



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1906 OF 2014**

*(Before D. K. N. Marete)*

**JANET KAGONYA OROCHO.....CLAIMANT**

**VERSUS**

**RILEY SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was brought to court vide a Memorandum of Claim dated 13th October, 2014. The issues in dispute is therein cited as;

*Wrongful, unfair and/or unlawful termination of the Claimant's employment and non payment of statutory and terminal dues by the Respondent*

The respondent in a Memorandum of Response dated 7th May, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that the respondent engaged her as a gaurdette on permanent and pensionable basis in March, 2008. Her further case expressed as follows;

*iv) The Claimant carried out all her duties diligently wherever she was posted by the Respondent.*

*v) On or about March 2014, the Respondent unilaterally drafted a fixed-term [Annual] employment contract and demanded the Claimant to execute it.*

*vi) The Claimant avers that the Respondent's unilateral decision to alter the terms of her employment from permanent and pensionable [annual], to her detriment after she had served the Respondent for over [5] years was unfair, malicious, wrongful and illegal.*

*viii) By a letter dated 8th April 2014 purporting that the Claimant's contract of employment had expired and that the Claimant had decided now to renew it, the Respondent terminated the Claimant's employment with effect from 7th April 2014.*

*viii) The Claimant avers that the Respondent's termination of her employment under the pretence that her employment was based on a fixed-term [annual] contract which she had declined to renew was unfair, malicious, wrongful and illegal.*

*ix) Upon termination of the unlawful Claimant's employment, the Respondent has neglected, declined and/or failed to pay the Claimant the terminal dues rightfully owed to her.*

*x) Throughout the period of the Claimant's employment, the Respondent neither allowed the Claimant to proceed on annual leave nor remitted to the Claimant any sum in lieu of her annual leave.*

*xi) Further, throughout the period of the Claimant's employment, the Respondent neglected, failed and/or declined to pay House Allowance which the Respondent was legally obligated to pay to the Claimant.*

*xii) Despite demand and Notice of Intention to sue, the Respondent has neglected declined and/or refused to admit culpability or pay any amount to the Claimant.*

She claims as follows;

<i>One Month's Salary in lieu of Notice</i>	<i>Kshs.11,836</i>
<i>i) Payment in lieu of Annual Leave</i>	<i>Kshs.56,590</i>
<i>ii) Unpaid House Allowance</i>	<i>Kshs.123,098</i>
<i>iii) Severance Pay</i>	<i>Kshs.34,194</i>
<i>iv) Damages for wrongful dismissal</i>	<i>Kshs.136,776</i>

The claimant's further case is that the transfer of the terms of service from permanent and pensionable to term contract and eventual termination offends clear legal provision thus rendering these unlawful. This is follows;

*i) By dint of Section 28(1) (a), of the Employment Act 2007, the Claimant was entitled to leave. For 21 days with full pay. She never went on leave throughout the period she was in employment.*

*ii) By dint of Section 40(1) (f), of the Employment Act 2007, the Claimant is entitled to one Month's wages in lieu of Notice. It is clear that the Respondent gave the Claimant no notice whatsoever of termination of her employment.*

*iii) The Claimant was also entitled to House allowance at 15% of her monthly wages for the entire period that the Claimant was in employment.*

*iv) The Claimant was entitled to severance pay at the rate of 15 days pay for each completed year of service as provided Section 40 (1) (g), of the Employment Act 2007.*

*v) This Honourable Court also has authority to order the Respondent to pay General Damages for its blatant disregard for the law and malicious and unlawful actions against the Claimant. We urge the Court to order the Respondent to pay General Damages equivalent to the Claimant's 12 Months wages for the year 2014.*

She prays as follows;

<i>i) One Month's Salary in lieu of Notice</i>	<i>Kshs.11,836</i>
<i>ii) Payment in lieu of Annual Leave</i>	<i>Kshs.56,590</i>
<i>iii) Unpaid House Allowance</i>	<i>Kshs.123,098</i>
<i>iv) Severance Pay</i>	<i>Kshs.34,194</i>
<i>v) Damages for wrongful dismissal</i>	<i>Kshs.136,776</i>
<i>vi) Costs of the Cause</i>	

The respondent's case is that the claimant was employed by the respondent on 11th March 2008 on the basis of annual fixed term contracts which were renewable with the most recent one expiring on 25th August, 2014.

The respondent's further case is that by a letter dated 25th March, 2014, she requested the claimant to attend her offices to sign a contract for 2013 – 2014 to which she did not respond. Instead she wrote a letter dated 1st August, 2014, in which she issued a three (3) months notice of resignation. This was further followed with a second letter dated 25th March, 2014, giving a months notice of resignation with a view to pursuing college education. She was then issued with a letter of cessation of employment on ground of non-renewal of contract and advised to clear so as to facilitate her exit process and plan. She did this on 7th April, 2014 and was paid her terminal dues as follows;

<i>a) 6 days worked in March (26<sup>th</sup> to 31<sup>st</sup>)</i>	<i>Kshs.2630.40</i>
<i>b) 18 months leave pay</i>	<i>Kshs.13,809.60</i>
<i>c) Uniform refund for 72 months @ Kshs.85</i>	<i>Kshs.6120.00</i>
<i>Less PAYE</i>	<i><u>Kshs.795.00</u></i>
<b><i>Total</i></b>	<b><i><u>Kshs.21,765.00</u></i></b>

She in turn signed a discharge form in appreciation and satisfaction.

The respondent further expresses her case as follows;

9. The Claimant's latest salary was a consolidated daily amount which included house allowance as is allowed by the General Wages Order. Appendix J is a copy of her latest payslip. Since the salary was monthly but paid at a daily wage rate she earned a higher amount than if her salary would have been based on a monthly pay rate. In any event and in the alternative, the claim for house allowance (even if merited which is denied) being a continuing breach is time barred under the Employment Act 2007.

10. She was paid leave pay for 18 months pursuant to section 28(4) of the Employment Act 2007. She had never applied to go for leave.

The respondent concludes by averring that the entire claim is an afterthought and an attempt at unjust enrichment. There was indeed no unilateral conversion of an open ended contract to a fixed term one. The claimant was always aware of her terms of service: She worked on annual fixed contracts.

The matter came to court variously until the 16th October, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are?

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant did not file any submissions in support of her case.

The respondent in her written submissions dated 13th November, 2018 reiterates a case lawful termination of employment pursuant to the claimant intimation and notices of resignation addressed to her (respondent.) The claimant intended to resign from employment to pursue further studies. This effectively terminated the employment contract *inter partes*.

The respondent sought to support her case by relying the authority of **Edwin Beiti Kipchumba v National Bank of Kenya (2018) Eklr** where Rika, J. observed as follows;

*“65. In general, an Employee does not have the right to unilaterally withdraw his resignation once given, as held in the case of Paul Chitichi Mwaro, cited by the Respondent in its submissions. A notice of resignation is basically a notice of termination of employment, given by the Employee to the Employer. It is a unilateral act. Under the Employment Act 2007, a notice of termination of employment does not have to be accepted by the recipient party, to become effective ...*

*If the Employee has resigned, with clear intention to do so, he is bound by his decision, more so where the Employer has accepted resignation. The Employee can only be accepted back in employment, if his Employer consents to the Employee's decision to withdraw resignation. Clear and unequivocal resignation, which has been accepted by the Employer deprives the Employee of locus poenitentiae (right to withdraw an offer resignation after it has been accepted).*

I agree with the respondent. This is a clear cut case of termination on the grounds of the claimant's quest for resignation which was honoured by the respondent. It in effect ended the contract of employment *inter partes*. It was no longer reclaimable as of right. The submissions and case by the respondent that the claimant's case is an afterthought therefore takes credence. I therefore find a case of lawful termination of the employment of the claimant by the respondent. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

**Dated and signed this 29<sup>th</sup> day of November 2018.**

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 3<sup>rd</sup> day of December 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Njoroge instructed by Ebosso & Company Advocates for the claimant.

2. Miss Okeyo instructed by Obura Mbeche & Company Advocates for the respondent.