



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 50 OF 2014

BETWEEN

DORCAS WANGARI KAMAU.....CLAIMANT

VERSUS

1. NITIN PANDYA

2. MILAN SHAH t/a NITIN PANDYA

& COMPANY CERTIFIED PUBLIC ACCOUNTANTS.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Tindika & Company Advocates for the Claimant

Bosire & Partners, Advocates for the Respondent

JUDGMENT

1. Through her Statement of Claim filed on 28th February 2014, the Claimant prays for Judgment against the Respondents for:-

- a) Overtime from 2011 to 2013 at Kshs. 204,480.
- b) 12 months' salary in compensation for unfair termination at Kshs. 384,000.
- c) 3 months' salary in lieu of notice at Kshs. 96,000.
- d) Salary for days worked in September 2013 at Kshs. 33,466.
- e) Leave pay for 2012 /2013 at Kshs. 32,000.
- f) Leave travelling allowance for 2012/2013 at Kshs. 4,000.
- g) Service pay at the rate of 15 days salary for each complete year of service at Kshs. 352,000.
- h) Leave for 2013/2014 on pro-rata basis at Kshs. 18,666.
- i) Leave travelling allowance over the years served at Kshs. 60,000.

Total ... Kshs. 1,184,613

j) Interest.

k) Costs.

2. She avers that she was employed by the Respondents, through a contract executed between the Claimant and the 1st Respondent, on 24th February 1992. Her first salary was Kshs. 4,500 monthly, and Kshs. 32,000 as of 30th October 2013 when her contract was terminated by the Respondents.

3. She states, she applied for annual leave on the 6th September 2013 from the 2nd Respondent. The 2nd Respondent did not approve because he had not consulted the 1st Respondent. She renewed the application to the 1st Respondent on 13th September 2013. She was brusquely told off by the 1st Respondent. The 1st Respondent stated that the Claimant was required to be in Office because there was an ongoing civil case involving Respondent's Company Hammond Holdings Limited. The Claimant was said to have custody of documents which the Respondents intended to use in the civil case.

4. The Claimant explained to the 1st Respondent that she needed to go on leave on 23rd September 2013. She had urgent family matters to attend to in Germany. Her visa was to expire on 19th October 2013. She explained also that she had forwarded all the necessary documents to Hammond's Advocates, Kinyua Muyaa & Company Advocates.

5. The Claimant rightfully and lawfully went on leave on 23rd September 2013, up to 21st October 2013.

6. She returned to the Office on 22nd October 2013. The 1st Respondent alleged the Claimant had disobeyed instructions, and gave the Claimant the following options: resignation; accept reduced salary of Kshs. 20,000 monthly; or the Respondents to issue termination letter. She declined the options. The Respondents issued her termination letter dated 30th October 2013.

7. Against this background, the Claimant urges the Court to find that termination was unfair under Sections 41 and 46 [b] of the Employment Act 2007, and grant her Judgment, in the terms pleaded above.

8. The Respondents filed their Statement of Response on 10th June 2014. They state that annual leave is taken at the convenience of the Employer and the Employee. The Claimant did not apply for annual leave on 6th September 2013. She informed the Respondents, on the evening of 23rd September 2013 that she was proceeding on leave. There was no approval from the Respondents. The Claimant was charged with the duty of preparing documents for use by Respondents' Company Hammond, in a case that was ongoing, H.C.C.C. No. 209 of 2009 between Hammond Holdings Limited v. Coast Computer Bureau Limited. The case was due to be heard on 30th September 2013. The Claimant did not fill the requisite annual leave application forms. She paralyzed Respondents' operations by taking unauthorized leave. She did not supply Kinyua Muyaa & Company with the requisite documents. The Respondents were compelled to hastily employ a new Secretary, who assisted with the documents. She was not a diligent Employee. She always reported to work late, failed to supervise subordinates, and misplaced files. The Respondent prays the Court to dismiss the Claim with costs.

9. The Claimant gave evidence on 2nd March 2015, 25th February 2016, 20th September 2016, and on 17th October 2016, when she closed her case. The 1st Respondent, Nitinchandra Krishnalal Pandya, gave evidence on 7th December 2016. 2nd Respondent, Milan Shah, gave evidence on 27th February 2018, bringing the hearing to an end. The matter was last mentioned in Court on 13th December 2018, when the Parties confirmed filing of their Submissions.

Claimant's evidence

10. She restated in her oral evidence, the contents of her Pleadings and Witness Statement on record. She was employed by the Respondents as a Secretary, on 24th February 1992. She worked for 21 years without warning. The business grew, and the Claimant was given additional responsibilities. She did work for Hammonds Holdings, Respondents' Company, which was landlord to the Respondents. She also did hotel booking at Pandya's Bamburi Beach Hotel. She was paid nothing for her work with the other businesses.

11. She was told by Milan in September 2013, that she was free to take annual leave, because the business was not busy at the time. Milan said he would consult Pandya. Claimant's Niece was in a crisis in Germany. The Claimant needed to urgently attend to her Niece. Milan reverted to the Claimant on 11th September 2013, with the information that Pandya had declined Claimant's leave request. She was told there was an upcoming hearing of the civil case involving Hammonds. The Case had been there from 1994. The Claimant was not a Witness. Her role was to type letters, and to forward them, to the Respondents' Advocates.

12. She saw Pandya on 13th September 2013, and requested that he approves leave. He got angry and told the Claimant it was not possible, because of the hearing of the Hammonds case was due on 30th September 2013. She was told if she wished to go, she could do so from 15th October 2013. Her visa was expiring on 19th October 2013. The Claimant forwarded all the documents needed by the Advocates through e-mail.

13. The Claimant travelled to Germany on 22nd September 2013, and returned on 22nd October 2013. She found another Employee was already performing her secretarial role. She was then given 3 options indicated at paragraph 6 above. She declined to have any of the options. Her contract was terminated. She supervised Messengers well according to instructions given by the Respondents.

14. Pandya was aware that the Claimant worked late. She worked for other businesses associated with the Respondents, including Bamburi Hotel; Abacus Secretarial Services; and Coast Bureau Services. She was not compensated for working for other businesses. She was not

heard before termination.

15. Cross-examined, the Claimant told the Court the Respondents run an auditing/ accounting business. They also do company registration. They have many Clients. They required Claimant's secretarial services.

16. The civil proceedings involved tenancy of the workplace. The building was derelict, leaking and damaging Respondents' files. Pandya told the Claimant to delay her leave, because he was traveling to Nairobi, and the Advocates would require certain documents in preparing for the hearing. She was advised she could take leave after 30th September 2013. The visa was to expire on 19th October 2013. She was traveling to attend to her Niece who was ailing. She did not agree that annual leave was approved, but deferred.

17. She did not have record of overtime work done. She was actively subscribed to N.S.S.F. The letter of employment provided for 1 month salary in lieu of notice. The Claimant prays for 3 months' salary in lieu of notice. She conceded it was her duty to obey lawful instructions of her Employer.

18. Redirected she told the Court that she did not have a single warning in 21 years. She was like a Mother to her Niece, and felt compelled to be in Germany, when her Niece was taken ill. She told Milan she was leaving on 22nd September 2013. Her annual leave was due in January 2013. She was never promoted into supervisory or managerial position.

19. Through a Supplementary List of Documents filed on 16th March 2016, the Claimant exhibited her passport, air ticket, and visa showing she left for Germany on 22nd September 2013, and returned on 18th October 2013.

20. Under further cross-examination, the Claimant told the Court that she did not inform the Respondents that she intended to travel to Germany at the time she applied for visa, on 3rd September 2013. Her Niece was married to a German man named Thomas Vom. He was taking care of Claimant's Niece. The invitation letter did not express a sense of urgency for the Claimant to be in Germany. The visa was valid for the period between 14th September 2013 and 19th October 2013. The Claimant could travel at any time between these dates. She did not have any document showing the directorship of Bamburi Hotel, or a letter of appointment indicating she worked for the Hotel. She did not have any medical document showing her Niece was sick.

21. Lastly the Claimant told the Court that she always notified the Respondents before going on leave. She ordinarily gave 2 weeks' notice. She, in this instance, notified Milan on 6th September 2013. He was okay with it. She was to get a Reliever in the 2 weeks. Hammonds was not her Employer. She did not have to justify the need for annual leave, as it was her entitlement. She did not go holidaying in Germany.

Respondents' Evidence

22. Milan confirmed that the Claimant was Respondents' Secretary. She asked to go on leave. Milan asked her to get the approval of Pandya. Pandya had informed Milan that there was an upcoming hearing of the Hammonds case. It was scheduled to be heard on 30th September 2013. The Claimant was advised she would be free to go after this. She left without Respondents' approval.

23. Whenever she worked excess hours, she was compensated. She was actively subscribed to the N.S.S.F. If she failed to take annual leave, she was paid in lieu thereof. The Respondents did not terminate her contract unfairly.

24. Upon cross-examination, Milan told the Court the Respondents were not direct Parties in the Hammonds case. The building had problems for more than 20 years. Respondents became tenants in 1993. Pandya attended the hearing on 30th September 2013.

25. The Claimant's travel to Germany would not have changed the status of the premises. She was the only Secretary. If the Hammonds case was not due for hearing on 30th September 2013, the Respondents would not have had issues with the Claimant.

26. Pandya did the letter of termination. He told Milan about the 3 options given to the Claimant upon her return from Germany. She worked for 31 years. She occasionally worked excess hours. The Respondents did accounting work for Bamburi Hotel. Milan was not aware that the Claimant did the bookings for Bamburi. Termination was justified. She declined Respondents' instructions to defer her leave. Redirected, Milan told the Court that the Claimant was the custodian of documents relating to Hammonds case. It was important she deferred her travel, until the hearing was over.

The Court Finds: -

27. The facts in this dispute are largely uncontested. The Claimant was employed by the Respondents as a Secretary, on 24th February 1992; she orally asked to go on leave on 6th September 2013 and 13th September 2013; she desired to take annual leave and travel to Germany to see her Niece, beginning 23rd September 2013; she left on 23rd September 2013 and was on leave up to 21st October 2013; there was no approval obtained to take annual leave, from the Respondents; and the Claimant's contract was terminated by the Respondents, after she returned to Kenya from Germany, on 30th September 2013.

28. The issues in dispute are, whether termination was fair, based on valid reason and carried out fairly; and whether the Claimant merits the orders sought.

29. Whereas it the right of an Employee to have annual leave of at least 21 days, after working for a consecutive period of 12 months, under Section 28 of the Employment Act 2007, there ought to be a consensus between the Employee and the Employer, on the timing. Section 28 uses such phrases as "may with the consent," "agreement between an Employee and an Employer," "agreed upon," "may agree on how

to utilize.’’ This is a language of consensus. The right of the Employee must not be denied. It must also not disrupt the Employer’s business. Annual leave must therefore be regulated. An Employee cannot just force her way out. There ought to be an agreement between the Employee and the Employer, on when the Employee takes annual leave.

30. Such agreement enables the Employer to plan about how the role discharged by the Employee, continues to be discharged, without business loss or inconvenience to the Employer. It is essential that the Employer secures a suitable Reliever for the period of the Employee’s annual leave. Annual leave is therefore a right, not a perk, but must not be taken without a common understanding with the Employer. It is a right which must be regulated by the Employer, just like the Employer is allowed the discretion in regulating hours of work, and generally in managing the business, within the confines of the law and the contract to which the Parties are answerable.

31. The Claimant herein obtained her visa and arranged to travel to Germany, days before she sought leave from the Respondents. For her, it seems approval was just a formality. The views of the Respondents were unimportant. She desired to travel on 23rd September 2013 to Germany. Her visa was to expire on 19th October 2013. She arranged to travel, and expected the Respondents to go along with her arrangement, without minding the views of the Respondents, and the needs of the business.

32. It was not necessary for her to justify her travel to Germany to anyone. She need not have disclosed to the Respondents why she was travelling to Germany. It was her right to take annual leave. However, she could not just go on leave the way she did, without the approval of the Respondents. She acted ill-advisedly. She left contrary to the instructions of her Employer.

33. The Respondents acted reasonably, asking the Claimant to defer travel by 7 days, from 23rd September 2013, to 30th September 2013. What was at stake to cause the Claimant to decline postponement of her travel by 7 days? The Respondents felt, and the Court has no reason to doubt them, that the Claimant’s presence was important for the 7 days leading to the hearing of the Hammonds case. Why did the Claimant not wait and assist the business as instructed? She seems to have taken the liberty and defied her Employer. Having worked for 31 years, she ought not to have taken such liberty.

34. Although it was not necessary for her to justify her travel to Germany, the Court notes that she conceded her Niece was not in an emergency. She was a married Woman under the care of her Husband. So what emergency, would justify the Claimant being in Germany at all cost, beginning 23rd September 2013? Why not wait until 30th September 2013 as offered by the Respondents?

35. In the end the Claimant engaged in acts of gross misconduct, characterized as insubordination. She left contrary to the express instructions of the Respondents. She not only behaved in a manner which was insulting to the Employer, under Section 44 [4] [d] of the Employment Act; she knowingly failed or refused to obey a lawful and proper command, which was within the scope of her duty to obey, issued by the Respondents, under Section 44 [4] [e] of the same law. She, in a moment of irrationality, blighted a tremendous 31-year service as Respondents’ Secretary. Without the approval of the Respondents, it can be argued further that the Claimant absconded. She was not away on approved annual leave, but on abscondment. The Respondents had more than one valid reason, in terminating Claimant’s contract.

36. When she returned to Office, she was asked by the Respondents to resign; take a pay cut; or have the contract terminated by the Respondents. She did not take the first 2 options, and the Respondents exercised the last option.

37. There was no disciplinary hearing before termination. The Claimant was just confronted with penal consequences of her French leave. The Respondents ought to have fulfilled their obligations under Section 41 of the Employment Act 2007, by taking the Claimant through a hearing. This was not done. Procedure was defective.

38. Taking into consideration the role played by the Claimant in the circumstances leading to termination of her contract, ***the Court awards her compensation for unfair termination, the equivalent of 3 months’ salary at Kshs. 96,000.***

39. She prays for 3 months’ salary in lieu of notice. She has not cited any contractual clause, law or wage instrument granting her this amount of notice pay. The Court in any event, having concluded that the Respondents were entitled to summarily dismiss the Claimant under Section 44 [4] of the Employment Act, which disentitles the Claimant to notice or notice pay. The prayer for notice pay is declined.

40. She gave general statements about working for other associate businesses of the Respondents. She does not ask for any specific prayer with regard to these other businesses. She seems to have brought in these entities, to buttress her prayer for overtime. But there is no evidence of unpaid overtime. The Claimant pleads that she worked overtime from 2011 to 2013. There is no record of such overtime. If she assisted other businesses of the Respondents outside of her job description, she ought to have negotiated the terms of such service with the Respondents at the time she served. It ought to have been, and perhaps was, taken into account in fixing her monthly salary. She could have bargained for extraneous duty allowance. Her involvement with other entities does not show she worked excess hours. It certainly does not establish the prayer for overtime pay calculated at Kshs. 204,480. The prayer is declined.

41. ***She is entitled to salary for September 2013, which is awarded at Kshs. 32,000.***

42. Leave travelling allowance is not a statutory benefit. It is a negotiated benefit. The Claimant seeks Kshs. 64,000 in leave travelling allowance. She has not shown to the Court any contract, wage instrument or workplace policy, entitling her to leave travelling allowance. The 2 prayers on this item are rejected.

43. The prayers for leave pay and pro-rata leave pay have not been established. The Claimant utilized her annual leave entitlement. She utilized her last annual leave entitlement just before termination. Her claim for leave pay has no foundation.

44. The pay slips on record show that the Claimant was actively subscribed to the N.S.S.F. She was ineligible for service pay under Section 35 [6] [d] of the Employment Act 2007.

45. *No order on the costs.*

46. *Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED: -

a) Termination was based on valid reason, but flawed on procedure.

b) The Respondent shall pay to the Claimant equivalent of 3 months' salary in compensation for unfair termination at Kshs. 96,000 and salary for the month of September 2013 at Kshs. 32,000- total Kshs. 128,000.

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 22nd day of March 2019.

James Rika

Judge