



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 177 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> December, 2018)**

**JOSEPHINE WAITHERA KIBOI.....CLAIMANT**

**-VERSUS-**

**CHARLESTON TRAVEL LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed her Memorandum of Claim on 7/12/2013 through the firm of Kinyua Njagi & Company Advocates alleging unlawful termination of her employment and refusal by the Respondent to pay her her terminal dues.
2. The Claimant's case was that she was employed on 23.3.2009 by the Respondent as a Manager at its JKIA office. Thereafter she served the Respondent under the said contract diligently, honestly and unreservedly.
3. On 13.4.2012, she avers that the Respondent abruptly, illegally and without any reasonable or probable cause, terminated her services and refused to pay her her terminal dues which she now seeks all totaling 1,234,000/=.
4. She contends that her termination was illegal as there was no hearing accorded to her and that false and inaccurate allegations were made against her.
5. The Claimant annexed her employment contract dated 22<sup>nd</sup> April 2009 and summary dismissal letter dated 13<sup>th</sup> April 2012 as exhibit.
6. The Claimant gave her sworn evidence in Court and in cross examination indicated that the directors of the Respondent were a spouse and Anne Wanjoki is her sister. She denies she was requested to go on leave on 11.4.2012 nor asked to hand over officially. She indicated that 2 staff members were sent to her to collect the airport pass and she declined to hand it over. 2 days later she was served with a dismissal letter. She says she handed over the pass to KAA.
7. The Respondents on their part filed the Reply to the claim on 13/3/2013 through the firm of Mwaniki Gachoka & Company Advocates. They denied the claim and aver that the Claimant was terminated due to **gross misconduct, insubordination, high-handedness, rudeness, coercion and disrepute behavior** and incitement.
8. They also aver that the Claimant totally refused to avail herself for a hearing at the Respondent's head office. They aver that the Claimant refused to collect her termination benefits amounting to 77,995/= which was salary earned upto April 12<sup>th</sup> 2012 and 46 days leave not taken.
9. The Respondents asked this Court to dismiss the Claimant's suit. The Respondent called 2 witnesses who said that the Claimant was inciting staff to leave the Respondent's employment. RW1 indicated that the Claimant was called to a meeting at their Westlands office and she refused to attend.
10. In cross examination RW1 told Court that they did not write letters to Claimant to go to Westlands and they did not formerly ask her to go to Westlands.
11. RW2 told Court she was sent to the Claimant for Claimant to handover and report to Respondent's head office but the Claimant refused. That Claimant never came back to work and was then terminated.
12. I have examined all evidence of both parties herein plus submissions filed.

13. From the dismissal letter served upon the Claimant dated 13.4.2012, the Claimant was dismissed for insubordination and incitement to staff. Insubordination is said to have arisen due to the requirement for her to report to the Respondent's head office which she declined to do. It was also stated that she incited staff to hand over resignation letters to the Respondent.

14. The RW1 gave evidence in Court and when cross-examined, indicated that the Claimant was not formerly asked to report to Westlands. Indeed there is no letter or document exhibited before Court indicating that the Claimant was actually asked to report to Westlands. The Claimant also indicated that there was no letter that was given to her instructing her to report to Westlands.

15. Other than this, the Claimant indicates that some staff came to her demanding she hands over her airport pass. She stated that she did not do so because the pass belonged to KAA and she handed it over to KAA.

16. In the circumstances, the reasons that led to the summary dismissal of the Claimant were not valid reasons.

17. On issue of due process, the Respondent indicated that the Claimant was not given a hearing because she was not corporative. Indeed, there is no letter inviting Claimant to any disciplinary hearing. There are no minutes for any disciplinary hearing. In the circumstances, it is apparent that the Claimant was not subjected to any fair disciplinary hearing before her dismissal.

18. Section 45(2) of Employment Act 2007 states as follows:-

(2) ***"A termination of employment by an employer is unfair if the employer fails to prove:***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason:-***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure..".***

19. In the case of the Claimant there were no valid reasons for the dismissal neither was she given an opportunity to defend herself. I therefore find her dismissal unfair and unjustified.

20. In the circumstances, I find for the Claimant and I award her as follows prayed:-

***1. 1 months' salary in lieu of notice = 77,000/=.***

***2. 12 days salary for days worked in April =  $12/30 \times 77,000 = 30,800/=$ .***

***3. Forty days leave as admitted by the Respondent =  $40/30 \times 77,000 = 102,667/=$***

***4. 5 months salary as compensation for unlawful dismissal =  $8 \times 77,000 = 616,000/=$***

***Total = 826,467/=***

***5. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.***

Dated and delivered in open Court this **18<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kinyua holding brief for Njagi for Claimant

Respondent – Absent