



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO 992 OF 2017**

**DAPHNE RITA D'SOUZA.....CLAIMANT**

**VERSUS**

**THAMANI CONCIERGE LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant has sued the Respondent allegedly for wrongful termination of her contract of service. She seeks compensation for this alleged irregular termination.
2. The Respondent denies this assertion. It avers that the Claimant was never terminated. She deserted employment.
3. Both parties filed their respective pleadings. They take entirely contrasting positions in the cause.
4. The Claimant asserts that she was employed by the Respondent in October 2016 as a travel agent. That she was later confirmed in February 2017.
5. That on 18<sup>th</sup> March 2017, she became unwell and could not report to work as required. She says that she sent a text message to her employer asking that she be allowed to seek medical attention. That the employer's representative (RW1) reacted sharply to the request and demanded that the Claimant reports to work. As a result, she reported to work but late and in pain.
6. At work, the Claimant asserts that she got a hostile reception from RW1. She was told that she had been terminated and should leave immediately.
7. As she left, the Claimant asserts that she was confronted by a security guard who had been directed by RW1 to have the Claimant ejected from the work premise. Before this, she asserts that she had been roughed up by RW1.
8. The Claimant asserts that she nonetheless visited hospital and later on sought to know from the Respondent her fate in relation to her employment. She was not given a positive response.
9. After failing to get a positive response from the Respondent, the Claimant engaged the services of her advocates who demanded for her terminal dues. It is only at this point that the Respondent responded asserting that it had not terminated the Claimant and that she should report back to work.
10. However, the Claimant asserts that this was just an afterthought by the Respondent. She says that before this, the Respondent had demanded that she returns company assets or she faces police action. She complied. That these events coupled with her forceful ejection from her work place on 18<sup>th</sup> March 2017 can only be understood in the context of a termination of her employment.
11. The Claimant therefore prays for several reliefs against the Respondent. These include the following:-

- |                                       |                |
|---------------------------------------|----------------|
| a. Salary in lieu of one month notice | Ksh. 40,000/=. |
| b. Unpaid salary for March 2017       | Ksh. 23,225/=. |
| c. Accrued leave                      | Ksh. 20,000/=. |

d. 12 months compensation for unfair termination Ksh 480,000/=.

e. Interest on the aforesaid amounts.

f. Certificate of Service.

g. Costs of the claim.

12. The Respondent denies the claim. It asserts that the Claimant was given permission to seek medication on 18<sup>th</sup> March 2017 when she was unable to work. That after her release, the Claimant never came back to work. This is despite inquiries by the Respondent on her whereabouts.

13. That it is only later in early April 2017 that the Respondent was served with a demand from the Claimant's lawyers asserting that the Respondent had unlawfully terminated the Claimant. The Respondent denies that it terminated the Claimant. In fact, it responded to the Claimant's lawyers through its lawyers asking that the Claimant resumes work. She never did.

14. After some time, the Respondent issued the Claimant with a notice to explain her absence from work. It did not elicit any response from the Claimant.

15. As a result, the Respondent treated the Claimant's actions as desertion of duty. Consequently, the Respondent prays that the Claimant's action be dismissed with costs.

16. At the trial, the parties adopted their respective witness statements and produced copies of the documents attached to their respective lists of documents. They also gave oral evidence.

17. At the close of the trial, the parties asked to be permitted time to file written submissions. However, as at the date appointed for this purpose, neither of them had put the submissions on record.

17. This is a case which presents a typical scenario of conflict of primary facts. In such case, the court has to rely heavily on its assessment of the integrity and candor of the witnesses and believe one of them. This includes examining the demeanor of such witnesses. This position finds support in the decision in *Nyagwoka Ogora Alias Kennedy Kemoni Bwogora V Francis Osoro Marko [2004] eKLR*. I will consider this dispute with this principle in mind.

19. The Claimant struck me as very consistent in her testimony. She did not flip flop on any of the issues she set out either in examination in chief or cross examination.

20. Conversely, although RW1 maintained that the Claimant absconded duty, it appears from the documentary evidence filed that this was an attempt at stage-managing this scenario in a bid to defeat the Claimant's claim. For instance, why would the Respondent write to the Claimant on 25<sup>th</sup> April 2017 (see document 3 on the defense list of documents) expressing ignorance about the whereabouts of the Claimant since she left work when there is evidence that the very same Respondent had engaged the Claimant through its lawyers earlier on around 10<sup>th</sup> April 2017 and 19<sup>th</sup> April 2017 regarding the Claimant's termination? What explains these contradictions?

21. In her testimony, RW1 states that she kept reaching out to the Claimant to resume work and even recovered the office laptop from her. Yet, the mode of reaching out to the Claimant is not indicated. And if the Respondent thought it necessary to reach out to the Claimant through letter on 25<sup>th</sup> April 2017, why were the other earlier attempts not documented in similar manner?

22. Having regard to these lacunas in the Respondent's evidence and in view of the obvious conflict in the material facts in this matter, I am inclined to believe the Claimant's version of the events in the cause. I believe the Claimant's position that she was terminated by the Respondent.

23. The letters by the Respondent's advocates dated 10<sup>th</sup> April 2017 and 19<sup>th</sup> April 2017 were an attempt to reverse the damage after it had happened. And I so hold.

24. Was the Claimant's termination lawful then? The evidence available from the Claimant is that on 18<sup>th</sup> March 2017 when she reported late on duty, she was simply asked to go away. No evidence of the Respondent having issued the Claimant with a termination notice is available. No evidence of the Claimant having been granted a hearing is presented.

25. Indeed, I believe that the Respondent's turnaround to plead that the Claimant was never terminated is in recognition of these missteps. I hold that the Claimant's termination was in contravention of the requirements of section 41 of the Employment Act as read with sections 43 and 45 of the Act.

26. Having so found, the next issue for determination is whether the Claimant is entitled to the remedies sought. The Claimant prays for one month's salary in lieu of notice. This is in line with the provisions of section 36 of the Employment Act. Accordingly, I award the Claimant Ksh. 40,000/= being the sum equivalent to salary for one month.

27. The Claimant also prays for salary for the 18 days she had worked. The Respondent has not provided evidence that this item was settled. This is despite a general assertion by it that the Claimant was paid salary for the 18 days she worked in March 2017.

28. In terms of section 112 of the Evidence Act, details regarding payment of salary would ordinarily be in the custody of the employer. The burden of proof in the circumstances rests on the employer to demonstrate settlement of such salary in the event of a dispute on the matter.

29. The Respondent did not provide evidence that it paid the Claimant salary for the days worked in March 2017. In the premises, I award the Claimant Ksh. 23,225/= being salary for that period.

30. Regarding the claim for leave, I note that the Claimant had not served the Respondent for one year on continuous basis. This claim is therefore not premised in law. It is accordingly declined.

31. In relation to compensation for wrongful termination, I take into consideration that the Claimant had been with the Respondent for a very short while before she was terminated. Further, when she was offered her job back, she declined ostensibly on account of soiled relations between the parties.

32. I think that she was not keen to mitigate her loss. I would therefore award compensation equivalent to three months of her gross salary. This works to Ksh. 120,000/=.

33. The aforesaid awards attract interest at court rates and are subject to statutory deductions where applicable.

34. The Respondent is also ordered to issue the Claimant with a Certificate of Service.

35. Finally, the Claimant shall have costs of the claim.

**36. Summary of the Award:-**

- a. The Respondent's termination of the Claimant's contract of service was unlawful.**
- b. The Claimant is awarded Ksh. 40,000/= in lieu of salary.**
- c. The Claimant is awarded Ksh. 23,225/= as salary for the days worked in March 2017.**
- d. The Claimant is awarded compensation of Ksh. 120,000/= for unlawful termination.**

**TOTAL Ksh. 183,225/=.**

- e. The awards above to attract interest at court rates.**
- f. The awards to be subject to statutory deductions if any.**
- g. The Respondent to issue the Claimant with a Certificate of Service.**
- h. Costs of the suit are awarded to the Claimant.**

**DATED, SIGNED AND DELIVERED ON THE 13<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**B O M MANANI**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B O M MANANI**

**JUDGE**