



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1891 OF 2015**

**LEAH WANJIKU WAMBU.....CLAIMANT**

**VERSUS**

**UNITY COLLEGE OF PROFESSIONAL STUDIES.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 23.10.2015 through Njoroge Mwaura & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's employment services with the respondent were terminated wrongly and unfairly.
- b) 6 months' salary for wrongful dismissal at Kshs.25, 000.00 x 6 =Kshs.150,000.00.
- c) Salary for the month of October 2013 in the sum of Kshs.25,000.00.
- d) Certificate of service.
- e) General damages.
- f) Any other relief that the Honourable Court may deem fit and just to grant.

The claimant has pleaded that the respondent employed her as an Administrator at the respondent's learning institution at a gross monthly salary of 25,000.00 and effective 01.05.2013. The claimant states that she was to serve for a term of one year from 01.05.2013 to 30.04.2014 and the contract was renewable. The claimant alleges that she was a good worker, she was discriminated against, her termination was not on account of gross misconduct or want of due performance, the dismissal was vague and fathomless, she worked overtime and she was not paid, and she seeks the prayers as stated above.

The respondent filed a defence on 17.12.2015 through Kanyi, Koge & Company Advocates. The respondent prayed that the suit is dismissed with costs. The respondent has admitted that it employed the claimant but denies that the claimant had a clean record of service. The respondent alleges that during her service the claimant was uncooperative, rude and always had a nasty verbal exchange with other staff and she accused her Kamba colleagues of practising witchcraft and the matter was reported to the police on 15.10.2013 per OB/68/15/10/013 at Buruburu Police Station. The claimant refused to sign staff register despite repeated requests to do so and the respondent alleges that the claimant was rebellious, insubordinate and engaged in professional misconduct. Further despite warnings she refused to change and instead breached the respondent's code of ethics and the Employment Act, 2007. Further after she was disciplined she falsely says that she was sexually harassed. She absconded duty on 14.10.2013 and disappeared and on 01.11.2013 the respondent attended the area Labour Office to resolve the dispute but the claimant failed to attend. Further the claimant had failed to collect her certificate of service.

The Court has considered the pleadings, the evidence and the submissions filed for the parties. The Court makes findings as follows.

To answer the **1st issue** for determination the Court returns that there is no dispute that parties were in a contract of service. The claimant was employed on 01.05.2013 as an Administrator. She worked for around 5 months with the respondent.

The **2nd issue** for determination is whether the termination of the claimant's employment was unfair. The claimant's evidence was that she worked for the respondent for 4.5 months on renewable contractual terms. Further, Paul Kanyi was the Director and after one month in the

employment the Director started making advances for a sexual relationship with the claimant. The claimant testified that she was a devoted Christian, she did not want to destroy her family and so she declined the director's advances. She testified that on 14.10.2013 the Director Paul Kanyi summoned her and told her not to leave at the close of the day's work. Further at 6.00pm the Director arrived and told the claimant that because she was uncooperative, the employment had to come to an end. The claimant testified that she was therefore dismissed because she declined the Director's advances for a sexual relationship. The claimant testified thus, "**He wanted to come to my house. I lived with a child. He could not be allowed. His advances were verbal on phone and face to face.**" The claimant's further evidence was that on 15.10.2013 she reported on duty for her final dues but she was locked out and she reported the dispute at the area Labour Office. She also reported the dispute to Federation of Women Lawyers –Kenya (FIDA – Kenya) who issued the letter dated 11.10.2013 alleging that the claimant had been sexually harassed. The respondent replied the letter by FIDA – Kenya by the letter dated 15.11.2013. The letter stated that the claimant absconded duty without informing the respondent's administration. Further the allegation of sexual harassment was an afterthought by the claimant calculated to tarnish the name of the respondent's director. In cross-examination the claimant testified as follows:

- a) The Director was Paul Kanyi and his wife Nancy Kanyi was the respondent's Principal.
- b) She reported the sexual advances at Buruburu Police Station under OB No.14/13/11/013 but did not move to prosecute the matter because her case was for loss of job and not sexual harassment.
- c) She admitted that in her witness statement at paragraph 9 she stated that she tendered a resignation but further testified that she never resigned. She then denied signing the witness statement. In re-examination she testified that she had signed the witness statement.

The respondent's Witness No. 1 (RW1) was Paul Kanyi and he stated that he never received a complaint against him by the claimant about the alleged sexual harassment until after the claimant left employment of the respondent – and after a reply to the FIDA –Kenya letter, no further correspondence was received about the issue except as alleged in Court. The reports he received were that the claimant wanted to recruit staff to a certain religious organisation. Further she refused to sign the check-in and check-out register saying that she was the administrator. So her name was missing in the exhibited staff daily attendance register. She was also given letters on absenteeism. The claimant further failed to attend the Labour Office as summoned on 06.10.2013. RW1 testified that the claimant absconded from duty and was never dismissed.

The respondent's witness No. 2 (RW2) was the Principal Nancy Kanyi. She testified that she was the co-director and she supervised the respondent's activities on a daily basis. Further the claimant never reported to her the alleged sexual harassment. She also supervised the signing of the staff attendance register. The staff signed when they attended and the claimant had not signed as required. RW2 testified that the claimant refused to sign the staff register because she said she was the administrator. Further the first time she heard about the sexual harassment is when she received the FIDA – Kenya letter. RW2 testified that on 14.10.2013 the claimant absconded from duty and the claimant gave no reason for the absence. Further the claimant had never been locked out from work.

The Court has carefully examined the evidence. The Court finds that the claimant's allegations that she was sexually harassed are pure afterthoughts made after she absconded from duty effective 14.10.2013 and there is no reason to doubt the respondent's account on the circumstances of the separation. The claimant while alleging that RW1 started to make advances for a sexual relationship after about one month of service, the claimant has failed to explain why she never reported to RW2 or other relevant authority until she had served for 4.5 months. Further the Court finds that the claimant while in her witness statement painted a case that she resigned, she abandoned that line in her oral testimony and alleged that she was locked out – and the Court finds that such contradictory evidence cannot be trusted. The claimant exhibited her pastor's letter dated 01.05.2014 alleging that in May 2013 the claimant had reported to him about her employment and thereafter the sexual harassment. The claimant offered no explanation why the letter was issued belatedly long after the event and why the pastor never intervened or was not called to testify.

The Court finds that on the material on record the claimant resigned from employment on 14.10.2013 when she refused or failed to report on duty and the alleged sexual harassment was a pure afterthought calculated to blackmail the respondent and its Directors. The Court will not aid the claimant in such unfair advances for unjust enrichment and the Court returns that the termination was not unfair or unlawful. In any event, there is no reason to doubt that the claimant refused to sign the staff attendance register and she received warning letters exhibited about her misconducts while in employment of the respondent – so that even if she would have been dismissed, she would have significantly contributed to her predicament thereby completely diminishing the chances for compensation under section 90 of the Employment Act and looking at the short period she had served being only 1.5 months after the 3 months' probationary service. Her claims for unfair termination and compensation will therefore fail.

To answer the **3rd issue** for determination, the Court makes findings as follows on the residual remedies in view of the findings on the 2nd issue above.

The claimant is entitled to a certificate of service per section 51 of the Act. RW1 testified that 13 days worked in October 2013 had not been paid and the same is awarded prorata at **Kshs.10, 483.90** (13/31 xKshs.25, 000.00). The Court has considered the parties' margins of success and returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the parties for orders:

- a) The declaration that the claimant has failed to establish a case for sexual harassment and unfair termination.
- b) The respondents to deliver the certificate of service and to pay the claimant **Kshs.10, 483.90** by 31.01.2020 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- c) Each party to bear own costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Thursday, 19th December, 2019**.

**BYRAM ONGAYA**

**JUDGE**