



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1979 OF 2015**

**J W N.....CLAIMANT**

**- VERSUS -**

**SECUREX AGENCIES (K) LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 8<sup>th</sup> June, 2018)**

**JUDGMENT**

The claimant filed the claim on 04.11.2015 through Wokabi Mathenge & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration to issue that the termination of the claimant's employment without according her a fair hearing and lacking proper, fair administrative procedure was unfair consequently void.
- b) Damages for unfair termination.
- c) 1 month salary in lieu of notice.
- d) A declaration to issue that any withholding of original academic certificates of an employee by an employer amounts to unfair labour practice.
- e) A declaration that the respondent acted unfairly, unreasonably, irrationally, and disregarded the human dignity of the claimant by making disclosure relating to allegations of sexual nature without verifying or ascertaining their veracity consequently occasioning her and her family psychological and social torment, trauma and distraught contravening Article 28 of the Constitution.
- f) General damages for violation of the right to inherent human dignity, privacy and confidentiality when dealing with employee affairs where allegations of a sexual nature have been raised.
- g) Costs of the suit be provided for.
- h) Any other relief the Court deems fit to grant.

The respondent filed the response to the claim on 14.12.2015 through Taibjee & Bhalla Advocates. The respondent prayed that the claim herein be dismissed with costs. The claimant filed a reply to the response on 18.12.2015.

There is no dispute between the parties that the respondent employed the claimant as a guardette effective 03.03 2015 and the claimant worked until sometimes on 09.08. 2015. It was a service of 6 months and one week.

The claimant was assigned to provide guarding services at a place known as Nakumatt Junction Mall on Ngong Road in Nairobi effective 24.03.2015. The claimant was paid Kshs.472 per day. The respondent retained the claimant's original academic certificates and upon the advocates making a demand, the respondent returned them as per the forwarding letter dated 16.10.2015.

The evidence by the respondent is that on 02.08.2015 allegations of improper conduct were reported against the claimant and the respondent undertook the relevant investigations and found that the allegations were baseless. During the investigations, the claimant continued in employment and performed her duties. She was not aware of the on-going investigations.

On 05.08.2015, the respondent's supervisor at Nakumatt Junction Mall convened a routine parade attended by 39 guards who were in the

employment of the respondent and deployed at the Mall. The claimant was present at the parade. The day supervisor known as Gideon consulted the night supervisor known as Nichodemus. The day supervisor then addressed the parade and announced that there was a female guard who had been captured on CCTV footage having sex with a stranger. The supervisor stated that the guard in issue had depicted disrepute to the respondent. The culprit was not disclosed but the supervisor undertook to have the culprit taken to the respondent's office by 10.00am and would be summarily dismissed. Thus the members of the parade became anxious and the supervisor explained that whoever would be picked will be the culprit. The supervisor stated that the culprit was a person of loose morals. The parade was dismissed and members proceeded to their respective areas of deployment. The claimant worked as usual but a colleague had inquired from her if she knew the culprit. Further, a lady known as Christine had been brought by supervisors with the aim of relieving the claimant at her work station. The claimant was asked to report at the office whereby the respondent's car was on standby to pick the claimant up for that purpose. The said Christine had been brought about by the same car.

The claimant prepared to leave as instructed by the supervisor but the zonal manager known as Kanyora directed her not to leave the station. She was then assigned to work within the Nakumatt Junction Mall but in an area ordinarily and exclusively guarded by the respondent's male employees. At about 4.00pm, the zonal manager, human resource officer, and the day supervisor arrived and called the claimant aside and asked her if she was aware of the sexual relations affair. They informed her that the same had been captured on CCTV. The claimant requested to see the CCTV footage which recorded the alleged sexual escapade to verify the allegations. The zonal manager, human resource officer, and the day supervisor went to the back room recording devices. They then left without informing the claimant whatever had transpired.

On 06.08.2015, the day supervisor mentioned that the claimant had been thought to be the culprit in the alleged sexual escapade and further announced at the parade that the allegations were untrue. That was publicly communicated at the parade attended by 39 guards.

The claimant was emotionally drained and she went into sobbing. She told the supervisors that there was need to verify and authenticate the information prior to communicating it to third parties. The parade dispersed and the claimant reported to her assigned place of work. On 7.08.2015 and 08.08.2015 she was on off duty to attend to personal matters and in line with granted permission.

On 09.08.2015 she reported on duty and the day supervisor Gideon informed her that the Nakumatt Junction Mall property manager one Rehema did not want the claimant to work at the premises. She was deployed to serve at an area where only men were ordinarily assigned to serve. The respondent assigned one Christine to take over the claimant's position at the Mall. The claimant was told that she would be allocated another duty station.

On 10.08.2015 she reported at work and attended the routine parade. She proceeded to her station of work and worked for about 3 hours and at about 11.00am, the day supervisor informed her that she had been summoned to the head office. The respondent's car was availed for that purpose. She was taken to the zonal manager and he apologized for the public communication about the claimant on the alleged sexual escapade. The claimant was told that she would be redeployed. She took off her uniform, changed in civilian attire and headed home to be recalled for redeployment.

Days ran and the claimant telephoned the zonal manager about her recall for redeployment. The manager replied that there was no opening for redeployment. The claimant's husband became concerned and he wanted to know the true circumstances leading to the termination of the claimant's employment. He visited the Mall and the property manager appeared unaware of the circumstances. On 07.09.2015 the claimant visited the respondent's head office accompanied by her husband and a senior supervisor one Ogut informed them that he was not aware that the claimant was not at work. Thereafter the claimant was not informed about her employment and she filed the present suit. Her husband was anxious and he visited Ogut at the respondent's office three times inquiring about veracity of the allegations and the fate of her employment.

The respondent's witness (RW) was one Moses Muli Maithya, the respondent's assistant human resource manager. He confirmed that at all material times he was not at the Nakumatt Junction Mall and all eye witnesses of the events had not been called to testify. His evidence was based on information and was therefore hearsay evidence and the Court considers that it was largely not admissible in the circumstances. He confirmed that the claimant had not been notified about the nature of investigations but the findings were that the claimant was innocent and she was informed accordingly. He could not confirm that the show-cause letter dated 27.08.2015 received at labour office on 09.11.2015 had been delivered to the claimant as there was no postal certificate. The claimant denied ever receiving or seeing such letter except as filed in Court. The letter alleged that the claimant had been absent from duty from 09.08.2015 and had failed to account for her whereabouts she was to explain and show-cause why disciplinary action was not to be taken and to do so by 22.08.2015.

Submissions were filed for the parties.

The **1st issue** for determination is to set out the reason for termination of the claimant's employment. The Court finds that there was no evidence that the show-cause letter was delivered. The evidence by the claimant that it was not delivered is credible. There is no reason to doubt the claimant's account that on 10.08.2015 she worked for 3 hours and was thereafter summoned to the head office. The purported show-cause letter was delivered to the labour officer on 09.11.2015 clearly as an afterthought and after unexplained delay. Even if the show-cause letter had been delivered, it is clear that the respondent never proceeded to act upon it by imposing one or other penalty against the claimant. The letter did not serve any purpose except miserably failing to show that the claimant had absconded duty as was misleadingly urged for the respondent.

The Court finds that the claimant's evidence was not challenged and the court finds that it was consistent and credible as it was coherent. On 10.08.2015 she was summoned and told to go home and to be recalled for redeployment. She made inquiries by herself, with her husband and through her husband but she was not recalled. The court finds that the respondent's conduct of failing to recall the claimant amounted to constructive termination of the claimant's employment. The claimant was entitled to consider herself terminated from the respondent's employment effective 10.08.2015.

To answer the **2nd issue** for determination, the Court returns that the constructive termination was unfair for want of a valid or genuine

reason as envisaged under section 43 of the Employment Act, 2007.

The 3<sup>rd</sup> issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a) The Court returns that the Claimant's termination was unfair for want of a valid reason.

b) The claimant had served for 6 months. The Court has considered that the claimant did not contribute to her termination. She desired to continue in employment. The Court has considered that the circumstances of termination did not relate to the respondent's operational requirements or the claimant's conduct or compatibility as envisaged in section 45 of the Act. Taking the factors into consideration, the claimant is awarded 6 months' salaries at the rate of the last gross monthly pay of Kshs.15, 000.00 making **Kshs.90, 000.00**.

c) The constructive termination was without notice and the Court returns that the claimant is entitled to one month salary in lieu of notice at **Kshs.15, 000.00** per month.

d) The claimant did not establish any reasonable justification for withholding the claimant's original academic certificates. The Court returns that the withholding of the certificates amounted to unfair labour practice in contravention of Article 41 (1) of the Constitution of Kenya, 2010. The claimant is entitled to a declaration that any withholding of original academic certificates of the claimant by the respondent amounted to unfair labour practice.

e) The claimant has prayed for a declaration that the respondent acted unfairly, unreasonably, irrationally, and disregarded the human dignity of the claimant by making disclosure relating to allegations of sexual nature without verifying or ascertaining their veracity consequently occasioning her and her family psychological and social torment, trauma and distraught contravening Article 28 of the Constitution. It was submitted for the claimant that making false allegations of sexual escapade against the claimant publicly at the parade was dehumanising and an infringement on the claimant's right to dignified treatment as protected in Article 28 of the Constitution of Kenya, 2010. The Court has considered section 6(1) (b) of the Employment Act, 2007 which provides that an employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker uses language whether written or spoken of a sexual nature. The Court returns that the claimant's evidence, that was credible, is that the respondent's supervisor announced at the parade attended by 39 guards that the claimant was the culprit in the alleged sexual escapade. The claimant having been so exposed and such words used against her, the Court returns that she was sexually harassed within the meaning of section 6(1) (b) of the Act. The Court has also considered section 6(2) of the Act which imposed upon the respondent the duty, after consulting the employees or their representatives, to issue a policy statement on sexual harassment. Under section 6(3) such policy statement was to provide for definition of sexual harassment as provided for in the Act; employee entitlement to employment free from sexual harassment; steps taken to prevent sexual harassment; explain how to make or report to the employer complaints of sexual harassment; and non-disclosure of the complainant except for purposes of disciplinary process or investigating complaints. In the instant case, the Court has found that the claimant was the victim of sexual harassment by reason of the supervisor's utterances at the parade. The Court further finds that it was not shown that the respondent had issued a policy statement on sexual harassment and made it known to all employees as envisaged in section 6 (4) of the Act. Thus the respondent by that omission and by the supervisor's utterances seriously exposed the claimant to sexual harassment and her human dignity as protected in Article 28 was injured. As for prayer for psychological and social torment, trauma and distraught the Court considers that the claims are in the nature of mental harm. To succeed, the claimant must show that the respondent owed her a duty of care, that duty was breached, and the breach caused the psychiatric, mental or psychological injury. Whereas the claimant has established that a duty was owed and it was breached, the Court returns that there was no medical or other evidence attempting to establish the alleged resultant psychiatric, mental or psychological injury. Thus, the prayer in that regard will fail.

f) The claimant prayed for general damages for violation of the right to inherent human dignity, privacy and confidentiality when dealing with employee affairs where allegations of a sexual nature have been raised. The Court has found that the claimant's right to human dignity in that respect as protected under Article 28 was violated. The parties' submissions have not offered much assistance to the Court in assessing the award of damages as prayed for. The Court considers the prayer to be in the nature of award of damages for compensation for injury to dignity, feelings and self-respect. First the Court considers that the respondent's conduct through the supervisor's public humiliation of the claimant seriously and adversely affected the claimant who testified that she was emotionally drained and she went into sobbing. The respondent's offensive conduct is aggravated by the respondent's failure to institute or invoke a policy statement on sexual harassment and which would have protected the claimant as envisaged in section 6 of the Act. Second, the humiliation and harassment had a serious effect leading to the unfair constructive loss of employment as well as anxiety between the claimant and her husband. The offensive treatment lasted from 05.08.2015 to 10.08.2015 when the claimant was told to go home to be recalled later; and the claimant's feelings thereafter continued to be seriously hurt for many days into September 2015 as her husband visited the respondent's office to establish the veracity of the claimant's predicament. The claimant was victimised and another employee was promptly redeployed in her place as she lost her job after a stint at an ordinarily exclusive men's point of work. The Court has considered the claimant's humiliation, hurt feelings, loss of self-respect, loss of dignity, loss of self-esteem and confidence, and her subsequent vulnerability at work and family levels and considers that an award of **Kshs. 1,000,000.00** will meet the ends of justice in this case and under the prayer as made on account of injury to dignity, feelings and self-respect in violation of Article 28 of the Constitution, 2010.

g) The claimant has substantially succeeded in her claims and prayers. Accordingly, the respondent will pay the claimant's costs of the suit.

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

a) The declaration that the termination of the claimant's contract of employment was constructive and unfair for want of a valid reason.

b) The declaration that the withholding of the claimant's original certificates amounted to unfair labour practice in contravention of Article 41 (1) of the Constitution of Kenya, 2010.

c) The declaration that the respondent acted unfairly, unreasonably, irrationally, and disregarded the human dignity of the claimant by making disclosure relating to allegations of sexual nature without verifying or ascertaining their veracity, consequently, contravening the claimant's right to inherent human dignity as provided for in Article 28 of the Constitution.

d) The respondent to pay the claimant a sum of **Kshs.1, 105, 000.00** by 01.08.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

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

**Signed, dated and delivered in court at Nairobi this Friday 8<sup>th</sup> June, 2018.**

**BYRAM ONGAYA**

**JUDGE**