



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 2038 OF 2016

BETWEEN

PAMELA NKIROTE KIGUNDA...CLAIMANT

VERSUS

SAFARI PARK HOTEL.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Mohammed Muigai LLP, Advocates for the Claimant

Muthoga Gaturu & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 4th October 2016. She states, she was employed by the Respondent Hotel as a Guest Relations Officer, on 1st November 2006. She was promoted to the position of Sales and Marketing Executive, effective 30th November 2008. She continued to work hard, and was promoted to the position of Assistant Sales and Marketing Manager, effective 1st May 2015.

2. She states, her contract was unfairly and unlawfully terminated by the Respondent on 23rd May 2016, on the allegation that she deserted. She had taken annual leave on 4th April 2016 and travelled to Europe to attend to a pressing family matter. She was expected back on duty, on 17th May 2016. She was unable to travel back and wrote to the Respondent seeking extension of her annual leave. She wished to have extension up to 13th June 2016. She had 28.5 unutilized annual leave days. When she returned to work she found her work e-mail account had been suspended, and learnt that her contract had been terminated.

3. The Claimant states, she was denied fair hearing; she was entitled to annual leave under the law and contract; termination was not based on valid reason; and there was no notice. She prays for Judgment against the Respondent on the following terms: -

a. 12 months' salary in compensation for unfair termination at Kshs. 773,724.

b. 12 months' salary in damages for unlawful termination at Kshs. 773,724.

c. 2 months' salary in lieu of notice at Kshs. 128,954.

Total...Kshs. 1,676,402.

d. Certificate of Service.

e. Costs.

f. Interest.

4. The Respondent filed its Statement of Response on 10th November 2016. It is conceded that the Respondent employed the Claimant, in the positions and dates, shown in her Pleadings. She was initially employed on probation on 29th July 2005, and confirmed in position at the end of probation, on 1st November 2005. She held the position of Assistant Sales and Marketing Manager, as at the time of termination.

5. She applied for annual leave to commence 11th April 2016 to 16th May 2016, a period of 36 days. She was expected back on 17th May 2016. She went on annual leave as arranged. On 16th May 2016, she wrote to the Respondent an e-mail, seeking extension of annual leave to 13th June 2016. She alleged she was attending to unspecified family matters in the UK. The Respondent considered the request and declined it on the same day. She was however granted an additional 6 days to enable her travel. She was therefore asked to report back on 23rd May 2016. She did not report back, and did not communicate on her whereabouts. The Respondent gave her sufficient time to explain her absence. She did not. The Respondent consequently issued termination letter, effective 23rd May 2016. She was paid terminal benefits. The Respondent prays for dismissal of the Claim with costs.

6. The Claim was heard and concluded on 3rd June 2021. The Claimant gave evidence, as did Respondent's Acting Human Resource Manager Bessie Inoti. The Claim was last mentioned in Court on 8th July 2021 when Parties confirmed filing of their Submissions and Judgment reserved for 18th November 2021. Judgment has been readied earlier and Parties notified of its delivery, on the date shown below.

7. The Claimant adopted her Documents and Witness Statement on record, in her Evidence before the Court.

8. Cross-examined, she told the Court that she had worked for 10 years prior to termination. She was experienced. She was familiar with processing of annual leave.

9. She applied for annual leave on 1st March 2016. It was for 30 days. It was corrected to 36 days and approved. She was to return on 17th May 2016. She did not unilaterally extend her annual leave period. She requested for extension. It was approved. She was granted 7 more days. She was sent an e-mail by the Respondent, and advised this could not be extended further. She was given reasons why there could be no more extension. She did not report back on 23rd May 2016 as advised. She returned on 13th June 2016 as she had wished. She informed the Respondent through her e-mail of 19th May 2016, that she could not make it back, by 23rd May 2016 as advised. She learnt that her contract was terminated, when she returned on 13th June 2016. She cleared and was paid Kshs. 151,225 in terminal dues.

10. Redirected, the Claimant told the Court that she was told by the Respondent that her docket was sensitive, which made it hard for further extension of annual leave. She had handed over before she went on annual leave, for the remaining part of the year. She communicated with her Supervisor Ruth Chege, in addition to writing e-mails to the Respondent, on the subject of annual leave. Her Brother was in the UK, going through a stressful divorce, and needed the Claimant for support. The Claimant was asked by the larger family to stand by her Brother.

11. Bessie Inoti similarly adopted the Documents filed by the Respondent, and Witness Statement, in her evidence. On cross-examination she told the Court that she holds a first degree from USIU; she holds diploma in human resource management; and had 15 years' experience in the area. She is familiar with labour law.

12. The Respondent was not influenced by Claimant's past conduct, in terminating her contract. She had accumulated 61 annual leave days. She utilized 36 of these, and had a balance of 25 days, at the time of termination. Her request for extension fell within the remainder of her annual leave days. Her extension was for 7 days. She was to resume on 23rd May 2016. There was no letter to show cause. Termination letter was sent by registered mail. She was unreachable by phone. The Respondent held disciplinary hearing in her absence. Redirected, Bessie told the Court that the Claimant did not communicate to her Supervisor after 19th May 2016.

13. Was termination based on valid reason under Section 43 and 45 of the Employment Act; was it fair in accordance with Section 41 and 45 of the Act; and are the remedies sought merited?

The Court Finds: -

14. The Respondent Hotel employed the Claimant as a Guest Relations Officer on 29th May 2005. She successfully completed probation and was confirmed in this position, on 1st November 2005. She rose through the ranks, and was Assistant Sales and Marketing Manager, by the time her contract was terminated, on 23rd May 2016. Her last salary was Kshs. 64,477 monthly.

15. There is no controversy that she applied to go on annual leave which commenced on 11th April 2016, ending 16th May 2016. The application was indicated to be for 30 days, but this was corrected to 36 days, at the time the Claimant commenced her annual leave.

16. She was to spend time in Spain and UK, according to the record. She was to return on 17th May 2016. She states that her Brother was involved in a stressful divorce in the UK, and she was asked by the larger family to stand by his side, which necessitated her being away beyond the expected date of return, 17th May 2016.

17. There is a series of e-mails exchanged between the Claimant and Human Resource and Administration Manager J. Kimathi. The Claimant also communicated with her Supervisor Ruth Chege, and Bessie Inoti on the subject.

18. The emails are as shown below: -

May 16, 2016, at 4: 16 PM.

Claimant to Kimathi, cc. Ruth Chege and Bessie Inoti.

“ I hereby write to request for extension of my leave. On my application, I indicated I would be back to work on Tuesday 18th May 2016. However, some family matters have arisen that require me to extend my stay in the UK, where I am visiting my Brother. I would like to apply for an extension from Tuesday 18th May 2016, to Saturday 11th June 2016, to resume on Monday 13th June 2016. I request that these days are deducted from the leave days remaining.”

May 16, 2016, at 6:02 PM.

Bessie Inoti to the Claimant, cc. Ruth Chege and J. Kimathi.

“ Morning. I believe you knew about the family issue beforehand. Why did you wait until the last minute when you were expected to resume to request for extension?

Following consultations and given the sensitive functions you have ongoing till end month, we cannot extend your leave until June.

However, given your current location, it has been decided to give you some grace period, and extend your leave up to Sunday 22nd May 2016. You are therefore expected back in the office on Monday the 23rd May 2016 without fail.”

May 19, 2016, at 7:10 PM.

The Claimant to Bessie Inoti, cc. Ruth Chege and J. Kimathi.

“Thank you for your e-mail. I deeply regret the late notification and inconvenience caused. *I appreciate that the Organization has entrusted me to handle sensitive accounts and events and I do not take this responsibility for granted.*

I have taken this into consideration in my request for leave extension. However, I will not be able to make it back to work on Monday 23rd May 2016. I need the extra days to attend family matters. The soonest I can be back, is on Monday, 13th June 2016. I kindly request that these days be deducted from my remaining leave days. “

19. From these e-mails, it is clear that the Claimant sought extension of her annual leave period of 36 days, from 18th May 2016, to 13th June 2016. She explained that she needed the extra days, to lend support to her Brother, who was involved in a stressful divorce.

20. The Respondent declined the extension up to 13th June 2016, but extended Claimant’s leave period to 23rd May 2016 to allow her wind up her tour of the UK.

21. The Claimant declined instructions, and went by her own desired leave schedule, returning to duty on 13th June 2016.

22. The first conclusion to be made from this behaviour, is that the Claimant had knowingly declined lawful and proper instructions of her Employer, which is an employment offence, under Section 44 [4] [e] of the Employment Act 2007. The offence is known as insubordination. The Claimant applied for annual leave, which was approved for a specified period. She then sought extension. It was not granted in accordance with her wish, but was extended, by about 5 days, to enable her wind up her tour and travel back in readiness for resumption of her work. She took up the additional days, and extended leave further to 13th June 2016. From the 23rd May 2016, to 13th June 2016 is a period of about 15 working days. The Claimant took 15 days of extended annual leave unilaterally. She was in a continuous period of insubordination for 15 working days.

23. The second conclusion is that the Claimant was away from her place of work, without the leave of her Employer, or other lawful cause. This too, is an employment offence under Section 44[4] [a] of the Employment Act. It is described as absent without leave, or other lawful cause. Between 23rd May 2016 and 13th June 2016, the Claimant was AWOL. She was in a continuous period of absence without leave of the Employer, or other lawful cause, for 15 working days.

24. For both employment offences, the Respondent was within its mandate, under Section 44[4] of the Employment Act, to summarily dismiss the Claimant for gross misconduct.

25. Termination was based on valid reason, under Sections 43, 44[4] and 45 of the Employment Act.

26. It is correct that the Claimant had a balance of 28.5 days, at the time of dismissal. Section 28 of the Employment Act however, requires that where an Employee is entitled to annual leave days in excess of the minimum specified under subsection [1][a] of the Employment Act, the Employer and the Employee may agree on how to utilize the leave days.

27. There was no agreement that the Claimant utilizes the remainder of 28.5 days or any portion thereof, in the UK. She appears to have fixed her own return-to-work date, and expected the Respondent to endorse that date. The law required her to have consensus with the Respondent. Her unilateral extension, could not be cured by the fact that she was owed leave days by the Respondent. An Employee does not

just extend her annual leave period unilaterally, just because she is owed more leave days, at the end of the period she was granted leave. There must be consensus on utilization of remainder of annual leave. The Claimant in any event, was not caught up in a personal emergency in the UK, requiring leave extension. The Court would think, as argued by the Respondent, that it was known to the Claimant before she left Kenya for the UK, that her Brother was involved in some stressful divorce. The Claimant was in a position to ask for a longer period of annual leave, from the inception. In the end she took her Employer for granted, and was engaged in 2 distinctive acts of gross misconduct, for which the Respondent was justified in imposing the sanction of summary dismissal.

28. There is no evidence that the Claimant was subjected to a disciplinary hearing, when she returned to work on 13th June 2016, or on any other date thereafter. There is no evidence of disciplinary hearing which took place in her absence, as proposed by Bessie in her evidence.

29. There was no letter issued asking the Claimant to show cause why she should not be disciplined. She was available on 13th June 2016. There were no charges preferred against her for any employment offence. There was no hearing, as prescribed under Section 41 and 45 of the Employment Act. She was just slammed with a letter of dismissal, with the effective date stated to be 23rd May 2016.

30. Procedure was flawed, and below the minimum statutory threshold of fairness, prescribed under Section 41 and 45 of the Employment Act.

31. The Court is persuaded that termination was based on valid ground, but flawed on procedure and to this extent, unfair.

32. The Claimant was paid terminal benefits as shown in the Final Dues Computation, signed by the Parties on 24th June 2016. The net sum paid was Kshs. 151,225.

33. The Court has taken into account this sum paid as terminal dues, in considering the amount the Claimant should be paid, as compensation for unfair termination. It has been considered that the Claimant worked for 10 years. Her record was tainted. There are a series of letters of warning and caution, relating to punctuality, absenteeism, inappropriate dressing while scheduled for duty at State House, and delay in submitting work reports. The Claimant's attitude, up to her final act of defiance, does not encourage the view that she could have gone on working until retired. She caused the Respondent to terminate her contract, by refusing to follow the instructions issued upon her by the Respondent, to return to work by 23rd May 2016. Termination was on valid ground, but lacking in fairness of procedure. ***The Court grants to the Claimant 3 months' salary in compensation for unfair termination at Kshs. 193,431.***

34. The Claimant was summarily dismissed. The Respondent was within its discretion to terminate the Claimant's contract without notice, or with less period of notice, than the Claimant was entitled to under the law and her contract. There is no justification in her prayer for notice of 2 months or any other period.

35. There is similarly no reason shown by the Claimant, why she should be granted damages for unlawful termination, separate from grant of compensation for unfair termination.

36. She is granted her prayer for Certificate of Service, under Section 51 of the Employment Act.

37. No order on the costs.

IN SUM, IT IS ORDERED: -

a. It is declared that termination was justified, but did not follow a fair procedure, and to this extent was unfair.

b. The Respondent shall pay to the Claimant equivalent of 3 months' salary in compensation for unfair termination at Kshs. 193,431.

c. Certificate of Service to issue.

d. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 15TH DAY OF OCTOBER 2021.

JAMES RIKA

JUDGE