



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

CAUSE NO 1697 OF 2014

REHEMA DIANA OGANA.....CLAIMANT

VERSUS

STREETWISE MEDIA SERVICES LIMITED....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 29th September, 2014 the claimant averred that she was employed by the respondent as a graphic designer at a monthly salary of Kshs 25,000/=. She claimed she served at the time of exit had been increased to Kshs 34,000/=. The claimant further pleaded that on 24th March, 2014 the respondent through its managers namely Peter Wainaina and Anita Hinga accosted her and informed her that various allegations of misconduct had been made against her. The respondent however failed to disclose the source of these allegations.

2. According to the claimant, the respondent subsequently forcefully evicted her and refused to allow her to clear her desk or even collect personal effects. The respondent thereafter subjected the claimant to immense harassment by making phone calls and sending text messages threatening to defame her through media and insinuating the claimant had stolen respondent's property.

3. The respondent denied the claimant's allegations and averred that around March, 2013 the respondent noticed that the office facilities were being misused namely surfing unofficial sites during office time prompting the respondent to issue a memo with instructions warning the staff about surfing unauthorized sites. According to the respondent, this did not stop and through internal investigations it was noted that the claimant was accessing social sites and other pornographic sites during office hours. When confronted she vehemently denied and stormed out of the office.

4. The respondent further pleaded that even after the claimant unceremoniously absconded duties, the respondent was kind enough to pay all her dues and loan which after calculation made the claimant remain owing the respondent which the respondent counterclaimed.

5. In her oral evidence in court, the claimant further stated that on 24th March, 2014 her boss Mr Wainaina called her to his office and told her that there were allegations against her by colleagues that she was not a team player. When she sought to know the source of the complaint, Mr Wainaina yelled at her and asked her to leave his office and get out of the premises. It was further her evidence that Mr Wainaina followed her while yelling and called the administrator and told her to ensure the claimant does not take anything out. She therefore took her handbag and left. It was her further evidence that she was never issued with any prior warning or notice and that the respondent never paid her terminal dues.

6. In cross-examination she said she was given a hard disk and a flash disk in the course of her duties. She also admitted receiving several internal memos and was aware of the memo on internet surfing. In re-examination she stated that it was not possible to surf anything without being seen by others since it was an open office and there was cctv. The second claimant's second witness Ms Zipporah Wambaya stated that she never surfed pornographic sites. She further stated that she was called to the Managing Director's office after the claimant and that there was commotion.

7. At the close of claimant's case the respondent sought adjournment to call witnesses but failed to do so after several adjournments and on 4th February, 2018 counsel for the respondent informed the court that the respondent would be closing their case without calling witnesses. The respondent filed response to the claim but never filed supporting documents or witness statements.

Under Section 43(1) of the Employment Act, in a 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. The respondent herein filed a response to the claim making several averments but never supported these averments with any documents as required by the rules of the court.

8. Further the respondent never called any witnesses. The averments in the statement of response therefore remained just as such. In the circumstances, the respondent failed to discharge the burden of proof cast upon it by law leading inevitably to a finding that the termination was unfair and the court awards the claimant as follows:

Kshs

a. One month's salary in lieu of notice	34,000
b. Salary for March 2014	34,000
c. Untaken leave for 2 years	47,600
d. Seven months salary as compensation for unfair termination	<u>238,000</u>
Total	<u>353,600</u>

e. Costs

f. Items (a) (b) (c) and (d) shall be subject to taxes and statutory deductions.

9. It is so ordered.

Dated at Nairobi this 7th day of December, 2018

Abuodha Jorum Nelson

Judge

Delivered this 7th day of December, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.