



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT KISUMU
CAUSE NO. 95 OF 2014

ASENATH DONELA HOCH.....APPLICANT/CLAIMANT

VRS

**THE PRINCIPAL WOMEN'S INSTITUTE FOR SECONDARY
EDUCATION & RESEARCH.....1ST RESPONDENT**

**BOARD WOMENS' INSTITUTE FOR SECONDARY
EDUCATION AND RESEARCH.....2ND RESPONDENT**

JUDGMENT

Asenath Donela Hoch Okelo was employed by the 2nd Respondent, Women's Institute for Secondary Education and Research, (WISER) an non Governmental Organisation running a private Girls' Secondary Boarding School and campus in Muhuru Bay, Migori County. She was employed as Financial and Administrative Officer at a monthly salary of Shs.55,000. She signed a two-year renewable contract covering the period 2nd April, 2012 to 30th March, 2014. Her responsibilities entailed ensuring that WISER NGO adheres to efficient and accurate financial and administrative systems.

On 8th October, 2013 she was served with a letter giving her 3 months notice of termination of her employment contract. The grounds for termination according to the letter was that her performance was wanting and she had failed to improve. She served the notice period and handed over in December, 2013. Her salary at the time of termination was Shs.60,500 per month.

Being dissatisfied with the termination of her employment she filed this suit against the Respondent's Principal and Board as 1st and 2nd Respondents respectively, claiming the following:-

- (a) Severance/gratuity346,500
- (b) Three months' salary being the remainder of the contract.....181,500
- (c) Damages for wrongful dismissal (60,500 x 12)726,000

Total 1,254,000/=

The Respondent filed a defence in reply to the memorandum of claim in which it alleges that during the currency of her employment the Claimant received numerous accounting and financial trainings to

enhance her skills and improve on her work efficacy but exhibited ineptitude in executing her duties. The Respondents aver that the Claimant made monumental accounting mistakes which impacted negatively on the fiscal health of the Respondent. The Respondents aver that the Claimant received several written and oral warnings and was categorically informed to improve her accounting accuracy to ensure retention but there was no visible improvement following which the Board saw it prudent to issue her with a termination notice. That in response to the termination notice the Claimant did not deny the allegations against her but pleaded for indulgence and mercies. The Respondents aver that the termination was proper, valid and lawful and in tandem with the provisions of the Employment Act, and the Respondent had valid and justifiable reasons for terminating the Claimant's contract. The Respondents deny that the Claimant is entitled to salary for the unexpired period of her contract or compensation for unfair termination of the contract as the termination was not unlawful or unfair. The Respondents further deny that the Claimant is entitled to gratuity as she did not complete the contract term.

The Respondents aver that the claim is incompetent, frivolous, baseless, spurious, scandalous and amounts to abuse of court process and the same should be dismissed with costs to the Respondents.

At the hearing the Claimant testified on her behalf. She was represented by M.M. Omondi instructed by M.M. Omondi & co. Advocates. The 1st Respondent Dorcas Adhiambo Oyugi, the Manager of WISER, testified on behalf of the Respondent led by Mr. Okumu instructed by M.J. Okumu & Associates Advocates. The parties thereafter filed and exchanged written submissions.

In her testimony and the written submissions filed on her behalf, the Claimant avers that she served the Respondent to the best of her ability and that any errors in her work were reported. She aver she worked in accordance with the induction she got from her predecessor. She was served with only one warning lettering and was never given a hearing before the termination and the termination was unfair. She further averred that she was entitled to gratuity as provided in her contract, the unexpired contract term and compensation or unfair termination.

Respondent

The Respondents through their witness and in the written submissions aver that the Claimant was disciplined for numerous accounting errors and nearly all financial reports she prepared had errors. RW1 testified that she warned the Claimant verbally and the Claimant promised to improve. The Respondents aver that the Claimant's contract was terminated in accordance with the exit clause in the contract.

Issues for Determination

From the pleadings, the *viva voce* testimonies and the submissions, the following issues arise from determination.

1. Whether there was valid reason for termination of the Claimant's contract.
2. Whether there was procedural fairness
3. Whether the claimant is entitled to the reliefs sought

Section 43 of the Employment Act provides that an employer shall be required to prove the reasons for termination and where the employer fails to do so, the termination shall be deemed unfair. In the present case the reason for termination is poor performance.

The only evidence of communication to the Claimant over her performance was the warning letter dated 4th July, 2013 which was followed three months later by the notice of termination dated 8th October, 2013. The letter of termination does not refer to any specific incident occurring after the warning letter leading to the conclusion that the Claimant's contract was terminated on the very grounds upon which she had already been warned and therefore constituted double jeopardy. There is no record of verbal

warnings to the Claimant to support the allegations that she had been warned verbally on numerous occasions.

From the foregoing, I find that there was no valid reason for the termination.

The next issue is whether there was procedural fairness. Section 41 of the Employment Act provides for the procedure before termination as follows:-

Notification and hearing before termination on grounds of misconduct

*(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, **poor performance** or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or **poor performance**, and the person, if any, chosen by the employee within subsection (1), make.*

The Claimant was never informed of the intention to terminate her employment. She was not given a hearing. According to the pleadings and submissions and also the testimony of RW1, the Claimant was served with notice of termination by email, contrary to the provisions of S. 41 which require the employer to explain to the employee the reasons for the termination in the presence of a fellow employee, or a Union shop floor representative if the employee is a member of a Union.

It is important for employers to distinguish between termination notice provided for under Section 35 and the procedural requirements provided in Section 41. Section 35 presupposes that the procedural requirements have already been complied with before the termination notice is issued. Indeed Section 35 (4) as provides that an employee may dispute the lawfulness or fairness of the termination while Section 45(4) and (5) provide for justice and equity in termination of employment. The Respondent's submission that it complied with Section 35 by giving notice to the Claimant does not absolve it from compliance with Section 41.

For the foregoing reasons, I find that the termination of the Claimant's contract of employment was procedurally unfair.

Remedies

The Claimant prayed for payment of salary for the unexpired term of her contract. There is no provision in the law or in her contract providing for payment of salary for any period after the date of termination.

The Claimant also prayed for gratuity. Having found the termination of her employment contract both substantively and procedurally unfair, she is entitled to gratuity up to the last day worked being 30th December, 2013. I therefore award her Shs.316,375 calculated at 3 months salary for the first year at Shs.50,000 per month and 2.75 months salary being gratuity for the second year at Shs.60,500 per month.

The Claimant also prayed for compensation. Taking into account the length of her service, the nature of the termination of her contract and all relevant factors including those enumerated in Section 49(4) it is my opinion that 2 months salary is reasonable compensation for loss of employment and award her Shs.130,000/= as compensation.

The Respondent shall pay Claimant's costs of this cause and the decretal sum shall attract interest at court rates from date of judgement.

Dated signed and delivered in open court this 25th day of September, 2015

MAUREEN ONYANGO

JUDGE.