



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1763 OF 2015

JULIA COOPER RUST.....CLAIMANT

- VERSUS -

THE ACADEMY OF DANCE & ARTS.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st May, 2019)

JUDGMENT

The claimant filed the present suit on 01.10.2015 through Kaplan & Stratton Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the summary dismissal of the claimant was unlawful, unprocedural and unjustified.
- b) Damages for wrongful termination the equivalent of 12 months at Kshs.200, 000.00 totalling Kshs.2, 400, 000.00.
- c) Three months salary in lieu of notice at Kshs.200, 000.00 per month totalling Kshs.600, 000.00.
- d) Petrol allowance of Kshs.10, 000.00 for the month of December 2014.
- e) Kshs.600, 000.00 for private lessons taken in December 2014.
- f) Accrued leave days.
- g) General damages for causing the claimant embarrassment and emotional distress.
- h) Certificate of service.
- i) An order for immediate return of the claimant's property namely an Arabian headpiece; 50 costume patterns; a glue gun; and a crystal tiara.
- j) Interest on (b) to (f) at court rates from 19.12.2014 until payment in full.
- k) Costs of the suit.
- l) Any other remedy that the Honourable Court may deem fit to grant.

The respondent filed the response to the memorandum of claim on 12.11.2015 through Mwendwa Macharia Mwangi Advocates. The respondent's case is that the claimant's case is bad in law, misconceived, incompetent and only calculated to embarrass the respondent and the respondent prayed that the entire memorandum of claim be struck out.

The claimant filed on 17.12.2015 the reply to the respondent's response. On 05.02.2016 the respondent changed its advocates to Mohamed Madhani & Company Advocates.

The respondent filed the amended response to the claimant's memorandum of claim and counterclaim dated 30.10.2018. The respondent counterclaimed that the claimant solicited parents and students to move to Dance Centre Limited in 2015 and that it incurred losses as a result. The respondent prayed for general damages for breach of fiduciary duty by the claimant. The claimant filed on 22.05.2017 the reply to

the respondent's amended response to claimant's memorandum of claim and counterclaim. The claimant prayed that the counterclaim be dismissed with costs.

There is no dispute that the respondent employed the claimant. The respondent runs the Academy of Dance and Art. By the contract dated 13.05.2014 the respondent employed the claimant in the position of Dance Teacher and Artistic Director or otherwise as the respondent may reasonably require from time to time. The contract provided, "**The Employer will pay the Employee a gross monthly salary in arrears of Kenya Shilling Two Hundred Thousand (Kshs.200, 000) from which all deductions required by law will be made. Additional income derived from private lessons outside the regular schedule for which the students are charged will be shared by the Employee and Employer on a 50/50 split.**" The contract provided that the respondent would provide the claimant with accommodation, transport and annual air ticket back to the United States of America (USA) and, medical cover. Further the respondent was responsible for providing the first air ticket back to Kenya upon commencement of term in September 2014 with the return upon completion of the summer term in July 2015 and obtaining and paying for the required work permit for the duration of the contract. The employment commenced on 01.06.2014 for a period of 25 months ending in July 2016 unless extended by mutual agreement. The final salary was to be paid for June 2016 unless the contract was extended plus the extra days in July 2016 up to the end of the Academy's term. The contract stated that any increments in the claimant's salary were entirely at the discretion of the respondent. Further, the claimant would work the hours that fit in with the time table of the Dance Studio and students' time table and schools.

It is also not in dispute that the respondent dismissed the claimant by the email dated 19.12.2014 at a time the claimant had travelled to the USA for Christmas holidays. The email stated as follows:

"Dear Miss Cooper Rust,

It is unfortunate that your behavior and actions have left me with no choice but to cancel your contract with immediate effect for gross misconduct. This under Kenyan employment law is instant dismissal with no compensation. You have been paid for December and that is in full and final of all dues from The Academy of Dance and Art.

Your promotion of your own company from the premises of the Academy of Dance and Art using our facilities, students and staff is totally unacceptable as has been mentioned in writing to you previously. You were under contract to work for The Academy of Dance and Art solely and not to promote business opportunities for your own benefit.

The rudeness shown towards the management and staff as well as all the shouting at the students is simply unacceptable. The shock of seeing the damaged feet of many of the girls from being pushed on pointe when they were neither ready or had the technique to do so is unbelievable and hugely unprofessional, this shows you are not teacher material. You might have noticed that none of the so called "company class" ever smile anymore they are all terrified of you.

We will be sending all your personal effects to 908 South Bonham Road, Columbia, South Carolina 2905, USA by FEDEX over the next couple of days. Your work permit has been cancelled and immigration informed that it is no longer exists.

We wish you well in the future but will not welcome you back at Rhino House. We shall endeavour to make this the happy place it used to be.

Yours sincerely,

Pernille Duckworth

Director

PS. Your mother has been copied in on this email as I do not want you to claim that you have not received this letter"

The claimant replied by her email of 20.12.2014 denying the allegations in the following terms:

- a) She was devastated and upset to receive the respondent's email which she noted contained many inaccuracies.
- b) The respondent had no right to summarily dismiss the claimant and the claimant wished the parties resolved the issue amicably failing the claimant would take legal action by instructing a lawyer.
- c) The respondent incorrectly alleged that the claimant promoted her own company from the Academy of Dance and Arts using the respondent's facilities, students and staff. She denied that allegation because she had an idea to establish a trust for the betterment of dance in Kenya to provide the students with more opportunities. The matter had been discussed openly with the respondent's director and the director felt that it was inappropriate so that the claimant dropped the idea. She denied establishing a company or a trust.
- d) The allegation of rudeness to management and shouting at children was denied and the claimant had had personal cards and letters received from the company students to prove otherwise. That the company class do not smile anymore and were terrified of the claimant was utter nonsense.
- e) The respondent was barred from touching any of the claimant's belongings because she'd make her own arrangements to have them removed and in any event the respondent had the claimant's wrong address for the USA.

f) The claimant demanded payment of full amount under the contract and Kenyan law.

The claimant testified to support her case and the respondent's director Pernille Duckworth (RW1) testified to support the respondent's case.

The Court has considered the pleadings, the evidence and the submissions on record.

The **1st issue** for determination is whether the summary dismissal of the claimant by the respondent was unfair. It is clear that the respondent dismissed the claimant without prior notice and hearing as envisaged in section 41 of the Employment Act, 2007. The Court follows **Jared Aimba –Versus- Fina Bank Limited [2016]eKLR** where the Court of Appeal held, **“20. However, under section 45 and 41 of the Employment Act, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination.”** Further, as the Court held in **Shankar Saklani –Versus- DHL Global FoRWARDing (K) Limited [2012]eKLR** a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract.

The Court returns that the termination by the email dated 19.12.2014 was abrupt, without a prior notice, and a hearing in that regard. The Court returns that the termination would be unfair procedurally. However, while making that finding, the Court has considered the meetings, the emails and the mediation initiatives between the parties prior to the dismissal letter and by which the respondent made it clear to the claimant that her conduct amounted to gross misconduct. As will be found later in the judgment, the established reasons for the termination indeed amounted to gross misconduct on the part of the claimant and the respondent's omission to serve a notice, though even a shorter one than was envisaged in the contract or statute would be excusable in view of the undisputed meetings, the emails and the mediation initiatives that took place touching on the claimant's misconduct.

Did the respondent establish the reasons for termination as set out in the termination letter? The first ground for termination was that the claimant promoted her own company from the respondent's premises using the respondent's students and facilities. The claimant in her testimony admitted that as per the terms of the contract of service, she was required to dedicate her time to work for the respondent and further as per clause 19 of the contract she was required not to accept any other form of employment or engage in any other business activity without the prior written consent of the employer and provided that such other employment did not conflict with the operations of the respondent. The claimant's evidence was that Dance Centre Limited was a company registered on 12.01.2015 and she was a director and shareholder. The evidence showed that the claimant was promptly employed by Dance Centre Limited in January 2015. The claimant also testified that in 2012 she worked for Artists for Africa but which did not operate in Kenya. The work, as per her testimony, was voluntary and focused on the Nairobi slums using support funds from the USA and under which the disadvantaged dancers would be taken to the USA. It is by that previous experience that the respondent employed the claimant. The claimant testified that in January or February 2014 a dance group known as Ballet Kenya was established and when the respondent employed her it became a free class hosted at the respondent's premises. The claimant testified that RW1 objected to Ballet Kenya activities sometimes in October 2014. The group was also known as the Ballet Company and it was the claimant's evidence that her running of the group was not aimed at securing students and then later moving with them to Dance Centre Limited which was registered in January 2015. The claimant confirmed that the respondent had properly invested in the Academy of Dance and Arts because it implemented the Royal Academy Dance Syllabus and which was the best global dance syllabus.

RW1 testified that she registered the respondent in 2007 and became operational in 2009. In 2013 one of her teachers was finishing her 2 years contract and she introduced the claimant to RW1 and, RW1 employed the claimant. RW 1 testified that at the interviews the claimant never mentioned her role in Artists for Africa and if she did, RW1 stated that she would not have employed the claimant so that the claimant's experience with Artists for Africa was not a consideration at the claimant's employment. RW1 stated that she employed the claimant because the claimant was a qualified ballet teacher.

RW1 testified that at the material time she had serious personal problems because her husband of 22 years had walked out and there were divorce proceedings and further, she had a medical problem leading to an operation in October 2014. In such circumstances, RW1 testified that she did not have enough attention to run the affairs of the respondent and a situation which was exploited by the claimant. RW1 stated that on 11.10.2014 and for the first time, she saw material on Ballet Kenya at the respondent's premises. RW1 testified that her investigations showed that the claimant had been working with respondent's parents Nigel Havergal Shaw and Tonya Shaw to set up Dance Centre Kenya and in fact, official search exhibited by the respondent showed that they had registered The Dance Centre Limited on 20.12.2013. That was a year prior to the termination of the claimant on 19.12.2014. RW1 testified that at one point she asked the claimant if she wanted a group of students away and the claimant had replied that it was a new idea and the claimant had been excluding the students but RW1 had opposed that exclusion. RW1 testified that in January 2014 the claimant came from Christmas holiday and she had papers and suggested to RW1 that there'd be a new logo and company. RW1 objected and her testimony was that the claimant was already killing the respondent by her activities. RW 1 testified that the claimant wanted a shareholding in the respondent on the day RW1 and the claimant had lunch with the claimant and the claimant's parents in May 2014 and RW1 testified that she had no objection to the request.

In view of the emerging disputes, RW1 sought to have the matter resolved by way of mediation so that mediation meetings were held in August and October 2014. RW1 testified that she offered that the claimant takes away the Ballet Class and further that RW1 informed the claimant that she had engaged in gross misconduct that could lead to instant termination. RW1 stated that the mediation collapsed. RW1 also testified that the Shaws could not have had the respondent's parents' email list because whenever the respondent wrote to parents, they addressed to themselves and send blind copies **“Bcc”** to the parents. As an Artistic Director, the claimant was a creator of dances but did not have authority like a board member (company director) and without authority, the claimant had written using the respondent's letterhead and secured the Kenya government permits to take the respondent's students to the USA – the migration department lacking the knowledge that the claimant lacked such authority.

RW1 was concerned that Artists for Africa used money from donors in Carolina, the USA, relying on Kenyan dancers but the money stayed in the USA because the Kenya Revenue Authority could not earn out of it and it was a business model which RW1 considered to be exploitative and not acceptable to her – because under that business plan, children in Kibera, Nairobi were exploited to get donor cash in the USA but which cash did not end up in Kenya. RW1 testified that the claimant had told RW1 that the claimant and her team put up charity

performances in the USA and donors gave money – and all that while, the claimant was the respondent’s employee. RW1 testified that the claimant called every of the respondent’s children to join her school, Dance Centre Kenya.

The Court has considered the evidence. The Court returns that there is no reason to doubt RW1’s account of the events. The Court finds that the claimant took advantage of her position and the prevailing RW1’s personal problems to advance her own interests in the Dance Centre Limited and its school the Dance Centre Kenya - and the claimant misled the Court that Dance Centre Limited was a company registered on 12.01.2015 and she was a director and shareholder. In fact the company had been registered on 20.12.2013 and all along as per RW1’s evidence the claimant had been conflicted as she systematically worked for the interests and promotion of the Dance Centre Limited and its school the Dance Centre Kenya.

Further the respondent by RW1’s evidence has established that the claimant had, under the Ballet Kenya and Artists for Africa arrangements, used the respondent’s letterhead and the secluded Ballet Class or Company Class (as it was also known) and hosted at the respondent’s premises, to secure government permission without the respondent’s authority and to take the respondent’s students to the USA. The emails on record show that after the termination the claimant swiftly joined the Dance Centre Kenya in January 2015 as the Artistic Director – and the Court finds that the evidence when taken together show that the claimant had all along, during employment with the respondent, been designing and promoting the interests of the Dance Centre Kenya. The Court finds that the respondent has established that as per sections 43 and 45 of the Employment Act, 2007 the reason for termination (using the respondent’s facilities and students to promote the Dance Centre Limited and its school the Dance Centre Kenya) was valid as at the time of the termination and it related to the respondent’s operational requirements and the claimant’s conduct.

The second reason for termination in the letter of 19.12.2014 canceling the contract of service was the rudeness shown to the respondent’s management and shouting at students and the “**company class**” did smile anymore and were terrified of the claimant. The Court finds that the claimant has established by the exhibits on her claim bundle that the students congratulated her and wished her well as their good teacher. The respondent did not establish the allegation and the reason as related to the claimant shouting at students and the students being terrified. That reason fails.

However the evidence on rudeness was established when RW1 in writing the email of 31.10.2014 to the claimant in referring to “**Flamenco**” class of 02.11.2014, RW1 had erroneously typed it as “**flamingo**”. The claimant forwarded the email to her mother with the question, “**Do you notice something a bit funny about this email sent out from our DANCE school?**” and the claimant’s mother had replied thus, “**Is this a class for large pink birds only?**” When the correspondence came to the attention of RW1, she felt that the error was being used by the claimant to ridicule and undermine her and in the opinion of the Court RW1 was, in the circumstances, entitled to feel ridiculed and undermined. In the Court’s opinion it was improper for the claimant to publish to her mother and make a joke about the error occurring purely within her employment relationship and which was purely official communication at the workplace. Further, rudeness was established in the words of the email of 09.10.2014 between Tonya Shaw and the claimant as found by the maid who had been engaged by the respondent to serve the claimant at the housing accommodation the respondent had provided for the claimant’s use. In that email the claimant wrote, “**Dear Pernille (aka devil woman)**”. Tonya Shaw was one of the directors of Dance Centre Limited and the Court returns that once again the claimant had published very derogatory and abusive words about RW1.

Accordingly, the Court returns that the respondent has established that the reasons for termination of the claimant’s employment were substantially valid or genuine as at the time of termination, they related to the respondent’s operational requirements and the claimant’s conduct. The termination was not unfair to that extent.

The **2nd issue** for determination is whether the claimant is entitled to 12 months compensation under section 49 of the Employment Act, 2007. The Court has considered the factors in section 49 of the Act. The claimant had served for about 7 months only. The Court further finds that the claimant fully contributed to the cancellation of her contract of service in view of the established reasons for termination. The Court has considered the correspondence and mediation meetings the respondent invoked to address the claimant’s misconduct as a mitigating factor in favour of the respondent. Taking the considerations into account, the Court returns that despite the identified procedural defect (and which the Court considers excusable), the claimant contributed 100% to her dismissal and she will not be awarded any compensation under the section. The Court also finds that the respondent was entitled to consider the misconduct as amounting to gross misconduct so that the termination would validly issue with a shorter notice than was agreed upon or as was prescribed in the Act. The dismissal was on 19.12.2014 but the respondent paid the month’s full salary. Accordingly, the prayer for three months salary in lieu of the contractual three months termination notice will fail.

To answer the **3rd issue** for determination, the Court makes the following further findings on the remedies as prayed for the claimant:

a) There was no contractual basis, evidence and submissions to justify the claims for Kshs. 10, 000.00 travel allowance for December; Kshs. 6, 000.00 for private lessons taken in December 2014; and accrued leave days. The contract provided that the respondent would provide transport but not monthly travel allowance and in any event the contract was terminated on 19.12.2014 and the claims for full month are found unjustified. The claimant had not served for an aggregate of 12 months and she is not entitled to prorated leave pay under section 28 of the act and in any event there was no evidence on the accrued leave days.

b) There was no evidence that the claimant owned the items she prays to be returned, no evidence that the items were delivered to the respondent and in replying the letter of 19.12.2019 the claimant had written in her email of 20.12.2014 thus, “**Please do not touch any of my personal items. I will make my own arrangements to have them removed....**” The Court returns that in absence of any other evidence the claimant purposed to be in charge of her own property and she cannot turn around to place liability upon the respondent in circumstances whereby there was no evidence that the respondent had tampered with the claimant’s private property.

c) The Court has found that the claimant contributed 100% to the cancellation of her contract of service. In such circumstances, she invited to herself the alleged embarrassment and emotional distress, if any, and the prayer for general damages in that regard will fail as the respondent was not liable accordingly.

d) The claimant is entitled to a certificate of service as per section 51 of the Employment Act, 2007.

The 4th issue for determination is whether the respondent is entitled to the counterclaim as prayed for. The respondent counterclaimed that the claimant solicited parents and students to move to Dance Centre Limited in 2015 and that it incurred losses as a result. The respondent prayed for general damages for breach of fiduciary duty by the claimant. First the loss as alleged amounted to a liquidated loss which was not quantified, not specifically pleaded, and was not strictly proved and in the Court's opinion, the prayer for general damages was misconceived in view of the alleged injury. As submitted for the claimant, the Court of Appeal held in **Abudi Ali Mahadhi –Versus= Ramadhani Saidi & Freight Forwarders Limited [1999]eKLR**, that special damages must be pleaded and be strictly proved. The respondent's witness No. 2 (RW2) was the respondent's accountant. His evidence was that at the end of January and early February 2015, the students who had enrolled left and each had been expected to pay Kshs. 12, 000.00 per term. RW2 also testified thus, "**I have no evidence that our students left and went to Dance Centre Kenya. There was no documentation.**" Further, RW2 testified that he had not filed the annual audit reports that informed his summary that had been exhibited. As submitted for the claimant, in **Africa Line Transport Company & Another –Versus- Sylvester Keitany [2017]eKLR**, a plaintiff is under a duty to present evidence to prove his claim. In the present case the Court finds that the respondent failed to discharge that duty.

The Court has revisited the submissions filed for the respondent and returns that there is no submission made on the quantum of the general damages for breach of fiduciary duty by the claimant, as was prayed for. Further the Court returns that the counterclaim was an abuse of the court process in view of Civil Suit No. 1026 of 2015 in the Chief Magistrate's Court at Nairobi as earlier filed by the respondent against the claimant raising a similar cause of action between the parties and seeking the same prayers as in the counterclaim. The Court returns that for the stated reasons, the counterclaim will fail.

The Court has considered the parties' margins of success and each shall bear own costs of the suit.

In conclusion judgment is hereby entered for the parties and the claimant's suit as well as the counterclaim are determined with orders:

- a) Each party to bear own costs of the proceedings.
- b) The respondent to deliver to the claimant a certificate of service by 01.07.2019 and as per section 51 of the Employment Act, 2007.

Signed, dated and delivered in court at Nairobi this Friday 31st May, 2019.

BYRAM ONGAYA

JUDGE