



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 436 OF 2013**

**NANCY JESANG SORGOR**

**CLAIMANT**

**v**

**KENYA WOMEN FINANCE TRUST**

**RESPONDENT**

**JUDGMENT**

1. Nancy Jesang Sorgor (Claimant) was employed on a 3 year renewable contract by Kenya Women Finance Trust (Respondent) with effect from 21 April 2008 as a Business Development Officer. She was issued with an appointment letter dated 11 April 2008.
2. The Respondent renewed the contract through a letter dated 30 March 2011 for a further 3 years on the same terms and conditions of service as the expired contract except for 3 alterations.
3. On 7 May 2012, the Claimant wrote to the Respondent seeking change of duties. The request was made because the Claimant had been involved in an accident in 2009 while in the course of duty and had recurrent health complaints.
4. The Respondent, through a letter dated 7 August 2012 transferred the Claimant from Kapsabet to Kericho in the position of Cash Officer with effect from 13 August 2012.
5. On 13 April 2013, the Claimant again sought a transfer from Kericho to the North Rift region and gave her health condition as the reason for the request. She wanted to be near a medical facility which could handle her health condition effectively.
6. On 26 April 2013, three significant events took place. The Claimant wrote a letter referenced *resignation letter* but which in actual fact was seeking 3 months time off work to rest. Secondly, she wrote another letter requesting that she be considered for reinstatement after the 3 months break.
7. On the same day, the Claimant wrote to the Respondent seeking to be placed on lighter duties pending surgery to deal with her situation.
8. The Respondent, through a letter dated 29 April 2013 informed the Claimant that her request to *resign* on medical grounds had been accepted and that she would be paid pay in lieu of notice and other terminal benefits.
9. On 16 December 2013, the Claimant commenced legal action against the Respondent and she stated the issues in dispute as

1. Unfair termination
2. Refusal to pay terminal benefits
3. Oppressive working environment.

10. The Respondent filed a Response on 31 March 2014 after which the Cause was heard on 23 July 2015 when oral testimony was taken.

11. The Claimant filed submissions on 21 October 2015, while the Respondent filed its submissions on 12 November 2015.

12. The parties identified 2 main issues in their written submissions which save for language were, *whether the termination of the Claimant's employment was unfair and appropriate remedies.*

13. In my view, the real issue in dispute is, *whether the Claimant resigned/validity of resignation or whether she was unfairly dismissed and appropriate remedies.*

### **Whether Claimant resigned/validity of resignation**

14. The Claimant stated in her testimony that she was involved in an accident in the course of employment which necessitated prolonged medical attention.

15. A medical practitioner at Kenyatta National Hospital recommended on 4 May 2009 that she be put on light duties. A doctor who reviewed her condition recommended on 13 May 2009 that she resume light duties. Another practitioner recommended on 27 May 2009 that she redeployed from her field duties to enable her heal.

16. On 29 March 2012, physiotherapy was recommended after MRI scans were conducted on 28 March 2012, while on 2 May 2012 yet another practitioner recommended that the Claimant be placed on light duties and that she should avoid riding motorbikes to maximize on management of her condition.

17. While in Kericho, the medical reports produced indicate that the Claimant required constant management and she was even sent to Nairobi Hospital and Moi Teaching and Referral Hospital.

18. It is under these circumstances that the Claimant sought a transfer on 7 May 2012 and was transferred to Kericho on 7 August 2012.

19. On 17 April 2013 and citing her medical condition and the need to be near a medical facility able to deal with her condition, the Claimant sought a transfer from Kericho.

20. In her testimony, she stated that she was still on field duties which required use of motor bikes and that her attempts to get time to attend physiotherapy only led to abuses from her Branch Manager who also denied her permission to go for medical attention.

21. She stated that she even collapsed in the work place and was rushed to Kericho District Hospital before being taken to AAR Eldoret where she was given 10 days off.

22. On resuming duty, the Claimant stated that she was summoned to the Respondent's head office in Nairobi where 2 officers, Carol Mwangi and a Mr. Wanjau asked her to resign because of her performance which was said to be poor.

23. The officers gave her paper and she wrote 2 letters, the *resignation letter* and the other letter seeking reinstatement letter. After writing the letters, the Respondent booked her to see a specialist at AAR Nairobi (Prof. Atinga).

24. According to the Claimant, she was then referred to go collect a letter from her work station. It was the letter accepting her resignation.

25. In the view of the Claimant, her case was one of unfair termination of employment because of her medical situation and that the Respondent acted inhumanely.

26. The Respondent's Human Resources Manager, Caroline Wanjiku testified. She stated that the Respondent was aware of the Claimant's medical condition and that she requested for a transfer to Eldoret on 17 April 2013, but there was no vacancy in Eldoret. She admitted that Claimant could access best treatment in Eldoret.

27. She also confirmed meeting the Claimant in Nairobi on 26 April 2013 where she informed them of her ill health and that they agreed that the Claimant could take a break and resume duty when her condition improved.

28. The Claimant thereafter wrote a resignation letter in a good state of mind and that it was agreed that the Claimant write a letter of reinstatement at the same time.

29. Instead, the Respondent acted on the resignation letter and accepted to pay the Claimant pay in lieu of notice and terminal benefits.

30. On cross examination, the Human Resources Manager stated that the Respondent would have no problem reinstating the Claimant.

31. It is germane at this juncture to set out in full the resignation and reinstatement letters

#### Resignation Letter

I kindly wish to resign from the company for a break of three months to enable me rest and come back when I am okay.

I am grateful for the support I have gotten from the company since the year 2008 when I joined the institution as a business development officer,

Thanking you in advance

#### Reinstatement letter

I kindly wish to request to be considered after the break of three months which I have requested to rest to enable me heal and recover.

Hand in Hand am grateful for the support I have gotten from the institution on medical cover. I hope to come back when am okay and work with the company again.

Thank you in advance

32. To put all the facts in perspective, it is also necessary to set out the letter accepting the resignation.

#### Resignation

We make reference to your resignation letter on medical grounds dated 26<sup>th</sup> April, 2013 and wish to inform you that the same has been accepted.

We wish to accept the resignation with effect from the same date. However, we shall pay you in lieu of notice as per your appointment letter.....

Kindly ensure that you clear and have handed over all the institution's property that were in your possession to your supervisor, including AAR card, employment card, office keys, etc

33. Considering the background and documents produced, it behoves the Court to address the test for what amounts to resignation in law.

34. In a decision from South Africa, *Quinn/Singlehurst Hydraulics (SA) Ltd* (2005) 6 BALR 673, the test was stated thus the test for determining whether an employee resigned or not is that an employee has to, either by word or conduct, show a clear and unambiguous intention not to go on with his contract of employment in that he has to act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the contract.

35. In *Southern v Franks Charlesly & Co.* (1981) IRLR 278 and *Sovereign House Security Services Ltd v Savage* (1989) IRLR 115, the Court of Appeal (England) held that words used by an employee when resigning should be unambiguous.

36. Although the legal principles/test cited are from foreign jurisdictions, I would endorse the principle(s) as equally sound within our legal system.

37. A resignation should exhibit unambiguous intention and should be specific as to when it takes effect or the effective date should be ascertainable from the facts. A statement of general intention would not meet the test.

38. Of course, I am alive to the principle that a valid resignation once tendered cannot be withdrawn unilaterally.

39. In the view of the Court, it is clear from the text of the Claimant's letters that she was seeking a break of 3 months to enable her deal with her medical condition and in no way was she expressing an unambiguous intention to permanently leave the employment of the Respondent.

40. Nevertheless, the Respondent instead of accepting the time off sought purported to bring the contract to a definite end by offering to pay wages in lieu of notice and terminal benefits. The Respondent even asked the Claimant to surrender documents which could only signal its intention to bring the contractual relationship to a definite end (medical card and employment card).

41. The Respondent had the option of invoking clause 6.1.7 of the Human Resource Policies and Procedures Manual to terminate the contract of employment on account of ill health or clause 8.1.3 on medical discharge or early retirement.

42. The Court therefore finds that there was no valid resignation by the Claimant capable of being accepted by the Respondent.

### **Unfair termination of employment**

43. Having reached the conclusion that there was no valid resignation, it is only logical to infer and conclude that it is the Respondent by its conduct as indicated in its letter purporting to accept the resignation that brought the contract to an end.

44. And in so far as the Claimant did not seek or evince an intention to bring the contractual relationship to a definite end, the Court finds that the Respondent by purporting to accept the resignation by tendering wages in lieu of notice was repudiating the contract without either complying with contractually agreed provisions on termination on medical grounds, or observing the statutory protections given to employees by sections 41, 43 and 45 of the Employment Act, 2007.

45. The Respondent's conduct in the view of the Court was oppressive and amounted to constructive dismissal.

46. The Court finds that the Claimant was dismissed unfairly.

### **Appropriate remedies**

#### ***Compensation for unfair termination of employment***

47. This is one of the primary remedies where the Court finds there was unfair termination of employment. The remedy is however discretionary, the factors which the Court ought to consider are provided for in section 49(4) of the Employment Act, 2007.

48. The Claimant had a balance of about 12 months to the end of her fixed term contract.

49. Considering her expectation to work out the full tenure of the contract, the Court would award her the equivalent of 12 months gross wages as compensation (according to the pay slip for April 2013 the gross wages was Kshs 44,300/-).

#### ***Notice pay***

50. The Claimant sought the equivalent of 12 months pay on account of pay in lieu of notice.

51. The contract provided for 1 month notice or pay in lieu of notice. The Claimant cannot get more than what she contractually agreed to (this by practice is computed using the basic pay which was Kshs 40,100/-).

#### ***Irregularly deducted leave days***

52. The Claimant sought Kshs 88,600/- under this head. No evidence was led to lay a foundation for this head of claim and it is declined.

#### ***Gratuity***

53. The contract provided for payment of gratuity at the rate of 25% of the basic wage(s) over the contract period and the Claimant is entitled to the same.

54. She sought Kshs 235,861/77. The Respondent had computed gratuity as Kshs 237,226/- for the period served

55. Considering that the Court has found the termination of employment was unfair, the Claimant would be entitled to gratuity for the 36 months term of contract.

#### ***Lost/prospective income***

56. The Claimant was on a contract of known duration and therefore she cannot lay claim to income she would have earned for the contended 29 years upto retirement.

### **Conclusion and Orders**

57. The Court finds and holds that the Claimant was dismissed unfairly and awards her and orders the Respondent to pay her

- |                        |                |
|------------------------|----------------|
| (a) Compensation       | Kshs 531,600/- |
| (b) 1 month notice pay | Kshs 40,300/-  |
| (c) Gratuity           | Kshs 362,700/- |

TOTAL

**Kshs 934,600/-**

58. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 11<sup>th</sup> day of March 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant

Mr. Maritim instructed by Lilan & Koech Associates

For Respondent

Mr. Kahiga instructed by Mirugi Kariuki & Co. Advocates

Court Assistant

Mwangi S