



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 133 OF 2016

BETWEEN

WINFRED MUTHINA JOHN.....CLAIMANT

VEERSUS

1. HATUA LIKONI ORGANISATION

2. GABRIELLE FONDILLER

3. PETER KWAME MWAKIO.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

Christine Kipsang & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim, on 17th February 2016. She states she was employed by the Respondents on 1st October 2012 as a Mentoring and Career Guide Coordinator. She earned a monthly salary of Kshs. 33,170, as of the date she left employment, 19th January 2016. She describes the 1st Respondent as a Non-Governmental Organization, the 2nd Respondent its Director, and 3rd Respondent its Programs Director. The Respondents terminated the Claimant's contract of employment on allegations that she failed to report for duty on 8th, 10th, and 11th of April 2014; she threatened to injure fellow Employee on 2nd October 2015; and injured a Minor at her residence, on 2nd January 2016. She states she was not given a letter to show cause, why disciplinary action should not be taken against her. She was not heard. She was not given any warning, and the allegations against her dating back to the year 2014, had gone stale by the time of termination. She prays the Court to find termination was unfair, and grant her the following orders against the Respondent:-

a) 1 month salary in lieu of notice at Kshs. 33,170.

b) Pending annual leave days for the years 2013, 2014, and 2015 at Kshs. 121,899.

c) Off days, from March 2013 to February 2015 at Kshs. 190,174.

d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 398,040

Total....Kshs. 743,284

e) Certificate of Service to issue.

f) Costs and interest be provided for.

2. The Respondents filed their Response on 9th May 2016. They state that the Claimant was employed by the 1st Respondent as a Career Guidance Officer, earning a gross monthly of Kshs. 33,170. She was on several occasions, involved in acts of misconduct, contrary to 1st Respondent's By-laws and Personnel Policies. She was given an opportunity to respond to the assault allegation, but ignored that opportunity. Termination followed the decision of the 1st Respondent's Board. It was the position of the Board that the Claimant was not suited for the role of Career Guidance/Mentor. She had utilized all her annual leave days, by the time of termination. She reported to work at 10.00 a.m. and left at 3.00 p.m. on weekdays. She was issued a warning letter dated 15th April 2015 over her absence of 8th, 10th, 11th April 2014. The Respondent did not refuse to issue Certificate of Service to the Claimant.

3. The Claimant was heard, and closed her case, on 16th December 2016. The Respondents repeatedly failed to give evidence on 24th February 2017; 19th June 2017; and 11th December 2017. On the latter date the Court gave an order closing Respondents' case. Parties confirmed the filing of their Closing Submissions on 7th March 2018.

4. The Claimant confirmed in her oral evidence, details of her employment history, and terms and conditions of service, given in her Statement of Claim. She told the Court that her Son was assaulted. She was herself threatened. It is not clear from her evidence who assaulted her Son, and who threatened the Claimant. She never went on annual leave, and did not have rest days. She only had a warning letter in 2014. She was not issued a letter to show cause, why disciplinary action should not be taken against her. There were no By-Laws at the time she worked.

5. Cross-examined, she testified that she worked for about 4 years. A Child called J M, assaulted Claimant's Son. It was alleged the Claimant in turn, assaulted M. The Claimant reported M to the Police. She did not hurt M. The Claimant was off-duty, on 8th, 10th, 11th April 2014. She received Respondents' letter dated 11th April 2014, asking her to explain her absence, by 18th April 2014. She did not respond to the letter. She received the letter dated 15th April 2014 warning her. Kshs. 3,000 was deducted from her salary, over the incidence. She did not have breaks during service. She worked throughout. Her performance was good. She did not have an altercation with a Colleague. Redirected, she told the Court the letters of 11th April 2014 and 15th April 2014, referred to the same allegation of failure to report for duty. She was deducted Kshs. 3,000 from her salary for this failure. She never received any other warning.

6. The Respondents, as indicated above did not give evidence. Their position on the dispute is as shown in their Pleadings, summarized at paragraph 2 above.

The Court Finds:-

7. The Claimant was employed by the Respondents as Career Guide / Mentor, on 1st October 2012. Her contract was terminated by the Respondents on 19th January 2016, on 3 grounds, that: she failed to report to work on 8th, 10th and 11th of April 2014; she threatened to injure fellow staff on 2nd October 2015; and injured a Child on 2nd January 2016.

8. Termination was with immediate effect. There was no hearing on any allegation. It is clear to the Court that the Respondent did not accord the Claimant procedural justice, as required under Section 41 and 45 of the Employment Act 2007.

9. Failure to report to work took place on 8th, 10th and 11th April 2014. The Claimant was warned over the offence. Kshs. 3,000 was deducted from her salary over this absence. This charge cannot have been a valid reason for termination, a warning having issued, and deduction having been made on the Claimant's salary, about 2 years before termination.

10. There was no evidence presented to the Court, in support of the other 2 allegations. It was not disclosed to the Court, which Employee was threatened by the Claimant way back on 2nd October 2015. No such Employee gave evidence before the Court. It was not explained to the Court why action was taken against the Claimant 4 months after the occurrence of the incident. There similarly was no evidence brought before the Court, showing that the Claimant assaulted a Minor. It was suggested to the Claimant in cross-examination that she assaulted a Child named M. There was no evidence from the Respondents, who have the obligation in law to establish the reason or reasons justifying termination, showing any Child was assaulted by the Claimant. The Claimant alluded to an assault on her Son by M, which assault she claims to have reported to the Police. Her evidence was not clear on what took place with respect to assault involving the Children. It was not however for the Claimant, to show there was assault of any Child, leading to termination; that evidential duty solely rested with the Respondents. They did not give evidence, and failed therefore, to establish reason or reasons for their decision of 19th January 2016.

11. The Claimant has shown that termination was unfair, both on account of procedure and validity of reason. ***She is granted the equivalent of 10 months' salary in compensation for unfair termination at Kshs. 331,700.***

12. ***She is allowed the prayer for notice pay at Kshs. 33,170.***

13. She did not persuade the Court on her prayers on rest days and accrued annual leave. She has not shown the Court how in a space of 3 years, she would be entitled to annual leave pay of Kshs. 121,899. She was employed in October 2012. She alleges she was denied rest days from March 2013. There is no evidence that she worked throughout the week. If she took rest days in 2012, why would she be denied rest days from 2013? The Claimant said nothing of her entitlement to rest days and annual leave, under her contract of employment. She merely stated she did not take rest days and annual leave. How many days was she entitled to in either case? By-laws of the 1st Respondent annexed to the Statement of Response indicate Employees were entitled to 26 days of annual leave, based on 6 working days per week. The By-Laws do not support the prayers for rest days and accrued annual leave. These prayers are not supported by evidence and are unpersuasive, and therefore rejected.

14. ***She is granted the prayer for Certificate of Service, under Section 51 of the Employment Act 2007.***

15. *No order on costs.*

16. *Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: the equivalent of 10 months' salary in compensation for unfair termination at Kshs. 331,700; and notice pay at Kshs. 33,170- total Kshs. 364,870.

c) Certificate of Service to issue.

d) No order on the costs.

e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 6th day of July 2018.

James Rika

Judge