



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

CAUSE NO. 185 OF 2015

(Originally Nairobi Cause No. 211 of 2012)

JOSEPHINE KIRIGO KAGWANJA.....CLAIMANT

VERSUS

WARUHIU CONSTRUCTION LTD.....RESPONDENT

JUDGMENT

1. Pursuant to a Court order made on 2 March 2016, the parties posed 5 questions requiring the Court's determination arising out of a Memorandum of Claim filed by Josephine Kirigo Kagwanja (Claimant) filed in Court on 18 October 2012.

2. And for the record, it is pertinent to note that a Response was filed on 15 March 2015 and that on 8 September 2016, the parties agreed that the Cause be determined on the basis of the record and written submissions.

3. The Court will examine each of the issues posed for its determination by making reference to the pleadings and submissions.

Whether Claimant issued a relevant notice of resignation

4. The Court has decided to commence the examination with a look at the second issue as its answer may render the first identified issue moot. In other words, a positive answer to the question of the resignation would make it superfluous to determine the unfairness of any alleged termination of employment.

5. In paragraph 5 of the Memorandum of Claim, the Claimant contended that she orally communicated an intention to terminate her contract which was followed with a written resignation letter on 12 July 2012.

6. The reason(s) advanced by the Claimant was uncondusive working condition(s) or difficult times, and the particulars included overwork, poor pay and lack of privacy.

7. The circumstances asserted by the Claimant, if proved would bring the resignation to the province of constructive dismissal.

8. The Respondent denied the plea by the Claimant, and on its part pleaded that the Claimant gave a 14 day notice of termination of employment but deserted immediately without even clearing/handing over.

9. The assertions in the pleadings of the parties are patently inconsistent and without testing through examination, it is not easy for the Court to determine whose version was (is) more probable.

10. It is the responsibility of litigants to consider the ramifications of the method they choose to proceed or prosecute their respective cases and in the situation at hand, the Respondent's Defence and/or letter replying to the resignation notice did not deny or traverse the averments regarding the hostile work environment.

11. In so far as the Claimant pleaded that the work environment was hostile, she was entitled to treat herself as constructively dismissed and leave immediately.

12. In the circumstances, the Court finds that the evidential sword tilts in favour the Claimant.

13. The Court therefore finds that the resignation was prompted by a hostile work environment, and thus the Claimant was entitled to resign and/or consider herself constructively dismissed.

Whether Claimant was unfairly terminated

14. Considering the state of the papers on record, the Court finds that the Claimant's resignation or constructive dismissal was prompted by the conduct of the Respondent and therefore there was unfair termination of employment.

Whether Claimant served for 5 years

15. The Claimant's pleaded case was that she was employed around January 2007 and that she was not issued with a written contract until separation around 12 July 2012.

16. The Respondent exhibited the Claimant's leave record for 2010 and a reply to the resignation letter dated 14 July 2012.

17. Considering the two documents and the obligation placed upon employers by section 9 of the Employment Act, 2007 to cause to be prepared and executed a written contract of service, the Court reaches a conclusion that the Claimant served the Respondent from 2007 to 2012, a period of about 5 years as contended.

18. The Court has also considered the provisions of section 10 of the Employment Act, 2007 and more so sections 10(3) and (7).

Appropriate remedies (prayers)

Annual leave

19. It is the responsibility of an employer to produce employment records.

20. Leave records for 2010 were exhibited and it suggests that the Claimant was paid for annual leave for 2010.

21. Respondent did not explain the failure to produce the leave records for the other years, and in consideration of sections 10(3), (7) and 74 of the Employment Act, 2007, the Court finds that the Claimant is owed commuted leave for 4 years of the 5 years served.

22. The Claimant quantified the amount as Kshs 44,100/- for the 5 years, but in light of the above conclusion, the Court would find the correct amount is Kshs 35,280/-.

Pay during maternity leave

23. The Claimant did not give any particulars of the months and year she was on maternity leave, and the Court declines this head of relief.

