a case of redundancy; and hence the provisions of sections 35, 40, 43, 44, 45 and 46 fail to capture the reasons given by the Respondent for dismissal or termination of the Claimant by the Respondent.

30. This Court in the circumstances concludes and finds that the reason upon which the Respondent terminated or dismissed the Claimant is invalid, illegal, unlawful, and not supported by the law. As stated earlier on, the only reason that the Court is able to deduce from the pleadings, oral testimonies, and written submissions is that the Respondent dismissed the Claimant because a new general manager had chosen a team to work with, in his own preference, and that the Claimant was not part thereof. Certainly, that is not supported by any law as a lawful, valid, or logical reason.

31. It is not alleged, and there is no evidence adduced, that the Claimant was performing poorly or incompetent. The Court finds that the termination, dismissal, or in whatever other term that the same may be described was whimsical, capricious, and malicious on the part of the Respondent. There is no allegation or evidence of fundamental breach of the terms of the contract by the Claimant. The letter dated 12<sup>th</sup> October, 2016 that allegedly terminated the employment and produced by the Claimant as exhibit 3a does not state the reason for the termination.

## **VII. PROCEDURAL FAIRNESS – DUE PROCESS**

32. Having found that there was no lawful reason given for the dismissal or termination, it would almost be an exercise in futility to consider whether the Respondent was fair in the procedure that it adopted in arriving at that decision. However, in the interest of justice and completeness, the Court shall consider this aspect as hereunder.

33. For termination or dismissal to be lawful, both the substance and the procedure adopted must be in accord with the law. Courts have dealt with these two aspects to the extent that this Court can state that the law on the two issues is somehow or to a large extent settled. See

the decisions in Walter Ogal Anuro V. Teachers Service Commission Cause No. 955 of 2011; Kenfreight (E.A) Limited V. Benson K. Nguti [2016] eKLR; Loice Otieno V. Kenya Commercial Bank Limited Cause No. 1050 of 2011; and Raymond Cherokwe Mrisha V. Civicon Limited [2014] eKLR, among many other decisions.

34. Based on the above decisions and sections 35, 40, 41, 43, 44 and 45 of the Act, the procedural steps that an employer must take include the following: -

(i) There has to be a reasonable cause for disciplinary action against the employee based on law. In other words, before an employer takes the procedural steps which may end up in dismissal or termination, such an employer must have established valid and lawful reason(s) for acting. This has been discussed at length in the foregoing part of this Judgment in regard to substantive justice.

(ii) The employee must be informed in a language that he understands of the intention of the employer to take the disciplinary action. In practice, this is a written notice that is usually and variously referred to as show cause letter or notice. This notice must contain specific allegations or accusations against the employee and invite the employee to respond thereto within reasonable time. The notice should also inform the employee of the likely consequences of the process that has started and inform the employee to submit all information including documents that the employee may intend to rely on.

(iii) Once the employee responds, the employer should consider the response and decide whether a hearing is necessary. It not every notice that must end up in a disciplinary hearing. If the explanation offered by the employee is satisfactory, the employer may end the process at that point or even consider other options such as a warning.

(iv) If the employer considers that a hearing is merited, then an invitation letter must be addressed to the employee inviting him for the hearing. In that notice the employee must be given adequate and reasonable time to prepare and be informed of the date, time, and venue for the hearing. The employee must be informed of his right to come for the hearing along with a co-worker or a representative from the union to which he is a member.

(v) Though a disciplinary hearing is not a Court trial, the employee must be accorded all due process to be heard and present his case in the fairest way.

(vi) As it can be discerned so far, the notices and exchanges have to be in writing and in a language that the employee understands. It logically follows that if the employee does not understand the language used, then he should be allocated interpretation services by the employer.

(vii) Finally, the employer must inform the employee of the decision arrived at and the reasons therefor. The employee must also be informed of his rights on appeal, review, or other legally available options.

35. It is also clear that in order for disciplinary proceedings to meet the required standard, as envisaged in the provisions of the law alluded to above and the precedents, the same must meet the rules of natural justice, constitutional requirements set out under Article 47, and Fair Administrative Actions Act. Denial of due process to an employee amounts to unfair labour practice under Article 41 of the Constitution.

36. Applying the above principles and standards to the facts of the instant cause, it is evidently clear that the Respondent did not subject the Claimant to procedural fairness or due process. Going by the evidence on record as analysed in an earlier part of this Judgment, there was no valid, lawful, logical, or probable reason(s) for the Respondent to consider disciplinary action against the Claimant, no notice was issued, and no hearing took place.

37. This Court finds and holds that the Claimant was not subjected to substantive and procedural fairness and now proceeds to consider the reliefs sought.

## VIII. RELIEFS

38. The reliefs sought by the Claimant against the Respondent have been set out in the first page of this Judgment and this Court shall consider each of the items sought. However, a party is bound by the pleadings filed and as such the Court shall only consider what the Claimant has sought.

39. The foundation of the reliefs that this Court may grant is section 49 as read with section 50 of the Act. Section 12(3) of the Employment and Labour Relations Court is also relevant and reiterates the remedies awardable.

40. The Claimant prays for the following: -

### (a) Gratuity

41. As stated elsewhere in this Judgment, the relationship between the Claimant and the Respondent is based on and governed by a written contract of employment dated 28<sup>th</sup> May, 2015. This Court has gone through the said contract and there is no provision for payment of gratuity and on that account alone this prayer on gratuity fails. It has been held that unless gratuity is agreed on in the written contract, there is no basis for a Court to award the same; see Pathfinder International Kenya Limited V. Stephen Ndegwa Mwangi [2019] eKLR and Bamburi Cement Limited V. William Kilonzi [2016] eKLR, among other decisions. On this issue therefore, this Court is in agreement with counsel for the Respondent that the same is not awardable and it is thus denied.

### (b) Compensation for unlawful dismissal or termination

42. The damage or loss that an employee incurs for unlawful termination or wrongful dismissal is the wages or salary denied in view of the termination or dismissal. This is so because in the real and logical sense, what an employee loses in the employment is the lost wages or salary. There may be an element of career growth interruption but strictly speaking what an employer does in case of unlawful termination or dismissal is denying the employee what he should have earned lawfully and justly.

43. The conduct of the Respondent in this cause was completely unjust and unfair. There was no valid, lawful, reasonable, or even probable reason to terminate or dismiss the Claimant. The Claimant was not subjected to procedural fairness and hence the conduct of the Respondent is manifestly and absolutely out of line.

44. The Respondent ambushed the Claimant with unfair termination or dismissal and as such the Claimant was not psychologically or otherwise prepared to look for another job after working for the Respondent for a period of over two years. However, there is no evidence as to how long it took the Claimant to obtain another job as she admitted in her testimony that she now has a job.

45. Section 49(1)(c) of the Act caps award under this head to gross salary of 12 months. This Court is of the opinion that the maximum of 12 months gross salary may only be granted in exceptional circumstances. In opposition to the award of 12 months gross salary as prayed by the Claimant, the Respondent's counsel has relied on a plethora of decided cases and this Court to a large extent agrees that the maximum award under this head may only be granted under exceptional circumstances.

46. The Court has taken into consideration the factors listed in section 49(4) of the Act and the authorities cited. Based on the evidence on record, the Claimant did not contribute to her dismissal or termination, she had worked with the Respondent for over two years, and she expected to continue working thereat. It is manifestly clear that the circumstances leading to this cause were solely occasioned by the Respondent. The Respondent did not take any steps to resolve the issues before or after this cause was filed in Court.

47. Considering all the above enumerated factors and doing the best that this Court can do in the circumstances of this cause, the Court is of the opinion that an award of eight months gross salary would be fair compensation and the same is awarded as hereunder: -

$$\text{Kshs.}116,776/- \times 8 = 934,208/=$$

48. This amount is subject to statutory deductions as per section 49 (2) of the Act.

#### **(c) Damages for loss of employment**

49. The Claimant has pleaded this relief in her statement of claim. However, during the hearing no evidence was adduced in support of the same. What exactly would this relief entail? Since it is specifically pleaded, the Claimant was under legal obligation to prove the same. It is not enough to plead a relief, a party so pleading must prove the same. The Claimant fell way below the required standard of proof, and there was even no attempt made to prove the same.

50. In any event, this Court has indicated in another part of this Judgment that the monetary loss that an employee incurs upon unlawful termination or wrongful dismissal is the loss of wages or salary that could have been earned. If that be the case, this has been taken care of in the foregoing paragraphs through the award of eight months gross salary. The Court denies to the Claimant this relief as the same has not been proved at all.

#### **(d) Certificate of service**

51. During the hearing, both sides were in agreement that the Respondent had issued the Claimant with a certificate of service or at least that the same had been prepared. The Court orders that if the same has not been delivered to the Claimant, the Respondent to avail the same within seven (7) days of this Judgment. For completeness the same should be handed over to counsel for the Claimant.

#### **(e) Costs**

52. Costs follow event and the Claimant is awarded costs of this cause based on the reliefs granted. The same may be agreed or taxed.

53. The Court has looked at exhibits 1, 2, 4 and 5 produced by the Respondent in support of the allegation that the Claimant was paid all her dues at the time of leaving the employment. The Court makes the following observations in respect thereof. One, it is very clear from the letter dated 21<sup>st</sup> October 2016, exhibit 4, that the Claimant received and or accepted the said payment on "without prejudice" basis. This obviously indicates that the Claimant did not forfeit her right to other or further claims. Secondly, the payment made was mainly in settlement of the dues for the month of October 2016. The Court is of the opinion that the said payment of Kshs.141,341/= does not in any way affect the award in this cause. In any event, the Claimant has not asked for any dues for that particular month of October 2016. The Court has said enough to confirm that that payment was not in full settlement of the dues to the Claimant and the same is not a bar to the Claimant being awarded any other amounts that are due and payable to the Claimant in law.

### **IX. DISPOSAL**

54. The Court makes the following orders in final disposal of this matter: -

- a) A declaration be and is hereby issued that the termination or dismissal of the Claimant by the Respondent was unlawful and wrongful.

b) The Claimant is awarded Kshs.934,208/= as compensation for wrongful dismissal or unlawful termination.

c) The Respondent is hereby ordered to issue a certificate of service to the Claimant and the same delivered to the Claimant's Advocates within seven (7) days of this Judgment.

d) The amount in (b) above shall earn interest at Court rates from the date of this Judgment till payment in full.

e) Costs to the Claimant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2021**

**DAVID NDERITU**

**JUDGE**