



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2562 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

IRENE JILLANI MWAMUYE.....CLAIMANT

VERSUS

RED COURT HOTEL T/A THE BOMA HOTEL.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The claimant filed her memorandum of claim dated 13th December 2016 and she brought a claim against the respondent claiming 3 months' salary in lieu of notice. She also gave her oral evidence on virtual platform on 9th August, 2021.
2. The respondent attempted to file his response out of time even though they were served with summons on 19th December, 2016 by the claimant.
3. Garane & Co. Advocates filed a notice of appointment on 30th January, 2017. They however did not file response on time and so the suit proceeded as an undefended cause according to court order.

CLAIMANT'S CASE

4. The claimant's case is that she was employed by Boma Hotel by her letter of appointment dated 2nd April, 2012. Her appointment was to commence on 2nd May, 2012.
5. She testifies that she resigned from employment on 10th September, 2016. She wrote the resignation letter dated 10th September, 2016.

RESPONDENT'S POSITION

6. The claimant made an application to proceed with the suit as an undefended claim and the court ordered the same to proceed as an undefended suit on 11th April, 2017.
7. The respondent applied to have the order for the suit to proceed as an undefended claim be set aside and it be granted leave to proceed to file a defence out of time.
8. The said application by way of notice of motion dated 6th November, 2018 was dismissed with costs on 17th May, 2019. The suit therefore proceeded as an undefended suit.

ISSUE FOR DETERMINATION

9. Is the respondent's letter dated 1st September, 2016 null and void and is the claimant entitled to three months' pay in lieu of notice. The referred letter changed notice period from three months' notice by either party to one month to terminate employment.

CLAIMANT'S SUBMISSIONS

10. The court considered the submissions by the claimant as well as the evidence adduced, the law as well as referred cases.

DETERMINATION

11. The court has found this case and the issue very interesting. The claimant voluntarily resigned from her job without any provocation or pressure. She gave a three months' notice as per her resignation letter.
12. The letter of her appointment clause 3 provided that this appointment may be terminated by either party by giving three months' notice or payment of three months in lieu of notice.
13. In her letter of 10th September, 2016 the claimant voluntarily resigned from her employment.
14. Article 36 of the Employment Act provides **“that either party party to a contract of service to which Section 35(5) applies without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section”**.
15. It is the law and the practice that either party can give notice to the other to leave employment. This is usually provided in the contract between the parties. The party that gives notice is the party to pay if they do not serve the notice period. It is not the other way round.

Frankly, I do not see on what basis the claimant is asking to be paid for three months' salary in lieu of notice and yet it is the claimant who resigned.
16. The case of **ELIZABETH KWAMBOKA KHAEMBA VS MOSOCHO SCHOOL AND OTHERS CAUSE NO.190/2013** that the claimant referred to is not at all similar to this present case. The referred case was about change of duties or job description of a claimant without consulting her. The respondent changed the notice period from three months to one month and so is claiming payment for three months even though she is the one who tendered the resignation.
17. The court does not dispute the fact that the employer cannot alter the employee's contract without consulting the employee as held in the referred case of **ELIZABETH KWAMBOKA KHAEMBA VS CARDINAL OTUNGA HIGH SCHOOL (Supra)**. Section 10(5) of the Employment Act also is clear that if employer revises the contract of an employee he must do so in consultation with the employee.
18. The point I am struggling with is one who gave notice to resign. Whether she gave notice of one month or three months the fact remains she opted to resign and there is no evidence that she was forced directly or indirectly to resign.
19. There is also no evidence in her submission that the respondent waived the notice period of three months under Section 38 of the Employment Act.
20. It is informative the respondent did not defend this claim but even that notwithstanding the claimant is not entitled to payment for notice since she is the one who resigned. Actually if the respondent had been keen to defend the suit, it is the one who would have claimed for three months' salary in lieu of notice because the claimant did not serve the notice period. Instead she was paid her dues for the month of September, 2016. There is no evidence adduced that the claimant worked during the notice period.
21. If she served consistently for the three months, she should have been paid salary up to the period of expiration of her notice period.
22. That is however not what she has prayed. Praying for pay in lieu of notice is haphazard because she is the one who gave the notice.
23. In reference to Section 38 of Employment Act referred by the claimant in her submissions provides that *“where an employee gives notice of termination of employment and the employer waives the whole or part of the notice, the employer shall pay employee remuneration package equivalent to the period of notice not served by the employee as the case may be, unless the employer and employee agree otherwise.*
24. The claimant admits in her memorandum of claim paragraph 7 that the respondent by its letter dated 13th September, 2016 (which letter I did not find in the court file) from the claimant's documents accepted the resignation and accepted would only pay the claimant for one month up to 9th October, 2016.
25. That averment confirms that the respondent did not waive part of whole of notice period and so the claimant having opted to resign can only claim salary for the period she worked.
26. In all fairness and even though the respondent did not defend the suit I am persuaded there would be no justifiable cause in law to grant the claimant the prayer for payment of salary in lieu of notice when she is the one who resigned voluntarily.
27. I am therefore inclined to dismiss the claim. The respondent not having defended the suit I make no order as to costs.

DECISION

28. Case is dismissed with no orders as to costs. The certificate of service to be issued to the claimant.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 14TH DAY OF OCTOBER, 2021.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 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 1B of the 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE