



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1691 OF 2013

(Formerly Civil Suit No. 7157 of 2007 in the Chief Magistrate's Court at Nairobi)

DIANA KAGENI MBARI.....CLAIMANT

-VERSUS-

**NATIONAL EMPOWERMENT NETWORK OF PEOPLE WITH
HIV/AIDS IN KENYA (NEPHAK).....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

JUDGMENT

The plaint was filed on 21.08.2007 through Sijeny & Co. Advocates. The plaintiff prayed for:

- a) General damages for breach of contract.
- b) Kshs. 290, 000.00 as particularised in paragraph 8 being:
 - i. Unpaid salary for June to October 2005 Kshs.50, 000.00.
 - ii. Unpaid salary for February 2006 Kshs. 120, 000.00.
 - iii. One month salary in lieu of notice Kshs.120, 000.00.
- c) Costs of the suit.
- d) Interest on (a) and (b) at Court rates.

The claimant's case is that the respondent employed her as a Technical Programme Adviser for 7 months ending on 31.12.2005. The agreement was dated 02.06.2005. By the letter dated 18.11.2005 the respondent adjusted the claimant's salary from Kshs. 110, 000.00 to Kshs. 120,000.00 effective 01.06.2005 so that the respondent became liable to pay the claimant Kshs.50, 000.00 being salary arrears for June to October 2005.

The claimant's further case is that the contract was renewable for a further period subject to availability of funds and the claimant's satisfactory performance. Further, normal termination would be effected by either party giving one month notice or one month's pay in lieu of the termination notice. The claimant worked as agreed and it is her case that she worked until February 2006 when the respondent's National Co-ordinator and Chief Executive Officer terminated the employment without notice. The claimant's case

is that the contract of service was extended beyond 31.12.2005 and it thereby became a month to month contract of service on the same terms terminable by one month notice or one month pay in lieu of such notice.

The respondent filed the statement of defence dated 11.10.2007 through Rachuonyo & Rachuonyo Advocates. The respondent prayed that the suit be dismissed with costs. The respondent admitted that it employed the claimant upon the terms pleaded for the claimant and the contract was lapsing on 31.12.2005. The respondent while admitting as owing the salary arrears for **Kshs. 50, 000.00** as pleaded for the claimant, the respondent further pleaded that it had paid the arrears.

The respondent denied the alleged wrongful dismissal and pleaded that by a letter dated 17.11.2005 the claimant was given a notice that the contract would terminate on 31.01.2006. She also knew that the contract's renewal dependent upon availability of funds. The respondent pleaded that in view of the notice dated 17.11.2006, the contract lapsed on 31.01.2006 and the claimant is not entitled to pay for February 2006 as claimed. A written and oral notice for termination had been served and therefore pay for one month in lieu of notice was not justified.

The claimant filed the reply to defence dated 15.10.2007 denying that she received the letter dated 17.11.2005 and that her contract of service lapsed on 31.12.2005 and it was orally extended for an indefinite term thereby creating a new contract terminable by one month notice or pay in lieu thereof. Further the contract of service ended on 10.02.2006 when the National Coordinator and the Chief Executive Officer verbally terminated the plaintiff's employment during a staff meeting. The claimant claimed one month pay in lieu of notice and pay for February 2006 plus Kshs.50, 000.00 salary arrears that she pleaded had never been paid. The claimant changed her advocates to Mugambi Mugania & Company Advocates.

The only issue in the suit is whether the claimant is entitled to the remedies as prayed for. The Court has considered the pleadings, evidence and submissions and makes the following findings:

- 1) There is no dispute that parties were in a contract of service.
- 2) The claimant worked in January 2007 and was paid full salary. The letter of 17.11.2006 was not specifically addressed to the claimant. Respondent's witness (RW) confirmed the letter was addressed to employees paid by Policy Project Kenya and the witness testified that he did not know if the claimant was paid by both Policy Project Kenya and ActionAid and as was testified and urged by the claimant. He also testified that he did not know if the claimant received the letter dated 17.11.2006. On the material before the Court, there is no reason to doubt the claimant's case that her last day at work was on 17.02.2006 when she wrote a detailed account of what had happened and the Chairman had told her to leave. The Court finds that the claimant worked in February 2006 and she was suddenly terminated without notice and she is awarded **Kshs.120, 000.00** being one month salary in lieu of notice. As urged for the claimant, the Court returns that she served on a month to month contract after her fixed term contract lapsed on 31.12.2005.
- 3) The claimant in her testimony confirmed she had been paid the Kshs.50, 000.00 arrears and the prayer is dropped accordingly.
- 4) The claimant worked up to 17.02.2006 and she is awarded $17/30 \times 120, 000.00$ making **Kshs.68, 000.00** prorated pay.
- 5) As submitted for the respondent, the Employment Act, 2007 did not apply to the cause of action and the submissions for compensation based on section 49 of the Act will fail. The prayer for general damages collapses as not justified.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- 1) Payment of **Kshs.188, 000.00** by 15.01.2020 failing interest to be payable thereon at Court rates

from the date of filing the suit till full payment.

2) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 22nd November, 2019.**

BYRAM ONGAYA

JUDGE