



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.150 OF 2018

DR. CATHRINE NJERI WAINAINA.....CLAIMANT

- VERSUS -

KIRIRI WOMEN'S UNIVERSITY OF SCIENCE & TECHNOLOGY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 12.02.2018 in person. She prayed for judgment against the respondent for:

- a. A declaration that the respondent's action was not only unfair but unlawful and wrongful.
- b. 12 months salary as maximum compensation for wrongful loss of employment at 12 x Kshs. 170, 000.00 making Kshs.2, 040, 000.00.
- c. One month salary in lieu of notice Kshs.170, 000.00.
- d. December 2017 salary Kshs.170, 000.00.
- e. 8 days leave Kshs.25, 538.50.
- f. One year of service pay Kshs. 47, 884.60.
- g. Total sum of Kshs.2, 444, 423.10 plus interest and costs of the suit.
- h. A certificate of service is issued.
- i. Any other relief the Honourable Court may deem fit and just to grant.

The memorandum of response was filed on 11.04.2018 through Namasaka & Kariuki Advocates. The respondent prayed that the claimant's suit be dismissed and for any other relief the Honourable Court may deem fit to grant.

There is no dispute that the respondent employed the claimant in the position of a Senior Lecturer and Coordinator of Science in Business Administration Programme effective 01.09.2016. The letter of appointment was dated 11.08.2016. The claimant's duties were reviewed by the internal memo of 28.08.2017 to include the role of Academic Coordinator of the respondent's Westlands Campus.

By the letter dated 18.12.2017, the claimant's employment was terminated effective 21.12.2017. The letter stated that the claimant would be paid one month in lieu of the termination notice as per the letter of appointment dated 01.09.2016.

The claimant's evidence was that at the Westlands Campus exams were starting on 11.12.2017 to 20.12.2017. The last paper was scheduled for 20.12. 2017 at 01.30pm and soon after that paper she received a telephone call from the Assistant Administrator and Human Resources Manager advising that the claimant picks a letter from the office in Kasarani Campus. The respondents Vice Chancellor was at the Westlands Campus but advised the claimant that he did not know about the letter. She proceeded to Kasarani Campus and collected the letter and the Deputy Vice Chancellor, Finance who had signed the letter advised her that she signed the letter of termination but it was the human resource manager who knew the basis of termination.The human resource manager told the claimant that she had no reasons for the termination because she was not part of the decision making.

On 02.01.2018 the claimant went to clear at her office and cleared per schedule in presence of the Deputy Vice Chancellor, Academics. As she left, the Deputy Vice Chancellor, Academics asked her why she had decided to resign. The claimant testified that in January 2018 she met the Vice Chancellor who was her immediate supervisor to understand the circumstances of the termination and for a certificate of service. The Vice Chancellor informed her that he had no reason for the termination. On 22.01.2018 the claimant had cleared with all the departments and she handed in all required results for students she had assessed in the examinations. Marking had started on 09.01.2018 and she asked to be advised what to do in view of the termination. She suggested marking on contract but she was not given that chance. She cleared with the Vice Chancellor on 22.01.2018 but was not given the certificate of service as was promised.

The respondent pleaded that the claimant failed to take up her reviewed duties as the Academic Co-ordinator of Westlands Campus and the claimant had failed to respond to oral requests to show cause and to attend the disciplinary committee hearing. She was therefore summarily dismissed for failing to adhere to the employment contract.

At the hearing the respondent urged a case that the claimant had been absent from duty for example on 29.11.2017 but on which date the claimant had testified that she attended the 67th Senate meeting ; and on 01.12.2017 but the claimant had testified she attended the 70th Senate meeting on final report on graduation. It was the claimant's case that allegations of absence were unfounded. She further testified that she was not told about the sittings of the disciplinary committee as pleaded for the respondent. Further, it was her case that the details of the oral invitation to the alleged disciplinary hearing had not been given. The claimant took issue that in any event the respondent had not filed the academic attendance register and the exam register which academic staff signed to confirm their presence on schedule. The claimant testified that the signing of the human resource register was not sufficient because it was only one of the three attendance register. She further testified that she had received no warnings or written notice on the alleged absence from duty or lateness.

The respondent's case and evidence was that the claimant failed to sign the human resource attendance register and she was therefore liable to dismissal but she was given a soft landing through the termination letter with pay in lieu of notice.

The **1st issue** for determination is whether the termination was unfair. The respondent pleaded that the reason for termination was failure by the respondent to take up the reviewed assignments at Westlands Campus. However, the respondent's witness No. 1 (RW1) confirmed that the claimant had successfully undertaken her duties at the Campus during the December 2017 examinations. Further the respondent's position at the hearing was that the claimant had failed to sign the human resource attendance register whereas absence from duty had not been pleaded at all. The Court returns that if the respondent desired to terminate the contract of service on account of the alleged misconduct, the proper procedure was a notice and a hearing per section 41 of the Employment Act, 2007 but which was not done. Further, in view of the inconsistency in pleadings and evidence including the termination with pay in lieu of notice, the Court returns that the reason for termination was not genuine as it was invalid as at the time of termination and the termination was unfair for want of a genuine reason as envisaged in section 43 of the Act. The Court returns that the termination of the claimant's contract of employment was unfair.

The respondent says that it should have dismissed the claimant but opted to give a soft landing. However, 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 submission on soft landing is therefore found unjustified and the unfair termination is not cleansed at all.

The **2nd 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 is entitled to the declaration that the respondent's action was not only unfair but unlawful and wrongful.
- b. The claimant prays for 12 months salary as maximum compensation for wrongful loss of employment at 12 x Kshs. 170, 000.00 making **Kshs.2, 040, 000.00**. The Court considers that the claimant did not contribute to her termination; she desired to continue in employment; and even after the termination she cooperated in the clearance process ensuring that the respondent's academic results were not adversely affected. The Court has considered the aggravating factor that even after the claimant had cooperated, the respondent decided not to issue the certificate of service or to pay in honour of the terms of the termination letter. The claimant's record of service was clean. The Court has further considered that the claimant's performance especially in coordinating the December 2017 examinations was not wanting in any respect. The Court returns that she is awarded the maximum compensation under section 49 of the Act in view of the unfair and unlawful termination.
- c. The claimant is entitled to one month salary in lieu of termination notice **Kshs.170, 000.00** as prayed for.
- d. The claimant was terminated effective 21.12.2017 but continued to ensure a smooth academic transition in view of the termination and she was not facilitated to complete the clearance until 22.01.2018. The Court returns that she has established a valid claim for December 2017 salary **Kshs.170, 000.00** as prayed for.

e. The 8 days leave **Kshs.25, 538.50** are confirmed in the clearance form by the Deputy Registrar Administration and the claimant is awarded as prayed for.

f. The one year service pay of **Kshs. 47, 884.60** is similarly confirmed in the clearance form by the Deputy Registrar Administration and the claimant is awarded as prayed for.

g. The claimant is entitled to a certificate of service per section 51 of the Act.

h. The claimant is awarded costs of the suit fixed at **Kshs. 50,000.00**.

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

a. The declaration that the respondent's action was not only unfair but unlawful and wrongful.

b. The respondent to pay the claimant **Kshs. 2, 503, 423.10** by 15.12.2018 failing interest to run thereon at Court rates from the date of the judgment till full payment.

c. The respondent to deliver to the claimant a certificate of service by 15.11.2018.

Signed, dated and delivered in court at **Nairobi** this **Friday 2nd November, 2018**.

BYRAM ONGAYA

JUDGE