



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1759 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 15<sup>th</sup> April, 2020)**

**SARAH NJERI NGUGI.....CLAIMANT**

**VERSUS**

**FIRST CHOICE TOURS & RAVEL LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed a Memorandum of Claim on 8/10/2014. She alleges that on 17/7/2014, the Respondent's Director summarily dismissed her, verbally, without giving her time to defend herself against allegations that she had stolen money.

2. The Claimant seeks the following prayers:

*a) A declaration that the Respondent's action of summarily dismissing the Claimant from employment was unlawful and unfair and that the Claimant is entitled to payment of her terminal dues and compensatory damages.*

*b) An order for the Respondent to pay the Claimant her due terminal benefits and compensatory damages totaling Kshs. 1,019,667.00/=.*

*c) Interest on (b) above from the date of filing suit till payment in full.*

*d) Costs of this suit plus interest thereon.*

3. The Respondent filed a Memorandum of Response and Counter-claim on 25/6/2015. It avers that the Claimant fraudulently raised invoices of a total sum of USD 14,868 against Strathmore University, its client. It denies summarily dismissing the Claimant without giving her time to defend herself.

4. It avers that it was agreed that the Claimant's dues would be paid upon her depositing in the Respondent's account, money that she had retained from clients being a sum of USD 3,868/-.

5. It avers in its counter-claim that it suffered a loss as a result of the fraudulent invoicing of USD 712.27. It further avers that it incurred losses as a result of the Claimant fraudulently undercharging a sum of Kshs. 10,590/- to Dr. Paul Wekesa on 15/7/2014. It prays for judgment against the Claimant for:-

*a) USD 712.27 and Kshs. 10,590 together with interest at contractual rates from the date of judgment until payment in full.*

*b) Costs of this suit with interest at court rates until payment in full.*

*c) Such other relief as the Court may deem fit to grant.*

6. The Claimant did not file a response to the Counter-claim.

**Claimant's case**

7. The Claimant CW1 testified that in July 2013, the Respondent's Director went to Strathmore University to follow up on money after she had issued tickets but was not successful. It was her testimony that it was not the Director's duty to collect monies from Strathmore University.

8. She testified that after getting to the office, the director told her to leave and a week later, she was issued with a termination letter. It was her testimony that she was entitled to one month's notice but was not issued with any notice. She stated that she responded to the termination letter and informed the Respondent that they had breached the contract of employment.

9. She contended that she promised to pay the pending amounts, which she had worked for. She testified that for the clients she had not raised an invoice, she had no time to follow up on payment. It was her testimony that she never issued any fraudulent tickets and she never engaged in fraud from 2014.

10. She contended that she had never been summoned by the Directorate of Criminal Investigations to record any statement. She further contended that she has neither been charged with any criminal offence nor has the Respondent sued her seeking to recover any monies.

11. In cross-examination, she testified that it was wrong for the Director to pursue payments of tickets as it was she who followed up on the same having sourced the clients. She testified that Strathmore University was her personal client.

12. She testified that she had no proof that she raised tickets for Strathmore University as the documents are in the office of the Respondent. She testified that in respect of the Invoice to Strathmore, annexed as Appendix 3 to the Respondent's documents, she collected the money and banked in the Respondent's account.

13. She testified that Strathmore used to wire the funds in instances where the tickets were for a group and would pay in cash if it was for an individual.

14. She testified that some clients paid cash but she had no documents as proof of payments as they were in the custody of the Respondent. She stated that she had no access to the company emails.

15. She testified that she was never rude to the director and she did not make it impossible to be given a hearing. She testified that there was nobody who witnessed what the Respondent's director did to her.

16. She testified that she had no contract with Movic Worldwide Company Limited though she at times acted on behalf of Movic as the Director made payments to that company.

17. She testified that she has not been evading police officers. She testified that she was aware that Movic was paid for tickets issued as she was told so by the Movic's owners.

### **Respondent's case**

18. Nazareno Ngare, the Respondent's Director testified as Rw1. He stated that the Respondent offers air tickets for both individuals and institutions. He testified that 2 ladies including the Claimant herein did the reservation and ticketing.

19. He testified that on 17/7/2014, they were supposed to pay International Association of Travel Agents (IATA) for tickets issued in the month of June but one of their clients, Strathmore University, had not paid the Respondent.

20. He stated that he relied on the invoices raised and decided to talk the Finance Director of Strathmore University to see if he could pay the company the billed amount of USD 14,868. He testified that in the Respondent's account, 11,000 dollars had been paid and the difference was USD 3,868.

21. He stated that he met the Finance Director who was surprised that they had paid less the amount. The Finance Director informed him the tickets issued were not for staff of the University. He testified that he got back to the office and asked the Claimant to explain the issue but instead, she started shouting and left the office.

22. He testified that he asked the Claimant to fill one week off but she did not do so. He testified that Strathmore never paid any money as evidenced in the Statement annexed as Appendix 4.

23. He testified that 11,000 dollars had been deposited in the account and he later realized that the Claimant had deposited 3,875 dollars on 5/8/2016. He stated that the Claimant never went back to the office but she handed over her laptop to the office assistant.

24. He testified that he confirmed details of the persons who were issued with tickets had been issued by the Claimant and that Movic Worldwide had requested for some tickets through Victor Oele.

25. He testified that he asked the accountants to check their invoices for 3 months and that it is then they discovered that the details indicated as being for Strathmore were for Victor Oele.

26. He testified that he discovered that the Claimant had issued tickets to Victor Oele worth 28,977 dollars but they did not claim these amounts as Victor was charged in Court and that they had also obtained Judgment against him but he did not pay any amount.

27. He stated that the counter-claim against the Claimant is for USD 712.27 dollars which is the difference in the amount they would have earned from these tickets. He further testified that the Claimant had issued a ticket worth Kshs. 10,000 to Dr. Paul Wekesa to Mombasa. He testified that the Claimant was the author of her misfortune.

28. In cross-examination, he testified that pursuant to her employment letter, the Claimant was to deal with existing clients and was also to acquire new clients. He confirmed signing the termination letter dated 17/7/2014, which was the day he went to Strathmore University. He stated that he did not send the Claimant away but wanted to give her 7 days leave.

29. He contended that the Claimant responded to the termination letter indicating that she had banked all the monies, which is the amount he demanded from the termination letter. He contended that he called the Claimant to a disciplinary hearing but did not have any letter confirming this invitation. He stated that he gave the Claimant a verbal warning.

30. He testified that the Claimant worked until 17/7/2014 and they did not pay her up to that day. He stated that he never paid her any leave and she did not go back to the office.

#### **Claimant's submissions**

31. The Claimant submits that the RW1 in his testimony confirmed that he sent the Claimant away and that it is clear she remitted all monies arising from the tickets she had issued.

32. It is her submission that no evidence was adduced before Court that the Claimant had been sued or found culpable of any fraudulent actions or that she deserted work and that the accusations by the Respondent remain mere allegations.

33. The Claimant submits that there is no doubt that she was not offered any proper chance to defend herself as required under Section 41 of the Employment Act.

34. She submits that the under Section 45 of the Employment Act an employer must not only prove that the reason for termination or dismissal is valid and fair but also that the employment was terminated in accordance with fair procedure.

35. She submits that the issue of desertion is an attempt by the Respondent to try and evade liability. She relies on the case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR** where the Court held that an employee must be given adequate opportunity to respond to charges against them.

36. She submits that she is entitled to salary for the 17 days worked in the month of July 2014. She also submits that she is entitled to notice pay under Section 36 of the Employment Act and unpaid leave under Section 28 of the Employment Act.

37. She submits that owing to the unfair nature of her termination, she urges the Court to award damages for unfair and unlawful dismissal to the extent of 12 months gross salary.

38. She submits that the case of **Geoffrey Kariuki Mwaniki v Managing Director Nanak Tracking Co. Ltd [2013] eKLR** galvanizes her case for a declaration that her termination was unlawful and she is entitled to damages and terminal benefits.

39. She submits that the Respondent's counter-claim must fail with costs as no investigations report was adduced in Court thus the allegations remain mere accusations.

#### **Respondent's submissions**

40. The Respondent submits that it provided uncontroverted evidence of the Claimant's unlawful and gross misconduct of stealing from the Respondent thus there are sufficient grounds for summary dismissal. It relies on the case of **Silas Owiti Oluoch & another v Fidelity Commercial Bank Limited [2017] eKLR** where the Court held that for a case of summary dismissal, there must be sufficient grounds to warrant termination of employment.

41. It submits that it accorded the Claimant all fairness under the circumstances before terminating her from employment. It submits that it waited for the Claimant to give a proper account for her actions and when this was not forthcoming, it was left with no alternative but to terminate her.

42. It is its submission that it complied with the requirements of Section 41 of the Employment Act but the Claimant waived her rights but her conduct.

43. In support of this submission, the Respondent relies on the case of **Festus Munyao Makau v Rods & Steel Limited [2017] eKLR** where the Court held that there are exceptions where an employer can be limited in full compliance with the provisions of Section 41. It submits that RW1 testified on the difficult circumstances prevailing and preventing full compliance.

44. It submits that there were grounds for terminating the Claimant under Section 44 of the Employment Act and the Claimant frustrated the operationalization of Section 41 of the Employment Act thus her termination was lawful and unfair. It therefore submits that the Claimant is not entitled to notice pay. It relies on the case of **Paul Litunya Abudo v University of Nairobi [2013] eKLR**.

45. It contends that the Claimant did not dispute or challenge the evidence adduced with respect to its counter-claim. It relies on the case of

**Linus Nganga Kiongo v Town Council of Kikuyu [2012] eKLR** where the Court cited the decision in **Motex Knitwear Limited v Gopitex Knitwear Limited HCCC No. 834 of 2002** that the defence and counterclaim were unsubstantiated as no witness was called to give evidence on behalf of the defence. It therefore urges the Court to allow its counter-claim.

46. It avers that in accordance with Section 19 of the Employment Act, it was justified in failing to pay the Claimant her 17 days June salary and her leave entitlement due to her conduct that led to the loss of USD 28,977.29.

47. It submits that the Court in **Rajeev Arora v Board of Directors African Cotton & Textile Industries Federation [2016] eKLR** rightfully interpreted Section 19 of the Employment Act.

48. In conclusion, it submits that the Court should not encourage the Claimant's conduct thus it should dismiss her claim and enter judgment as prayed in its counter-claim.

49. I have examined all the evidence and submissions of both Parties. the issues for this Court's determination are as follows:-

1. *Whether there were valid reasons to warrant the Claimant's termination.*
2. *Whether the Claimant was given an opportunity to defend himself before being terminated.*
3. *Whether the Respondent's counter claim is proved.*
4. *What remedies to grant in the circumstances.*

50. On the first issue, the Respondent has admitted terminating the Claimant as per their letter dated 17/7/2014. From the letter, the reasons for the termination are not indicated though in evidence, the Respondent gives the reasons for termination as being some dealings the Claimant had with 3<sup>rd</sup> Parties which led to the Respondent's losing some moneys as per the counter claim.

51. These reasons were however not given as reasons for the termination as envisaged under Section 43 of the employment Act 2007 which states as follows:-

- 1) *"In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*
- 2) *The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".*

52. Other than lack of giving valid reasons to the Claimant before being terminated, the Respondent also admitted that they did not give the Claimant an opportunity to be heard. This is contrary to Section 41 of the Employment Act 2007 which states as follows:-

- 1) *"Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*
- 2) *Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".*

53. In view of the fact that the Claimant was thus terminated without valid reason being given and without any disciplinary hearing to accord her an opportunity to defend herself of the accusations leading to her termination, the termination was unfair and unjustified as provided for under Section 45(2) of Employment Act 2007 which states as follows:-

- (2) *"A termination of employment by an employer is unfair if the employer fails to prove:-*
  - (a) *that the reason for the termination is valid;*
  - (b) *that the reason for the termination is a fair reason:-*
    - (i) *related to the employee's conduct, capacity or compatibility; or*
    - (ii) *based on the operational requirements of the employer; and*
  - (c) *that the employment was terminated in accordance with fair procedure".*

54. As for the counter claim, the Claimant did not respond to it formally. This means that the counter claim is uncontroverted and I allow it accordingly as prayed. The dollar rate will be as at date of delivery of judgement.

55. In terms of remedies, I find for the Claimant as follows:-

*1. 1 month salary in lieu of notice = 70,000/=*

*2. Leave not taken for the duration worked – 1 year = 70,000/=*

*3. 17 days salary for days worked in July 2014 =  $17/30 \times 70,000 = 39,667/=$*

*4. 10 months' salary as compensation for the unlawful termination =  $10 \times 70,000 = 700,000/=$*

**Total = 879,667/=**

*Less amount awarded in counter claim =  $10,590 + 712.27 \text{ dollars at the rate of } 105.90 \text{ per dollar} = 75,429.39/=$*

**Total = 86,019.39**

**Total now awarded=879,667/=**

**less 86,019/=**

**Balance = 793,647.61/=**

*Less statutory deductions*

*5. The Respondent will pay costs and interest at Court rates with effect from the date of this judgement.*

Dated and delivered in Chambers via Zoom on this **15<sup>th</sup> day of April, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Samuel Maina for Respondent – Present

Claimant – Absent