



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 2281 OF 2012

ROSE M. NTEERE.....CLAIMANT

VS

RIARA GROUP OF SCHOOLS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant in this case, Rose M. Nteere was an employee of Riara Group of Schools Limited the Respondent herein. She brought this claim following termination of her employment on 1st January 2011. The Respondent filed a Statement of Reply on 28th May 2013.
2. The matter came up for hearing before me on 21st November 2018 during the Nairobi Station Service Week. The Claimant testified on her own behalf and the Respondent called its Senior Human Resource Officer, Stephen GathaiyaKariuki.

The Claimant’s Case

3. The Claimant was employed by the Respondent on 13th November 2008 in the position of Administrative Assistant. At the time of leaving employment, she earned a monthly salary of Kshs. 36,400.
4. The Claimant worked for the Respondent until 1st January 2011 when her employment was terminated. She terms the termination as unlawful and unfair. She therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 36,400
- b) Leave.....36,400
- c) House allowance @ 15% of basic salary for 25 months.....136,500
- d) Service gratuity @ 15 days per year.....36,400
- e) Refund of pension contributions.....5,000
- f) 12 months’ salary in compensation.....436,800
- Less amount paid on account.....(10,822)

5. The Claimant also claims costs and interest.

The Respondent’s Case

6. In its Statement of Reply dated 27th May 2013 and filed in court on 28th May 2013, the Respondent admits having employed the Claimant by letter dated 13th November 2008. Her starting monthly salary was Kshs. 35,000 and by letter dated 29th March 2010 it was increased to Kshs. 36,400. The Respondent states that the Claimant’s monthly salary was inclusive of all allowances and benefits.
7. The Respondent pleads that by letter dated 2nd December 2010 from the Claimant’s immediate supervisor to the Head of School, a

complaint was made regarding the Claimant's conduct on 18th November 2010 and particularly the Claimant's wilful neglect and/or refusal to perform work which was her duty to perform. The Claimant was thus accused of wilful failure and/or refusal to obey a lawful and proper command issued to her by the Respondent through her supervisor, which was within the scope of her duty to obey.

8. The Respondent states that the Claimant's employment was lawfully and fairly terminated by way of termination notice dated 10th December 2010. The Claimant was paid full salary for the month of December 2010 plus her final dues.

9. The Respondent adds that prior to the termination of her employment, the Claimant was duly informed of the implication and consequences of her misconduct and was thereafter accorded ample time and opportunity to respond to the allegations and provide an explanation for her conduct. The Claimant provided a written explanation by way of letter dated 4th December 2010. The Respondent states that the Claimant's explanation and representations were considered before the decision to terminate her employment was made.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

11. The Claimant's employment was terminated by letter dated 10th December

2010 stating as follows:

"Dear Ms. Nteere,

RE: CONTRACT TERMINATION NOTICE

*Notwithstanding previous similar incidents of your insubordination, the recent incident that happened on **November 18, 2010** is referred in this case. We also make reference to your own written statement dated December 4, 2010 regarding this incident of which more details are well within your knowledge.*

*A report received from your immediate superior appended with comments from your head of school confirms that you were actually given instructions by your immediate superior but you disobeyed. In a meeting held in the HOS's office on **December 10, 2010** in which you were present, it was explained to you the implications and consequences of insubordination as elucidated by the **Employment Act, 2007 section 44**. With due consideration that your case called for summary dismissal as per the provisions of **TEA, 2007 section 44(4) (e)** the directors of the RGS has opted instead to terminate the contract of service. As such you are notified of the decision to give you a one month termination notice effective **December 11, 2010**. However, you may not serve full notice since it has been opted that your contract with the RGS will stand terminated effective from **January 1, 2011**. Any shortfall of this notice will ensue in payment which will be reflected in your final dues enumerations.*

*In order to facilitate computation of your final dues **immediately on or before** the expiry of the short notice period, you will be required to carry out a proper and complete handing-over of your present allocated duties and your current department property in your possession to the **Head of School** or her **delegate**. During the period preceding your separation from the school, you will be expected to give **maximum cooperation and spirited team-work** to all the RRP staff and similarly in the entire RGS community.*

*Like any other staff during this festive season, you will be expected to proceed on your leave as will be scheduled by the head of school. If applicable, any pending leave will also be captured in your final dues. You are also kindly advised to collect a letter enumerating your entitled terminal dues from the Human Resource Manager's office **before you commence your leave** awaiting the day when your termination notice expires.*

We wish to take this opportunity on behalf of the management and directors of the Riara Group of Schools to sincerely thank you for the period you have offered your services to the RGS and to sincerely wish you all the best in your future endeavors.

Yours sincerely,

*For: **The Riara Group of Schools***

(Signed)

SAMSON M. KAMAU

DEPUTY HUMAN RESOURCES MANAGER

12. This letter accuses the Claimant of disobeying instructions issued by her superior. According to the evidence on record, the Claimant had received instructions to go to the Respondent's main office to assist other Administrative Assistants to prepare for a school event. In her written explanation dated 4th December 2010, the Claimant states that she spoke to her colleague by the name Sarah to find out if she needed help. Sarah is said to have indicated that she could cope with the work at hand.

13. By her own admission, the Claimant did not follow the instructions issued by her superior. The Claimant however told the Court that this did not amount to disobedience of a lawful command as she explained why she did not go to the main office.

14. Section 47(5) of the Employment Act, 2007 provides that:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

15. Regarding the employer's burden, Section 43 of the Act provides the following:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

16. It is now firmly settled that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment. This position was affirmed by the Court of Appeal In **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR** by citing with approval the following excerpt from the **Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642:**

"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair."

17. The point is that in determining whether an employer has discharged its burden under Sections 43 and 47(5), the Court does not ask what it would have done were it in the shoes of the player; all the Court asks is whether in the circumstances of the case, the employer acted reasonably. If the answer to the latter question is in the affirmative, then the Court will not interfere with the employer's decision.

18. It is not in contest that the Claimant failed to attend to an assignment given by her superior. Indeed her only issue is that her explanation as to why she did not comply with the instructions was not accepted. I do not think the Claimant was at liberty to vary the instructions given to her by having a discussion with her colleague. It seems to me therefore that the Respondent had a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act.

19. The next question is whether in effecting the termination, the Respondent observed the procedural fairness requirements set by Section 41 of the Act. The Respondent's Senior Human Resource Officer, Stephen Gathaiya Kariuki told the Court that following the Claimant's failure to perform work assigned to her on 18th November 2010, a written complaint was made by the Claimant's immediate supervisor to the Head of School on 2nd December 2010.

20. The complaint was brought to the Claimant's attention who submitted a written response on 4th December 2010. Thereafter, the Claimant was issued with a termination notice dated 10th December 2010. It would appear that the Claimant was not afforded an opportunity to be heard in person prior to the termination. The Court could not therefore tell whether the representations made in her response of 4th December 2010 were taken into account.

21. The disciplinary process was short circuited without justifiable cause and the Court finds and holds that in effecting the termination of the Claimant's employment, the Respondent failed to adhere to the mandatory requirements of Section 41 of the Employment Act.

22. Moreover, there was no legal basis for the Claimant to be forced to take her leave during the notice period. I say so because leave and notice pay are mutually exclusive rights and one cannot be traded for the other.

Remedies

23. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation for unfair termination of employment. In arriving at this award, I have taken into account the Claimant's length of service as well as the fact that there was a valid reason for the termination. I have also considered the Respondent's conduct in effecting the termination.

24. From the evidence on record the Claimant was issued with termination notice and paid for the notice shortfall. The claim for one month's salary in lieu of notice therefore fails and is dismissed.

25. The Claimant also claims house allowance. Section 31(1)and(2) of the Employment Act provides as follows:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

26. The Claimant's claim for house allowance is based on the fact that her pay slips provided for basic pay. However a reading of her letter of appointment dated 13th November 2008 clearly indicates that her remuneration was inclusive of all benefits and allowances. The Court therefore finds and holds that the Claimant was paid a consolidated salary inclusive of house allowance. The claim for house allowance is without basis and is dismissed. Similarly, no basis was laid for the claim for service gratuity which also fails and is dismissed. The same fate befalls the claim for refund of pension contributions.

27. In light of the finding that the Respondent's action of sending the Claimant on leave during her notice period was unlawful, the claim for leave pay succeeds and is allowed.

28. Finally, I enter judgment in favour of the Claimant as follows:

- a) 3 months' salary in compensation.....Kshs. 109,200
- b) Leave pay for 21 days (36,400/30x21).....25,480
- Total.....134,680**

29. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

30. The Claimant will have the costs of the case.

31. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF DECEMBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Nyabena for the Claimant

Mr. Kinuthia h/b Mr. Nyachoti for the Respondent