



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1712 OF 2014

ANGELA WOKABI MUOKI CLAIMANT

VERSUS

TRIBE HOTEL LIMITED RESPONDENT

JUDGEMENT

1. The issues in dispute – wrongful dismissal; unfair termination; and remedies for wrongful dismissal and unfair termination.
2. By letter dated 29th August 2008, the Claimant was employed by the Respondent as the Group Human Resource Manager earning a gross salary of Kshs.140, 000.00 per month. The Claimant worked diligently and earned successive annual and merit increments enhancing her salary package to kshs.625, 643.00.
3. On 15th July 2014 while the Claimant was at work, she was orally told by the Respondent to clear and hand over. There were no reasons given for the termination or prior notice for the same as required under her letter of appointment at clause 16(2). Upon handing over, the Claimant was told that her terminal dues would be worked on and later communicated to her by the Financial Controller of the respondent.
4. On 1st August 2014, the Claimant received an email from the Respondent on the subject of final dues to which she replied on 2nd August 2014 disappointed with the treatment from the Respondent contrary to the law. On 11th August 2014 the Claimant was called to meet the chairman of the Respondent in a meeting at his office on 13th August 2014. Present were the chairman, another director and the Financial Controller who questioned her about allegations of gross misconduct while in employment. The Claimant had not been notified of the hearing and the responses she gave were never put into account by the Respondent as she was asked to resign from her position which she declined to do. The Respondent indicated that they would get back to her but for 2 days there was no word. The Claimant decided to write a response to the allegations made against her but there was no reply.
5. On 27th August 2014 the Claimant wrote a demand letter through her advocates calling the Respondent to admit liability and pay her terminal dues. In response the Respondent noted that the Claimant had given the Respondent a termination notice; that on 15th July 2014 she applied for annual leave due to appointment and depression resulting from anonymous email circulated to Respondent staff; 10 days after going on leave the Claimant requested for a meeting with Respondent directors to defend herself on the allegations in the anonymous email and during the meeting it had been agreed that the Claimant would resign as she was unable to work. On 2nd September 2014, the Claimant replied noting she had been treatment in a cruel and unfair manner when she was refused to resume work upon her refusal to resign.

6. The Claimant was aggrieved by the respondent's decision to terminate her employment without notice or justifiable reasons. The allegations that the Claimant took leave from 15th July 2014 is not true as had she been on leave, her salaries should not have been stopped in June 2014 and refused her to resume duty. The Claimant had thus been summarily dismissed by the Respondent on 15th July 2014 hence the letter of 1st August 2014 on final dues which related to a termination of employment by summary dismissal. The Claimant did not commit any acts of gross misconduct, she did not resign or breach her contract of employment.

7. The claim is that the Respondent did not comply with the law with regard to the termination of the claimant. She was not given notice or a hearing pursuant to section 41 of the Employment Act and was condemned unheard. The termination was discriminatory, unfair, unlawful and wrongful and the Respondent failed to take into account that the Claimant had a family that depended on her and had financial obligations like loans and rent and the resultant damage thereof. She was not accorded constitutional rights to fair labour practice and thus suffered loss and damage.

8. In her contract of employment it was an express provision that termination of employment would be upon 3 months' notice which was not issued and this has caused the Claimant loss and damage. A Certificate of Service was not issued and as a result the Claimant has suffered loss and damage in trying to obtain alternative employment. The failure to issue a Certificate of Service is an offence punishable with a fine of Kshs.100, 000.00 and the Court has jurisdiction to act on the same. Further that the termination was malicious, in bad faith and with the intention to humiliate the Claimant and cause her suffering by denting her stellar career in the hotel and hospitality industry. The Claimant is aggrieved and seeks damages.

9. The Claimant is seeking;

a) Damages and payment of 12 months' salary

b) 3 months' notice pay

c) Unpaid salary for July 2014

d) Pay for untaken 36 leave days

e) School fees refund

f) Severance pay for 15 days for each year worked.

10. The Claimant is therefore seeking her terminal dues, a declaration that she was unfairly dismissed and terminated from her employment with the Respondent and should be compensated; punitive and aggravated damages; compensation for constitutional violations; Certificate of Service; a fine of Kshs.100, 000.00 against the Respondent for failure to comply with section 51 of the Employment Act; interest of the dues and costs of the suit.

11. The Claimant testified in support of her claim that she is a human resource practitioner and was employed by the Respondent for 6 years from 2008 to 15th July 2014 when she was unfairly terminated. The Claimant was employed by the Respondent as the Group Human Resource Manager at Village Market, Tribe Hotel in Gigiri. She commenced employment on 1st September 2008 and was issued with a contract. As a permanent and pensionable employee, she reported to the General Manager as the immediate supervisor. Each year staff were appraised and based on good performance salaries were increased on merit. At the end of 5 years, the Claimant had an enhanced package with a gross salary of Kshs.652, 043.00.

12. On quarterly basis, the Claimant attended the Board meeting to update them on finances and approval of plans. She had an amicable relationship with all her supervisor but this changed in early 2013.

13. On 14th July 2014 the Claimant was called by the chairman and the chief executive officer and was told to resign from her employment and hand over. There had been an anonymous email circulated alleging that the Claimant had grossly misconducted herself. The Claimant asked whether the demand to resign was related to the email and was informed that the respondents had ignored it and the demand to hand over had nothing to do with the allegations made.

14. The Claimant was then called by the chairman and the CEO, which was rare as the supervisor was not present. She was asked to hand over and leave immediately. The finance manager was to compute the payable dues. The general manager came and the Claimant requested to have more time for handing over as this was abrupt. She was given one (1) day extension to finalise the handing over.

15. The Claimant was not given any reasons for the abrupt demands. She was not given any notice or written reasons for termination. In her mind the Claimant thought the Respondent was using anonymous email as an excuse. The email had been sent on 14th July 2014 alleging that the Claimant had stopped staff transport but this was not put in its correct context. Also, previously there were many anonymous emails and the directors always dismissed them as they could not act on anonymous allegations.

16. The Claimant was thus directed to go home and wait for communication in 7 days. The practice was to give written notice or reasons.

17. After 2 weeks there was no communication. At month end there was no salary paid. The Claimant called seeking for her dues and the chairman replied indicating that he would send a letter. He also promised the Claimant to give a good reference letter.

18. However, in the sector which is small and highly regulated information was rife that the Claimant had been dismissed from her employment. On 1st August 2014 the Claimant got an email from the finance controller with her worked terminal dues and noted that if she had any questions, such should be discussed with the directors. That the dues would be sent to the Sacco, Kentours where the Claimant had a loan. However the computation of such dues was shocking as they implied she had been summarily dismissed. She was only paid salary due and leave days. On 2nd August 2014 the Claimant replied seeking clarification on the dues computation as she thought the respondents did not have proper information as there were no reasons for summary dismissal.

19. On 4th August 2014 the financial controller called the Claimant at 8pm at night with information that her salary increments were unprocedural. This was strange as all salary increases were documented and based on yearly appraisal. The Respondent had all the records in their custody.

20. On 13th August 2014 the Claimant was invited for a meeting with the chairman for 15th August 2014. At the meeting she found the chairman, CEO and the financial controller. The chairman wanted to know the reasons why the Claimant wrote an email on 2nd August 2014 and she noted that she was replying to the financial controller computation of her terminal dues that implied a summary dismissal. At this time the claimant's supervisor the general manager had been dismissed. The Claimant was also asked to resign to save face and to avoid injuring her career but the Claimant noted that damage had already been done as around the hospitality sector everyone knew she had been dismissed. She however asked for reasons for the forced resignation of dismissal. The chairman indicated that they had made a decision 6 months earlier to terminate her employment. That the Claimant had reported to immigration department; that she was moonlighting in staff transport; and that there was questionable recruitment and had told on the Respondent to the immigration department.

21. The Claimant observed that had the Respondent made a decision 6 months before to terminate her she had no chance for a fair hearing, she had no knowledge of such allegations or time to defend herself.

22. That the Respondent had an elaborate disciplinary procedures and grievance handling mechanism and therefore should have used the same. The Claimant did an email giving details of all allegations and her responses. There was no response. She sought legal assistance. The Respondent then replied noting that

the Claimant had given notice of terminating her employment with the Respondent after expressing depression from the anonymous email of 14th July 2014. However the Claimant did not resign. She had not taken leave and there was an elaborate system and procedures on how to apply and take leave. The Claimant had been called for a meeting where she was asked to resign and when she refused to do so as there was no reason for the same, the Respondent made effort to push her out.

23. The Claimant wrote and asked to be reinstated as she had not been issued with a termination letter and here salary was not being paid. She had not applied for leave or resigned. On 21st September 2014 the Respondent advocate replied noting that the Claimant was on leave and that final dues would be paid from 1st August 2014 being;

a) Salary for July 2014

b) Leave pay

24. The Respondent said that this were normal dues for termination however what was paid related to summary dismissal. That a normal salary does not send all salary due to the Sacco which the Respondent did as this is done upon termination. Accused leave is not paid with salary but upon termination. The email by the financial controller was clear that this was a case of summary dismissal. This is wrong as no employer in the sector will employ the Claimant on the grounds that she left the Respondent upon summary dismissal.

25. The Claimant also testified that the Respondent has in defence alleged that she resigned upon getting a new job and thus gave resignation notice, which is not true. There was no new job and she did not resign. The Claimant did not inform her Sacco that she had left the Respondent but the Respondent officer wrote to the Sacco a sent her final dues to them. The Respondent communicated with the Sacco directly that the Claimant had ceased employment with them.

26. The Claimant also testified that upon her termination there was a wave of terminations;

She was terminated as the group human resource manager;

The general manager was terminated 6 days later;

The executive chef left;

The pastries chef left; and

The Assistant general manager was dismissed.

There are no reasons as to why they were dismissed.

27. The Claimant also testified that she is seeking pay in lieu of 3 months' notice as set out under her contract. In her contract, notice period was graduated after serving for 5 years under clause 16(2).

The salaries due are admitted;

School fees for her children is due as this was a benefit to all employees and Kshs.26,500.00 x 2 for 2014 not paid all at Kshs.57,000.00 was not paid to her;

Severance pay for years served as what the Respondent did was to declare the Claimant redundant;

Damages for unfair termination;

28. Punitive damages for failure to issue Certificate of Service. That the certificate issued indicated the

Claimant was a Human Resource manager which was not correct as her title was Group Human Resource Manager and this is important in the sector and she rejected the issued certificate. The Respondent argument was that they did not have such a position as Group Human Resource Manager but the contract of employment was specific.

29. The Claimant also testified that after the *Westgate tragedy* and the travel advisories by foreign governments business for the Respondent was not good. To remain afloat, they had to lay off employees. Several employees were terminated at the same time. The Respondent were addressing a redundancy but in a wrong manner. Thus they forced the Claimant to resign and when she refused, she was dismissed. A redundancy pay should be made.

30. In cross-examination, the Claimant testified that upon her employment, the general manager was Allan and all employees were on a 2 years contract. There was high turnover and the 2 year contracts were changed to 5 years for all staff. The 2 years contract were signed by the Claimant and Allan. She was the first human resource manager from 29th April 2009 as the Respondent was newly opened. New letters of appointment was issued superseding the 2 year contracts. Michael Flint was the general manager and the Claimant signed her own contract as the Group Human Resource manager. She signed all employment letter in their original form. The general manager should have signed her contract and it was unprocedural for her to sign her own letter but this remained in the Respondent records. That the anonymous email of 14th July 2014 accused her of hiking the costs of Christmas lights but the costs she made were the lowest; she was accused on charging high NHIF charges but this was a statutory requirement; she was accused of getting kickbacks from those offering transport but this was a case of costs cutting; and that had the Claimant been given time, there should have been an audit over the Christmas party expenses, the NHIF deduction and the issue of transport. There was no hearing of notice of what she was supposed to respond to.

31. The Claimant also testified that in the 2 year contract termination notice was 4 weeks and in the 5 year contract it was 3 months. Both contracts were signed by an officer of the respondent.

32. The Claimant also admitted writing an email dated 26th June 2014 to Felzarki applying for a job while at the Respondent employment and the reason was that the environment had become very hostile as she started looking for employment. She also did an email to Mark Somen seeking a recommendation letter in 2013.

Defence

33. In defence, the Respondent states that the letter of employment submitted by the Claimant is allegedly executed by the general manager Mark Somen on 29th August 2009 when he was not an employee of the Respondent as he was employed vide letter dated 16th May 2009. The letter of employment dated 21st September 2013 is denied as a self-accreditation but the salary earned is correct.

34. The defence is also that the Claimant asked for leave on 15th July 2014 due to low morale of staff due to an email of 14th July 2014. The Claimant was never asked to hand over the office and such hand over was for taking care of important work while she was on leave. The Claimant shared with the managing director and general manager that she was looking for new employment 2 months earlier and would be voluntarily terminate her employment with the Respondent by handing in her letter within days so as to take up her new employment. The Respondent thus allowed the Claimant to take leave to consider the matter.

35. That the termination was on the volition of the claimant. This was not illegal or in breach of terms of employment as alleged. The terminal dues were by error called 'final dues'. The dues were for leave and salary for July 2014. This was not an indication that the Claimant had been terminated from her employment. The claimant's computation of her own terminal dues was a confirmation of her intention to terminate her employment.

36. The defence is also that upon the Claimant making her desire to seek employment elsewhere, her return to the Respondent was an afterthought and a fall back upon unsuccessful securing the new employment. The Claimant was at a meeting on 13th August 2014 and those in attendance were to follow up on her termination.

37. The Respondent had no problem with the Claimant resuming her employment but she was reluctant to face the staff due to their low morale. That when the Claimant shared a computation of her final dues it was an indicator that she would resign. The Respondent confirmed what the Claimant was owed in dues. This was not inhuman or unfair as alleged and the termination of employment was voluntary and has refused to collect her dues since.

38. The Claimant elected to terminate employment as she looked for new employment and was never sent away on 15th July 2014 as alleged and in a meeting of 13th August 2014, both parties met and addressed pending issues. The Claimant did not notify the Respondent that her notice pay was for 3 months and having left voluntarily no such dues are owed.

39. A certificate of Service is issued upon the employee complying with the contract of employment without questions. There is nothing due to the Claimant in this regard after she verbally expressed her desire to leave the respondent's employment. The certificate will issue upon the Claimant settling out her legitimate dues. No aggravated or punitive damages are due. The claim for Kshs.11, 272,864.60 is denied and the Claimant owes the Respondent Kshs.280, 090.35. Any dues owing to the Claimant should be paid to Kentours Sacco on priority on behalf of the Claimant as the Claimant owes the Sacco Kshs.2, 630,311.00. As such the claim should be dismissed with costs.

40. In evidence the Respondent called two witnesses.

41. Harjit Singh testified that he has been the Financial Controller of the Respondent since January 2008 before the hotel was opened on 28th August 2008 as part of the team that was preparing for the opening. The Claimant joined the Respondent as Human Resource Manager on 4th September 2008.

42. The Claimant gave him a computation of her final dues at Kshs.3, 255,770.00 as the practice was before exit to compute her dues. Had she been terminated, such dues would have been issued on 15th July 2014. When he got the dues computation, he was told that the Claimant was going on leave and her tabulation of dues shocked him as they implied terminal dues. The board directed him to copy them with the Claimant final dues and it was an error that he used a template of 'final dues'. This included salary of July 2014 and the payment for leave. There was no severance pay or gratuity. The Claimant was still an employee of the Respondent and the dues owing by 31st July 2014 were notified of her. The computation was setting a scenario if she left as at that date she would be owing Kshs.280, 090.00 to the respondent. For the Claimant to leave employment without notice she should have paid the Respondent 2 months' notice. When the Claimant computed her own terminal dues it was an indication that she was leaving her employment without notice.

43. The Claimant had a loan facility with Kentours and there was a memorandum of understanding for a check off system. Upon end of employment, the loan should have been repaid. The Sacco wrote indicating the claimant's loan was Kshs.2, 630,311.00. The computations therefore done were setting a scenario of what the Claimant would owe if she terminated her employment. What he did in 'final dues' was not final but when the figures were confirmed with the Sacco, there was a tally?

44. The witness also testified that when the Claimant challenged her dues, he consulted with the chairman and looking at her work records computed the leave days due. They decided to restrict the Claimant from the Respondent premises so as to access all the records. That all files needed to be secured. The fact of the Claimant computing her final dues shocked him and thus saw the need to secure Respondent property. The Claimant had to hand over as she had voluntarily terminated her employment and he needed to be careful with all records in the computer and passwords and so needed to restrict her access. You was conflicting information and as financial controller he needed to be sure.

45. Upon cross-examination the witness testified that upon employment by the Respondent he was issued with an appointment letter that was not time specific. The management was by a South African company under general manager Allan and this letter dated 1st January 2008 has never been changed. Mr Mark Somen came in as the next general manager when the hotel opened following problems with the South African company. The evidence by the Claimant that all staff had 2 year contract is not correct. Contracts were never changed to 5 years.

46. That during the audit he did not get any contract of 5 years. The Claimant had letter of appointment dated 29th August 2008 but it was issued in 2009 and therefore signed by Mark Somen but there was a problem, had such a letter been changed by Somen, he should have put a current date and note employment - the letter on record is backdated although not a forgery it creates a technicality. This was the letter in claimant's file as the original copy. Due to the technicality it is not clear what her terms of termination were.

47. Mr Hirjit also testified that he does not know when the Claimant ceased employment with the respondent. The defence is that she resigned voluntarily. He was not party to Claimant discussions with the board. On 15th July 2014 he was told the Claimant was going on leave and was to secure her files. The Claimant was reporting to the general manager who was not in that day. The Claimant asked for an extra day which was not odd and on 16th July 2014 he was told to see her out of the premises. This was standard procedure when going on leave. On 16th July 2014 the chairman asked him to compute claimant's dues following questions as to why the Claimant was leaving and he was told that she was proceeding on leave.

48. Mr Hirjit also testified that before computing the claimant's dues there was a call to the Sacco. He did not refer the Claimant as a 'former employee'. The claimant's status with the Respondent was clarified on 16th July 2014 and in the board meeting in August 2014 and it was clear the Claimant had to leave the respondent. Final dues had to be paid. July salary is not in dispute. This should be paid. It has not been paid due to the suit in court.

49. The Claimant was the Group Human Resource Manager and when she asked for her certificate of service it referred to her as the human resource manager. This was an error. The Respondent had meant to expand but it remained as one unit. The Village Market is a different business from the respondent.

50. That the Claimant testified that upon her termination other employees left but their contracts expired. The deputy general manager contract expired in 2014. The executive chef left as the contract expired and was not renewed. They were not forced to resign as alleged. The general manager was American and he resigned; the chef was Italian and the deputy general manager was Belgian. They left the country and dues were paid. There was no discrimination against the claimant, her case was unique to the respondent. 3 months before the Claimant left the general manager told him that she had resigned as she was looking for a new job in March/April. The chairman got to learn about it and had no problem. There was no letter of resignation.

51. The 4 senior officers of the Respondent left after the Claimant terminated her employment and were paid their dues. The Claimant was not paid due to the fact that she is a woman and the others are foreign nationals. The others had 2 years work permit. The claimant's case was different as the Respondent had never had similar issues before.

52. This was not a case of downsizing the business. The position of Group Human Resource manager does not exist. It is the same job with the current human resource manager. On the structure there is a position for group human resource manager as there is a new hotel coming up.

53. There was an anonymous email on 14th July 2014. The contents really upset the board. The staff morale went down. The Claimant was accused of various acts of gross misconduct. It was normal for staff to share such emails. When the staff chose to go directly to the board, it was a point for concern.

54. The 2nd witness for the Respondent was Eshani Hamed, a director and member, Managing Director for Green Investments for the respondent. Has been a director since inception of the respondent. In 2008 staff were employed in preparation for opening up the Respondent business. The Claimant commenced employment in September 2008 and the human resource manager. The letter of appointment dated 29th August 2008 is signed by mark Somen as general manager but Mr Somen was not the employee of the Respondent at the time. There was an agreement between the Respondent and Protea Group in South Africa to manage the Respondent business. Protea was to send a general manager to open the business and manage from September 2008 with their general manager, Mr Somen was employed later in 2009 after the relationship with protea terminated.

55. That Mr Somen came from New York vide letter of appointment dated 16th may 2009. His letter is signed by the Claimant as the officer responsible for human resource. It is therefore strange that Mr Somen signed the claimant's letter of appointment before he was employed by the respondent. Possible explanation is that this letter was backdated by Mr Somen to August 2008. This letter is contested as it has different terms from the original letter issued to the claimant. That the witness was not aware of the letter as the Claimant had a 2 years contract but what Mr Somen allegedly signed is a 5 years contract.

56. That the Claimant was employed as the Human Resource Manager and not Group HR but had been asked to oversee work at the Village Market as part of the respondent's business. The claimant's work was impressive and her abilities and skills were very good as she was familiar with the law.

57. Mr Hamed also testified that in an email dated 23rd April 2014 he wrote to Mr Reg, a consultant on the structure and human resource matter and noted that before he left for China, the Claimant had expressed challenges with the general manager and that she was going to resign. That the Claimant has told him she would resign from her position. That she had few job offers and would submit her resignation. That this left him under the impression that the Claimant would resign immediately. This was supported by an email the Claimant sent to Mr Somen on 26th November 2013 asking for a letter of recommendation. The letter was recovered from the claimant's computer after her termination. The letter and other mails had been deleted. The Claimant was asking for a letter of reference and at some point it had come to the Respondent director's attention that the Claimant was looking for new employment when negotiating her salary. The general manager brought it up at a board meeting that while discussing with the claimant, she indicated to have been negotiating a new job. That by email dated 6th June 2014, the Claimant was applying for a job with peter Kiefer, a director in France for a human resource position. These job applications were from the claimant's work address and the material were retrieved after the Claimant had left her employment.

58. That on 14th July 2014 an anonymous email was sent from some employees dissatisfied with the Claimant role in addressing corruption; transport for staff; and this was a protest against the Claimant that she was not working well. This was brought to the attention of the board and on 15th July 2008 the chair called the claimant. The board had wanted to know if the Claimant was still at work as from April 2014 she had been expected to resign and serve notice. That Hamed was under the impression that the Claimant was still serving her notice period.

59. Present at the meeting were Sanjay Shah, Manoj Shah, the Chairman or board and the witness. The first issue the Claimant was asked was with regard to her resignation and the second issue was the anonymous email. The Claimant denied the allegations made in the email and was then asked to formerly follow up with her resignation and her terminal dues would be computed. The Claimant was asked to compute her terminal dues and send to the Financial Controller. The Claimant did a draft letter on a redundancy package but the general manager did not sign it. The Claimant had hoped Mr Flint would sign and confirm dues as;

a) Salary for July 2014;

b) House allowance up to July 2014;

- c) 3 months' notice pay;
- d) 16 days' pay in severance pay;
- e) 36 days of leave
- f) School fees refund at kshs.26, 500.00;
- g) Less loans and advances, if any.

60. This letter was based on the different options of;

- a) Dismissal;
- b) Termination; or
- c) Redundancy,
- d) And maximum compensation due to the Claimant based on redundancy.

The Claimant gave the board these options for her exit. The Respondent was therefore following up on the resignation as the Respondent was keen to have the Claimant leave on a good record, have a good employability record and the Respondent was willing to give a good recommendation.

61. The Claimant did not resign despite indicating her willingness to do so. He was not sure if the Claimant was paid after July 2014 but soon after the suit was filed.

62. The Claimant was a member of Kentours Sacco which wrote and indicated there was a loan due at kshs.2, 630,311.00. Before any dues are paid to an ex-employee the Sacco has to clear and be paid. Sacco membership is voluntary and there was an amount the Claimant owed by August 2014.

63. The claim for unfair termination therefore does not arise as the Claimant was asked to formalise her resignation as she had indicated to the Respondent verbally. The Respondent had no trust with the Claimant and the staff had expressed lack of trust in her and she was not going to do her work effectively. This was not wrongful dismissal. The Claimant has not been paid her dues due to the Court case.

Submissions

64. The Claimant submit that on 15th July 2014 while at her work she was invited to the board room for a meeting with the Respondent board and asked to handover and leave the Respondent premises. Not reasons were given. She was asked to compute her final dues. The Claimant asked her supervisor the general manager to help extend her time by one (1) day for her to do handing over as this was abrupt and she was still in shock. The general manager was not aware of these developments. No termination letter was issued.

65. The Claimant also submit that her letter of appointment was revised to a letter of appointment, a matter that affected all Respondent employees from 2008 to 2009. Such letters are signed by the Claimant as the Group Human Resource Manager. The claimant's letter of appointment is signed by Mr Somen and backdated noting the changes and revisions done. Such letter has been in the claimants' file in the custody of the respondent.

66. The Claimant also submit that she never resigned from her employment. Upon filing the claim, the Respondent in defence states that the Claimant was given leave on 15th July 2014 so as to think about her decision to resign and the handover she was directed to do was to secure her work while on leave. That the termination of employment was through the claimant's own volition. This evidence was denied by the Claimant on the grounds that there is no leave application form or an approve leave submitted to support

the respondent's evidence that on 15th July 2014 she was sent on leave. She never resigned from her employment. That the evidence of Mr Hamed was that following the anonymous letter on 14th July 2014 he called for an urgent board meeting to discuss the contents of the email. The Claimant was later called and told to resign and was not sent on leave as stated in the defence. Mr Hamed also affirmed that as at 16th July 2014 the Claimant ceased being their employee due to the contents of the anonymous email and the tension caused to the employees.

67. On the remedies sought, the Claimant seek her unpaid salary for July 2014. Other employees who left the Respondent were paid within one (1) month but the Claimant has not been paid her dues. That the Claimant is entitled to 3 months' notice pay in terms of her letter of appointment. Severance pay is due to the Claimant as confirmed by Mr Hamed that every year an employee is paid severance upon termination and recently, 140 employees were terminated and paid a package in severance. That such dues should be paid with interest.

68. The Claimant is also seeking her Certificate of Service as the Group Human Resource Manager and not as Human Resource Manager, her position was clear in the letter of appointment. That the Claimant has been unable to secure new employment due to the non-issuance of the certificate of service. The Claimant is entitled to damages for unfair termination as there was no notice and or reasons assigned to the same the reasons given in Court by Mr Hamed were never brought to the attention of the Claimant before to enable her respond. The contents of the anonymous letter were never interrogated to ascertain their truthfulness for the Respondent to rely on the same and force the Claimant out of her employment. Section 41 and 43 of the Employment Act were never adhered to as held by **Shankar Saklani versus DHL Forwarding (K) Limited [2012] eKLR**. that the circumstances within which the employer and employee relationship can be terminated and the process of summary dismissal must follow the law as held in **Mary Chemweno Kiptui versus Kenya Pipeline Company limited, Cause No.435 of 2013**.

69. The Claimant also submit that she suffered racial discrimination when the other executive members of the Respondent were foreigners and were paid their dues and she was left out. Despite being the first to be terminated, she has never been paid her dues. The Claimant was never issued with a certificate of service, this was in bad faith and this violated her constitutional right under article 41 of the Constitution and damages are due. That such dues should be paid with costs.

The Respondent submit that the claim is on the basis that on 15th July 2014 the Claimant was verbally informed to clear and hand over without reasons or notice as set out in her letter of appointment dated 27th [‘AW1’ dated 29th August 2008] August 2008. She received ‘final dues’ on 1st August 2014 and was surprised with treatment given to her. That a meeting was called on 13th August 2014 to discuss her termination on the reason of the anonymous email circulated by third parties.

70. That the defence is there were two (2) reason why the Claimant sought to terminate her employment. First she had sourced alternative employment and secondly, following the anonymous email, the nature of allegation, the Claimant opted to leave employment.

71. The Respondent submit that upon the employment of the Claimant as Group Human Resource Manager on 1st September 2008 she was issued with a letter but the Claimant has annexed a letter signed by Mr Somen who was appointed in 2009 long after the claimant's letter of appointment was issued. The letter was therefore backdated to extend the contract term. This dents the credibility of the claimant's evidence.

72. That other senior employees left their employment for different reasons and this does not amount to discrimination against the claimant. The Claimant was seeking alternative employment as records were submitted by the respondent. Such new employment were sourced while the Claimant was actively engaged by the Respondent and through her work address.

73. That on 14th July 2014 an anonymous email was circulated with several serious allegations against the claimant. Mr Hamed was forced to convene an urgent board meeting and when the Claimant was called

she denied the same. That the Claimant was given a hearing in the presence of Mr Sanjay, Manoj and Hamed as the Respondent was concerned with claimant's staff relations... that the Claimant opted to resign. She was to compute her final dues and thus she left her employment to await computation of such dues. Before this could be resolved, the Claimant filed this claim.

74. That upon her resignation, the Claimant owed Kentours kshs.2, 630,311.00 which were paid. The Claimant was entitled to 36 days leave and school fees refund. The claim for 3 months' notice does not arise as the Claimant left her employment voluntarily. She never gave notice. There was no redundancy to warrant a claim for severance pay. The claim for punitive and aggravated damages does not arise and will be prejudicial to the Respondent as the same is not contemplated under the Employment Act. Section 51 of the Employment Act does not require the Respondent to issue a recommendation letter. Such claims should be dismissed with costs.

Determination

From the pleadings, the evidence and submissions of the parties I set out the following issues for determination:

The question of the applicable contract of employment;

Who terminated the employment relationship?

Whether there was discrimination against the claimant;

The question of issuance of Certificate of Service; and

Whether there are any remedies.

75. The employer has the sole right to decide whether to terminate employment or not. However such should have a notice or a reason(s) as required under section 43 of the Employment Act. The employer should give a written notice setting out the reasons. The employee equally has a right to terminate employment by giving notice or payment in lieu thereof. For some reason, the drafter of the law did not require the employee to give reasons for terminating an employment contract. Maybe that should be a matter taken up for review. However, I surmise that one of the intentions of not requiring an employee to give reason is that, work and employment is in shortage and in high demand. The power balance at the work place tilts in favour of an employer rather than the employee who has little leeway in terms of getting new and alternative employment as unlike an employer who will always have a crowd of able and willing employees at the gate seeking entry into the workplace every day. Such gives an employer an upper hand at deciding who to hire or fire. The law thus and the legislators being placed in the current labour regime and the economies of scale, put in safeguards against an employer who, keen to replace an employee at will, has to meet a set procedure and give genuine, fair and valid reason(s) for the same as to be left otherwise, there would be *laissez faire* as it were.

76. It is common cause that there is no notice of termination of employment by the Respondent or a notice of resignation by the claimant. The Respondent admits that on 15th July 2014 the Claimant was directed to hand over and was escorted out of their premises. Harjit Testified that he was directed to secure all records in the claimant's custody and ensure that she left the Respondent premises. The Claimant has never resumed work since. Mr Hamed confirmed these details in his evidence and further that he is the one who directed the handing over of the Claimant and her exit from the Respondent premises.

77. What followed is telling of the respondent. On 16th July 2014 Mr Harjit wrote to Mr Hamed on the subject of the Claimant thus;

Dear Sanjay/Hamed,

FYI. Angela came up with the attached final dues workout due to her and the covering letter.

I have told her that as far as I understood we were due to pay her only for the month of July 2014, up to 31st July, together with any accumulated leave (which is being verified). Hamed further clarified that leave was to be half taken and half paid.

We have removed her from her payroll and mail passwords and she shall be leaving before 5pm today.

78. I find no error in the implication of this communication submitted by the respondents in their Supplementary List of Documents. Effectively, as of 16th July 2014, the Claimant had ceased being their employee, her terminal dues related to salary for July and leave days due. She was effectively removed from the payroll and mail passwords and access to the premises controlled.

79. The email in reply to Harjit by Sanjay was more emphatic. Harjit wrote his email at 3.41pm and Sanjay replied at 5.02pm thus;

Dear Harjit,

Your instructions were to calculate her outstanding leave and presently to only effect that payment.

Kindly confirm that her personal belongings have been removed from the office and she has no further access into Tribe.

80. Though the Claimant has not claimed constructive dismissal, effectively, by the conduct of the respondent, she was forced out of her employment. I find no reasons or notice given at the time of such termination of employment. The evidence that there was a meeting called on 13th August 2014 and the Claimant was in attendance on 15th August 2014 came after the fact. Termination had taken effect and to the Respondent it did not matter what explanations existed with regard to the anonymous emails or the responses the Claimant made effort to address while at home after the 16th of July 2014.

81. Termination of employment is a serious issue to happen to an employment. So severe is the implication that to ease the same, reasons must be assigned to the same in terms of section 43 of the Employment Act. An employer is forbidden from acting in a manner irrational. The decision to terminate employment must have a basis with regard to conduct, capacity or performance. Before assigning such reasons, the employee must be given a hearing and such hearing is regulated under section 41 of the Employment Act as held in **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited, Cause No.74 of 2013**. Even in the most serious cases that warrant summary dismissal, an employee must be given a hearing in terms of section 41(2) of the Employment Act.

82. The process of hearing and ensuring that the employee is given a fair chance to know allegations made is a mandatory requirement of the law. Other than hearing the allegations, the employee must be given a chance and opportunity to give their defence. At such hearing, the employee must be accompanied by a fellow employee of their choice. These are mandatory regulations that the employer must adhere to. Failure to do so, the provisions of section 45 of the Employment Act fall into place as the subsequent action taken in such circumstances amounts to being unfair.

83. Mr Hamed testified that on 15th July 2014 he convened an urgent board meeting following the anonymous email circulated by third parties. Present were Sanjay Shah, Manoj Shah and Hamed. The Claimant was called from her office without the knowledge of the supervisor the general manager and asked to explain the contents of the email. Mr Hamed in his evidence did not indicate as to whether this was a disciplinary meeting or whether the Claimant was required to show cause why her employment should not be terminated. He testified that;

...

At the meeting, the first issue was the claimant's resignation as she told me she would. The second issue was the email on the claimant's character making it a challenge to the good work conditions with other staff. The Claimant denied the allegations. We asked the Claimant to follow up on her resignation and to compute her dues

...

84. From such evidence, it was apparent that the Respondent had serious concerns against the claimant. However, the protections under section 43 and 41 of the Employment Act required that the Claimant be given a fair chance to defend herself upon notification of the allegations made against her. I find the time the Respondent board convened an urgent meeting and called the Claimant to answer questions is not time sufficient to have given the Claimant fair notification of the allegations and accord her the rights set out under section 41 of the Employment Act. The resulting action of sending the Claimant away from her employment, ended in termination of employment that was unfair.

85. On the contract differences, first the claimant's evidence is that upon employment she was issued with a contract for 2 years. Several other staff got a similar letter but it was realised that there was a high turnover and it was resolved to change the contracts. The 2 year's contract were converted to 5 years and since the Claimant was the one in charge of human resource, she signed all these letters including her own. That this was unprocedural but such a letter is valid as it contains her terms of employment. The Respondent witness Mr Hamed testified that the 5 years contract issued to the Claimant was signed by a person who was not an employee of the Respondent at the time. That where the letter was backdated, this was never brought to the attention of management.

86. In this regard, there is no allegation that the 5 years contract in the possession of the Claimant is a forgery, fraudulent or in her possession through illegal means. Mr Hamed testified that where such a letter was issued to the claimant, it was never brought to the attention of management. However, the letter forms part of the claimant's work records. Save for the termination period notice all other terms of employment are not contested. The work records of employee is the property of the employer and the employer has the right to access and assess all such records and where there is found to be any anomaly, it is upon the employer to immediately address. The Claimant asserts that the letter and contract for 5 years was lawfully issued for the reasons that all employee contracts were changed from 2 years to 5 years due to high turnover. The Respondent does not submit any evidence to challenge this averments that all employees had 2 years contract and not 5 years. Save for Hirjit who insisted that his contract since employment has never been changed, the contract for the Claimant for 5 years has not been challenged as a forgery. Such a contract is therefore valid and the Court shall apply its terms.

87. On the question of notice period, this issue was settled by the Respondent witness Mr Hamed when he testified that following the anonymous email, the board was informed and when the board had its meeting on 15th July 2014 they were all under the impression that the Claimant was serving her notice period following what Hamed had discussed with the Claimant and was left under the impression that the Claimant would resign. Mr Hamed was also as at July 2014 under the impression the Claimant was still serving her resignation notice period. This means that they were an implied expectation upon the Respondent management that the notice would cover April to July, a period of 3 months. Otherwise, had the Claimant resigned, this was the notice period she had been expected to give or make payment in lieu. To take this evidence otherwise would leave a serious lacuna in that where the Claimant did not resign or make payment in lieu of such notice, the Respondent should have issued termination notice for a similar period or payment thereof. Notice pay is therefore due for 3 months in terms of clause 16(2) (b) of the letter of appointment issued to the Claimant and dated 29th August 2014.

88. An issue arose out of the respondent's evidence. That the Claimant was terminated from her employment or was expected to resign from the reemployment as she had secured new employment with another employer. That upon the exit of the claimant, the Respondent was able to retrieve deleted emails from her hard drive and got a letter sent to Peter Kiefer on 26th June 2014 seeking employment as

Director of Human Resource. That the Respondent also retrieved an email from the Claimant to Mr Somen seeking a letter of reference in 2013. That these emails were sent from the Respondent email address. Though the discovery of such emails came after the fact of termination of employment, the Respondent made a huge dependence on the same. The value of such can only be for the Court to give emphasis that, a work email address, all materials at work belong and is the property of the employer. Use of employer work email to look for new employment is wrong. Such work email is the property of the employer. An employee cannot claim privacy over matters shared, included or shared out of such an address at the expense, time or within the tools allocated for work by the employer. in the **Case of Bar Bulescu versus Romania, Application No.61496 of 2008**, the European Court of Human Rights that whilst human rights law gave employees a reasonable expectation of privacy at work, this right was subject to an employer's legitimate objective of managing its resources effectively. Therefore, an employer could, if the circumstances justified it, be entitled to monitor employees' emails provided this was limited in scope and a proportionate means of achieving its legitimate objective.

89. I find the Respondent was justified in accessing the email records from the Claimant from the work email address. Such I find met legitimate expectations of ensuring its property was used for the purpose for which it was intended, serving the Respondent objective. Any deviations by the Claimant were outside her work. No sanction as there is no counter-claim.

90. On the question of discrimination against the Claimant on the grounds of race, the Claimant testified that upon her termination from employment by the respondent, other executive members were terminated and as foreign nationals, they were paid all their terminal dues and she has not been paid. A claim of discrimination at the work place is a serious allegation and with it there is a sanction in a fine and or imprisonment and payment of damages where found to exist. Such an allegation can invite severe business implications to an entity such as the respondents'.

91. The defence that the officers the Claimant has pegged her claim of discrimination upon left the employment of the Respondent after her termination. I find the circumstances related by the Claimant and the basis of her claim of discrimination against her allegedly arose after her employment relationship with the Respondent ceased. To therefore claim and weigh her circumstances vis-a-vies what the Respondent did to other employees left behind would be fishing for evidence too wide. The fact of the procedural lapses and the substantive elements required before the Claimant was terminated must be looked at within her employment with the Respondent and what happened with her employment.

92. I therefore find that the claim for discrimination against the Claimant on the ground of race lacks basis and has no merit. No sanction should follow.

93. The question of certificate of service came to the fore and on the claimant's evidence that she has been unable to secure new employment as the Respondent has refused to issue her with an appropriate Certificate of Service. That she was issued with a Certificate under reference employment as the Human Resource Manager which was not correct as she was the respondent's Group Human Resource Manager. That despite bringing this to the attention of the respondent, they have refused to issue an appropriate certificate of Service which has denied her a chance to apply for a new job. In defence, the Respondent stated that the Claimant was in charge of one entity, the Respondent business and there was no group for her to hold such a position. That when the Claimant started her employment she was helping at the Village market but there is a Human Resource Manager in charge now. That the certificate has not been issued as the Claimant filed suit. In submissions, the Respondent has heavily relied upon section 51(2) (2) [there is obvious replication of section 51(2)] of the Employment Act on the basis that an employer is not bound to issue a recommendation letter.

94. What is clear under the letter of appointment is that the Claimant was employed as a Group Human Resource Manager of the Respondent since 29th August 2008. This was confirmed by Mr hamed. All the documents issued to the Claimant are under this employment title – Group Human Resource Manager.

95. Upon termination of employment, the Certificate of Service should go with it unconditionally. Whatever reasons and or grounds leading to termination or dismissal, the issuance of a Certificate of

Service is mandatory and not based on the wishes, discretion or regulation of the employer. Section 51(1) of the Employment Act is set out in mandatory terms;

51. (1) an employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

96. Where there is evidence that an employer has failed to issue such certificate upon termination of employment, faces a serious sanction set out under section 51(3) of the Employment Act;

(3) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false

, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

97. The Certificate must therefore be truthful. The required information is set out under section 51(2) of the Employment Act. Ignorance of such provisions by an employer is not an excuse. The failure to issue the certificate in the required terms is wrongful and a sanction must issue.

98. Also in assessing a claim for unfair termination of employment and the remedies due, section 45(5) of the Employment Act becomes a relevant point of reference. Non-compliance with the mandatory provisions of the law, both in terms of procedure and the substantive reasons given or not given, implicates an employer. The law provides;

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider—*

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(f) the existence of any previous warning letters issued to the employee

[Emphasis added]

99. Mr Hamed for the Respondent admitted that the Claimant was a very good employee and she did her work diligently and was conversant with the law however, in the termination of her employment, this was largely left to run and resolve itself with the hope that the Claimant would resign from her position to save the Respondent the hurdles. This amounts to an unfair labour practice strictly forbidden under the constitution. Here Mr Hamed knew that the Claimant wanted to leave her employment since April 2014, he did nothing. He let her continue serving. If this had created a problem for Hamed in the manner of relating with the claimant, as the employer, he should have endeavoured to address the same but not let things resolve themselves. I therefore find this procedure unfair.

100. Further the failure to comply with section 51 is quite deliberate. The Respondent has chosen not to

follow the law and not issue a Certificate of Service stating the nature of employment and term served. The Certificate of Service is not equivalent to a letter of recommendation and should not be confused for either. What the Claimant is entitled to is the Certificate of Service and nothing more that the Respondent as the former employer does not wish to issue in giving a good reference.

101. The practice of the Respondent is to issue terminal dues and separation with its former employees within one (1) month. This was affirmed by Mr Hamed with the cases of the former general manager, pastry chef, and other executive officers who left. They were paid their terminal dues within one month of termination of their employment. Also, recently when the Respondent laid off 140 employees, they got a package immediately.

102. The practice is therefore that within the shortest time possible, the Respondent settles all issues with a former employee. This has not been the case with the claimant. Mr Hamed testified that they have refused to settle claimant's dues as she filed this case in court. However, the law gives an employer such as the Claimant to lodge her claim before this Court at any point and further that she should not be victimised for doing so. Section 46(h) of the Employment Act is specific in this regard, no employee with a legitimate and well-founded claim should be victimised by the employer for lodging her clam with the court. Where that happens, this amounts to unfair labour practice.

103. For the purpose of the non-issuance of the Certificate of Service, the penalty due is payment of a fine not exceeding Kshs.100, 000.00 or imprisonment of 6 months or both. Upon the admissions by the Respondent witnesses that the Certificate of Service as required under section 51(1) was not issued, recognising the good work conduct of the Claimant while with the Respondent and the mandate of this Court to ensure fair labour practice, the sanction herein shall be an award of kshs.100, 000.00 to the claimant. Where such monies are not paid within 7 days, the Claimant shall be at liberty to move the Court for application of the full force of section 51(3) of the Employment Act.

104. On amounts paid to the Sacco, Kentours Sacco, it is important to note that when an employee consents to deductions from the salary to a third party such as a Sacco, and at the exit there is a liability, any deductions made to offset the same are lawful unless there is evidence that the same is unlawful. Section 19(1) (h) provides;

19. (1) notwithstanding section 17 (1), an employer may deduct from the wages of his employee—

...

(h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty per cent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and

105. As such, payments for a loan taken while in employment through a check off system with the knowledge of the employee and based on the due salaries, such must be addressed before final dues are paid. However in this case, despite the Respondent not issuing a termination notice to the claimant, they went ahead and contacted Kentours Sacco with information of termination of employment without the knowledge of the claimant. The Claimant had not refused to settle her loan account with the Sacco and had no knowledge at the time of such contact that her employment had been terminated. All these factors compounds the unfair termination of employment as by the Respondent seeking from Kentours Sacco to know the loan balances due was with the intention of paying terminal dues. I find such conduct only supports the respondent's decision to terminate the employment of the Claimant without notice or in writing. Such I find to be contrary to section 35, 34 as read together with section 45 of the Employment Act and thus amounted to unfairness.

Remedies

106. On the finding that the Respondent engaged in unfair labour practice contrary to section 54 of the

Employment Act, compensation is due. Putting into account that the Claimant was of starling performance and had no disciplinary case for the entire period of her employment, maximum compensation at 12 months is appropriate. On the evidence that the Claimant was earning a gross salary of Kshs. 625,643.00 per month she is awarded kshs.7, 507,716.00.

107. As set out above, the notice pay due to the Claimant is 3 months. No notice was issued in accordance to section 35 of the Employment Act and the same is awarded all being Kshs.1, 876,929.00.

107. On the unpaid salary for July 2014, the Claimant worked up and until 16th July 2014 when she was led out of the Respondent premises upon hand over. She was never able to work again. As such, the salary due is for the 16 days of work all awarded at Kshs.333, 676.00.

108. Leave days due are admitted at 36 days. Such are awarded at kshs.866, 275.00.

109. The claim for school fees is a benefit the Claimant enjoyed while in the employment of the respondent. Such is awarded as claimed at Kshs.53, 000.00.

110. Punitive and aggravated damages claimed shall only apply to the extent that for non-compliance with the provisions of section 51(1) of the Employment Act, the Criminal sanction of a fine and or imprisonment is converted to a payment to the Claimant all at Kshs.100, 000.00.

111. The claim for damages for constitutional violation is declined. On the findings above with regard to the claims for discrimination on the basis of race and such not affirmed, no damages shall be paid.

112. Costs herein are due as the unfair labour practices the Respondent engaged in were deliberate and meant to frustrate the claimant. Had the termination process been address in accordance with the law, the suit should have been avoided. Costs are awarded. Further the respondent's evidence is that they have not paid the Claimant her terminal dues as she filed this claim and have been waiting for the outcome. Where indeed the Respondent were aware that they were owing the claim, such should have been settled without waiting for the Court to direct on the same. As such, the salaries due, the notice pay due, the school fees due, all shall be paid with interests.

113. On the claim for severance pay such is declined as the circumstances leading to the claimant's termination are not under the provisions of section 40 of the Employment Act. Even where four senior executive left the Respondent employment, such was after the Claimant had ceased her employment with the respondent. The Respondent confirmed that one resigned from his employment, two others had their contract terms lapse and there was no renewal and the other left for a new employer. As such, the termination and despite the circumstances stated that business was low due to the *Westgate Tragedy*, the link to the circumstances leading to the claimant's termination do not speak to a redundancy.

In conclusion, I enter judgement for the Claimant against the Respondent in the following terms;

1) I declare the Claimant was unfair terminated from her employment with the respondent;

a) Compensation for unfair termination awarded at kshs.7,507,716.00;

b) July 2014 salary awarded at kshs.333,676.00;

c) Leave due awarded at kshs.866,275.00;

d) School fees awarded at kshs.53,000.00;

2) In terms of paragraph 103 above, punitive damages awarded at kshs.100, 000.00; such an amount shall be paid within 7 days as set out under paragraph 103 and 110 above.

3) Interests shall be paid for (1)(b), (c) and (d) above;

4) Above dues shall be paid less what the Claimant may owe to Kentours Sacco and any advances made while in employment;

5) Costs of the suit awarded to the claimant;

6) The Respondent shall issue the Claimant with a certificate of Service unconditionally as the Group Human Resource Manager and not later than seven (7) days through her advocates on record and a copy sent to her last listed address.

Orders accordingly.

Delivered in open court at Nairobi this 29th day of September 2016.

M. MBARU

JUDGE

In the presence of:

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