



**REPUBLIC OF KENYA**

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

**CAUSE NO 1321 OF 2013**

**CHARITY NJAGI.....CLAIMANT**

**VS**

**COMWORLD BUSINESS CENTRE.....RESPONDENT**

**AWARD**

**Introduction**

1. In an *ex parte* award dated 1st November 2014, which was delivered by my sister **Onyango J** on 2nd November 2014, I directed the Respondent to pay the Claimant the sum of Kshs.112,525.00 being two months' salary in compensation for unfair termination, one month's salary in lieu of notice and prorata leave.
2. The Respondent, who had failed to appear at the hearing in spite of due service subsequently came to court by Notice of Motion under certificate of urgency dated 14th November 2014 seeking orders for setting aside the *ex parte* award. The Respondent's application was allowed by consent of the parties on 17th December 2014 and the Court directed that the matter be heard afresh on 25th March 2015.
3. The case did not proceed as originally scheduled and on 24th June 2015, the Court gave 21st September 2015 as the new hearing date, on which date there was no appearance for the Respondent, in spite of due service. The Court therefore proceeded to hear the Claimant *ex parte* yet again.

**The Claimant's Case**

4. The Claimant's claim is contained in a Memorandum of Claim dated 12th August and filed in Court on 14th August 2013. She states that she was employed by the Respondent in the position of Office Manager cum Receptionist, at a monthly salary of Kshs.35,000.00 from 1st November 2012. She was not issued with a written employment contract. On 31st May 2013, the Respondent terminated the Claimant's employment verbally without notice and without any justifiable cause.
5. The Claimant claims that she was not given any opportunity to be heard prior to the termination of her employment. She also claims that during the time of her employment with the Respondent she did not take any leave.
6. The Claimant's claim is as follows:
  - a. 12 months' salary in lieu of notice.....Kshs.420,000.00
  - b. Leave pay for 7 months.....Kshs.17,500.00
  - c. Gratuity

- d. Compensation for wrongful dismissal
- e. Certificate of service
- f. Punitive damages
- g. Costs
- h. Any other relief the Court may deem just to grant

### **The Respondent's Case**

7. In its Statement of Defence filed on 29th October 2013, the Respondent states that the Claimant was hired as a Receptionist on temporary basis from 1st November 2012. Her monthly salary was Kshs.15,000.00. Upon recruitment of a substantive Office Manager, the Claimant's employment was terminated on 31st May 2013.

### **Findings and Determination**

8. The issues for determination in this case are as follows:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the reliefs sought.

### **Termination of Employment**

9. It is common cause that the Claimant's employment was terminated effective 31st May 2013. According to the Claimant, there was no valid reason for the termination. On its part, the Respondent pleads that having been hired on temporary basis, pending recruitment of a substantive Office Manager, the Claimant's employment was terminated by mutual agreement once the new Office Manager was employed. The Respondent did not however call any evidence to confirm its account of the circumstances leading to the termination of the Claimant's employment.

10. Section 45 (2) of the Employment Act, 2007 requires an employer to provide a valid and fair reason for the termination of an employee's employment. The employer must also prove that the employment was terminated in accordance with fair procedure and Section 41 of the Act establishes the procedure to be adopted in terminating employment on grounds of misconduct, poor performance or physical incapacity. Section 40 provides for termination of employment on account of redundancy.

11. The Claimant testified that the Respondent's Director, one Thomas Kariuki informed her that the business was not doing well and that her employment would therefore be terminated. Kariuki promised the Claimant that she would be recalled in August 2013, a promise that was not kept and the Claimant was later to learn that she had been replaced. The Claimant told the Court that she was not given any termination notice.

12. Apart from an unsupported averment that the termination of the Claimant's employment was by mutual agreement, the Respondent did not provide any reason for the termination and evidently did not follow due process in effecting it. The Court therefore finds the termination unfair for want of substantive justification and procedural fairness.

### **Reliefs**

13. In view of the finding that the termination of the Claimant's employment was unfair both substantively and procedurally, I award her two months' salary in compensation. In making this award I have taken into account the Claimant's length of service with the Respondent as well as the Respondent's conduct in the termination.

14. I further award the Claimant one month's salary in lieu of notice as provided under Section 35(1) of the Employment Act, 2007. The Respondent did not produce any leave records to prove that the Claimant

had taken her leave and the claimant is therefore entitled to prorata leave for 7 months. The claims for gratuity and punitive damages were not proved and are dismissed.

15. The monthly salary paid to the Claimant was in contention. In this regard, the Claimant pleads a figure of Kshs.35,000 while the Respondent pleads a figure of Kshs.15,000. In support of her claim, the Claimant produced a bank paying in slip dated 30th November 2012 showing a cheque for Kshs.35,000.00 drawn by the Respondent in her favour. In her sworn testimony, the Claimant told the Court that her salary was reduced to Kshs.15,000.00 effective February 2013.

16. The Respondent did not provide a pay statement as required under Section 20 of the Employment Act, 2007 and the Court therefore found no evidence to contradict the Claimant's testimony. Additionally, no reason was given for the reduction of the Claimant's salary. Consequently, the Court adopts the figure of Kshs.35,000.00 as the Claimant's salary for purposes of this claim.

17. Ultimately I make an award in favour of the Claimant in the following terms:

- a. 2 months' salary in compensation for unfair termination.....Kshs.70,000.00
  - b. 1 month's salary in lieu of notice.....35,000.00
  - c. Prorata leave( $35,000/30 \times 1.75 \times 7$  months).....14,292.00
- Total.....119,292.00**

18. I direct the Respondent to issue the Claimant with a Certificate of Service in accordance with Section 51 of the Employment Act, 2007. The Respondent shall also pay the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

19. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF NOVEMBER 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Omwansa for the Claimant

Mr. Kaka for the Respondent