REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2210 OF 2014

LIZ AYANY.....CLAIMANT

- VERSUS -

LEISURE LODGES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

JUDGMENT

The claimant filed the statement of claim on 11.12.2014 through J.A. Guserwa & Company Advocates. The claimant prayed for judgment against the respondent for:

a) A declaration that the claimant suffered unfair and unlawful termination by the respondent.

b) Damages for wrongful and unlawful termination.

c) Payment of all the lawful terminal dues set up at paragraph 10 being:

i) Pay in lieu of 2 months' notice @ Kshs.179, 809 per month Kshs.359, 618.00.

ii) Pay in lieu of 26 leave days earned Kshs.153, 699.00.

iii) Gratuity pay for 2 years of service Kshs.378, 336.00.

iv) Salary for 15 days worked in September 2014 Kshs.88, 672.50.

v) 12 months compensation Kshs. 2, 157, 708.00.

vi) Total Kshs.3, 138, 033.50.

d) Maximum 12 months compensation for wrongful termination.

e) Cost of the suit with interest thereon.

The response was filed for the respondent on 24.02.2015 through Kimani Kimondo & Company Advocates. The respondent denied the claimant's prayers (other than those admitted) and prayed that the claimant's suit against the respondent be dismissed with costs to the respondent.

The respondent employed the claimant as Sales & Marketing Manager by the letter of appointment dated 20.01.2010 and effective 25.01.2010. Clause 2 (b) of the letter provided thus, "**On completion of the probationary period, you will be confirmed in your employment after which the employment shall be terminated by either party giving 2 months notice.**"

The claimant was issued with the letter dated 15.09.2014 written by the respondent's Executive Director one John K. Mutua and addressed to the claimant accordingly. The letter narrated that the claimant had been issued with a warning letter about her rudeness towards the Executive Director. It also narrated that the claimant had continued with unacceptable practice of rudeness which was totally inappropriate trait for a sales person; that the claimant defied instruction; that the claimant was uncooperative; and the that the claimant had not changed her (after warnings) and approach especially her brazen rudeness. The letter then continued to state as follows;

"My patience has finally been tested to the limit after your outrageous amendment to the new driver's appointment letter that i personally signed with clear reporting instructions which you went ahead to amend despite Monica, the Assistant HRM, informing you that it was I who had drafted the letter and inserted the reporting guideline!

I do not wish to delve to your other numerous transgressions, especially you being a very poor team player and deploying 'bully', abusive and confrontational tactics with virtually everyone.

Your last action alone of amending a letter from me, as Executive Director, is deplorable and enough to summary dismiss you for in subordination and total defiance & lack of respect to authority.

Therefore, I will give you the option of resigning with immediate effect with all your dues owed to you to be fully paid including notice period or I will terminate your services and detail all your many transgressions which will not do your CV or repute any good.

I have been overly patient as you continuously ignored my constant warnings and cautions with utmost impunity and I really should actually have taken this action earlier.

You will only report on duty Monday 15th September to clear your personal effects and hand-over details of your duties and responsibilities to Victoria Mwakuwa. I hope you will not cause any drama otherwise it will work adversely against you.

We wish you all the best in your future endeavours.

Yours sincerely,

Signed

JOHN K. MUTUA

EXECUTIVE DIRECTOR"

It appears that the claimant failed to resign as was threatened in the letter of 15.09.2014. The contract of employment was terminated by the letter dated 17.09.2014. The termination letter referred to the letter of 15.09.2014 and that the claimant had continued with abusive and rude behaviour as per the e-mails of 06.02.2014, 09.08.2014, and 05.09.2014 which the letter stated to attest, reinforce and aptly confirm the claimant's defiance, callous insubordinate nature and scant respect for authority and warning the claimant of serious consequences. Thus the respondent's management had decided upon a separation by invoking the termination clause in the letter of appointment dated 20.01.2010. The letter promised to pay terminal dues including salary up to 15th September 2014; 2 months' salary in lieu of notice; one pending day; any fringe benefits on pro-rata basis; and less any monies owed to the respondent.

The claimant's final dues were computed at Kshs. 309, 172.00 (net) being 2 months' pay in lieu of the termination notice and 15 days worked in September 2014.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair.

The Court has considered the evidence. It is clear that while alleging misconduct and poor performance, the respondent invoked the termination clause. However, section 41 of the Employment Act, 2007 provides that in event of a dismissal on account of poor performance or misconduct, the employee shall be given a notice and a hearing. The Court returns that the termination was in breach of that provision and therefore unfair. While making that finding, the Court considers that it was unfair labour practice, while alleging misconduct and poor performance, for the respondent to purport to invoke the termination clause. In the Court's opinion, the termination clause in the letter of appointment could not be invoked in clear contravention of section 41 of the Employment Act, 2007. The Court holds that where the Act has made a clear minimum and mandatory provision governing the employment relationship such as section 41 of the Act and a situation so governed accrues, the parties are bound by the statutory provision. In such circumstances, the employer has no option and cannot unilaterally invoke a contractual provision to deny the employee the protection as afforded under the mandatory statutory provision.

The evidence in court by the claimant was that she had made a suggestion to correct the letter of appointment of the driver in issue while it was still at a draft stage and in good faith towards aligning it to sound reporting lines for the new driver. The Court considers that if a disciplinary process had been initiated per section 41 of the Act, then the respondent would have effectively considered the claimant's explanation prior to the dismissal or termination.

The court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus, **"The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee**

in determining the genuine cause of the termination."

The letter of 15.09.2014 suggested a soft landing when the Executive Director wrote, "**Therefore, I will give you the option of resigning with immediate effect with all your dues owed to you to be fully paid including notice period or I will terminate your services and detail all your many transgressions which will not do your CV or repute any good."** However, the claimant failed to resign as was suggested and there was no valid agreement to separate in the prevailing circumstances. Thus the respondent was under an obligation to invoke section 41 of the Act but failed to do so rendering the termination unfair.

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 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. Again, the Court follows **Kenya Union of Commercial Food and Allied Workers – Versus- Meru North Farmers Sacco Limited [2014]eKLR** (Mbaru J) where it was held that section 41 of the Employment Act, 2007 is couched in mandatory terms and where an employer fails to follow the mandatory provisions and an employee is terminated after such flawed process such termination is ultimately unfair. Again, in **Rebecca Ann Maina & 2 Others –Versus- Jomo Kenyatta University of Agriculture and Technology [2014]eKLR**, (Ndolo J) it was held that whereas each case would be considered on its own merits, non compliance with any provisions of section 41 of the Act rendered any disciplinary action out rightly unfair. In the present case the respondent clearly failed to comply with the mandatory provisions of section 41 of the Act and the Court finds that on that account the termination was unfair.

The **2nd issue** is whether the claimant is entitled to 12 months maximum compensation as prayed for and under section 49 of the Employment Act, 2007 for for unfair or unlawful termination. The claimant had served for about 4 years and desired to continue in employment. However, the Court has considered the claimant's record of service. The claimant received several warnings such as e-mail of 13.09.2014, another one dated 06.02.2014 (erroneously dated 06.02.2013) and in both instances the claimant did not raise a grievance about the content and reasons for the warnings. The court has taken into account the evidence by the respondent's witness and considers that verbal warnings had also issued. Whereas the warnings amounted to punishment imposed by the respondent against the claimant in that regard and therefore requiring no reply or response on the part of the claimant, nothing stopped the claimant from raising a grievance in view of the warnings if they had been unfair or unjustified. In view of the warnings, the Court returns that the claimant contributed substantially to her predicament culminating in the termination of the contract of employment. Taking those factors into account the Court awards the claimant under section 49 of the Act 3 months' payment at Kshs.179, 809.00 making **Kshs.539, 427.00**.

The **3rd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

a) Pay in lieu of 2 months' notice @ Kshs.179, 809 pm **Kshs.359, 618.00** was not in dispute as was admitted by the respondent and is allowed as prayed.

b) The claimant did not establish the contractual, statutory or other basis for the prayer for gratuity and the same will fail.

c) Salary up to 15.09.2014 is not in dispute and is awarded at **Kshs.88, 672.50** as prayed for.

d) The claimant did not establish the 26 pending leave days and is awarded **Kshs.6, 163.18** as allowed and computed by the respondent for one pending day.

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

1) The declaration that the termination of the claimant's employment by the respondent was unfair, wrongful and unlawful.

2) The respondent to pay the claimant **Kshs.1, 533, 307.68** (less tax) by 01.08.2018 failing interest to be payable thereon at court rates from the date of the judgment till full payment.

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

Signed, dated and delivered in court at Nairobi this Friday 22nd June, 2018.

BYRAM ONGAYA

JUDGE