



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2422 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilla on 14<sup>th</sup> December, 2015)**

**ROSE MWIKALI NZUKI .....CLAIMANT**

**VERSUS**

**FOOD FOR THE HUNGRY KENYA.....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant filed her Memorandum of Claim through the firm of Were & Oonge Advocates on 30.11.2012, seeking damages for unfair/unlawful termination. The Claimant alleges that on 2.05.2007, she was employed by the Respondent as a Human Resource and Administration Coordinator (Field based officer) stationed at Food for the Hungry Marsabit sub office and elsewhere within the Country. That she worked diligently without any misconduct on her part earning promotions and increment of salary. As at the time of termination the Claimant was earning a salary of Kshs. 116,711/-. The Claimant avers that in February 2012, the Respondent without any just cause unlawfully/unfairly terminated her.

2. Prior to her termination, in the month of December 2011, with instructions from the Respondent, she hosted a Christmas party for the Respondent's employees. Later in February, 2012, she was summoned to the Respondent's offices in Nairobi where she met with the Human Resources officer who terminated her services for an alleged discrepancy uncovered during the quantification of expenses/amounts spent at the event. She was accused of inflating the amount spent on the party by Kshs. 7,000/=. She was thus terminated without being afforded an opportunity to be heard or applying rules of natural justice and in violation of the Respondent's own procedural manual.

3. The Claimant states that the Respondent in an attempt to cover-up, its Human Resource Manager in person and by e-mail correspondence demanded that the Claimant resign from her employment or be summarily dismissed but offered to pay her pension fund dues and accrued leave days. That despite this offer from the Claimant, the Respondent still went ahead to dismiss her without any dues or benefits per the contract of employment.

4. The Claimant on diverse dates in the months of February, March, April and May 2012, attempted to have audience with the Respondent's Human Resource Officer to no avail. She alleges that the HR officer demanded that she resign over the said irregularities in the accounting for the Christmas Party. It was never a voluntary decision to resign but rather one under duress from the Respondent. The Claimant states that she was not confronted with the allegations against her so that she can defend herself and prior to this she had not been involved in any impropriety.

5. The Claimant seeks reinstatement and in the alternative compensation to the tune of Kshs. 3,734,752/=.
6. The Respondent filed a Response to Claim on 4.02.2013, admitting the employment relationship but denying that the Claimant worked diligently without misconduct. The Respondent also alleges that the Claimant's contract was terminated on account of her voluntary resignation and the copies of the email sought to be relied on by the Claimant make no reference to unfair termination.
7. The Respondent further admits that the Claimant was indeed tasked with the Responsibility of organizing the Respondent's staff party (Marsabit Office). The Claimant accordingly made purchases for the party and presented supporting documents for expenses incurred to the Marsabit finance office where it was noted that the said documents had various discrepancies. The Accountant sought clarification from the Claimant who asked that the said documents be returned to her and she later provided a different set of documents which equally had discrepancies.
8. The Respondent further alleges that he discrepancies were so glaring and the Claimant failed to give an explanation for the same necessitating a thorough investigation which revealed that the Claimant had intentions to defraud the Respondent of at least Kshs. 7,139/= which is sufficient reason to dismiss her summarily but she resigned before the Respondent could do so.
9. In addition to the above, the Respondent states that it is a Christian organization and the Claimant was duty bound to abide by the Christian Principles regarding honesty and morality, a duty which she failed to abide by.
10. The Respondent in conclusion states that it sent the Claimant a computation of her final dues on 20.02.2012, requesting her to sign the same if she had no further claims against the Respondent which she did on 31.03.2012. It is the Respondent's contention that the termination was lawful and in line with the Claimant's contract of employment and the Employment Act and is thus not entitled to the prayers sought.
11. Having considered the evidence from both parties, the issues for consideration are as follows:

- i. ***Whether there were sufficient reasons to warrant termination of the Claimant or if the Claimant voluntarily resigned from duty.***
- ii. ***Whether due process was followed in the circumstances.***
- iii. ***What remedies if any, the Claimant is entitled to.***

12. On the 1<sup>st</sup> issue, on 9/2/2012, there is email communication between the Claimant and the Respondent's HR Manager about what the Claimant was to be paid upon resigning. In one email stated as follows:

***"Please note this is not possible since yours was a case of summary dismissal. Notice pay is paid in cases where a staff's contract is terminated without notice. I however requested that you be given an option to resign for the sake of your career (emphasis is mine).***

-----“.

13. This email points to the fact that the Claimant was given this option to resign and the resignation was therefore not voluntary.

14. In an email dated 7/2/2012 at 12.03 pm the Claimant had indeed written her resignation letter under the subject;

**“RESIGNATION AS REQUESTED”**

The question then is whether the resignation was a voluntary resignation or an involuntary resignation/constructive dismissal?.

15. A resignation is voluntary if the employer does not influence or prompt the employee to so resign. This is irrespective of whether the employee has committed some acts or omission which would otherwise warrant his dismissal. Where the employer prompts the employee to resign promising some carrot to wade off some stick then the resignation is not voluntary.

16. In this case, the resignation of the Claimant was prompted or discussed with the Respondent and this in itself is not a voluntary resignation but a constructive dismissal. The issue of constructive dismissal was discussed by the Supreme Court of Canada – *David M. Potter vs. New Brunswick Legal Aid Services Commission, a statutory body corporate pursuant to a special act of Province of New Brunswick* 2015 SCC 10. The court observed as follows:

***“in cases in which this breach of the test applies, a constructive dismissal consists of conduct that, when viewed in the light of all circumstances, which lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employee evince(s) an intention no longer to be bound by the contract. In Re Rubel, at page 322, a course of conduct that does evince such an intention amounts cumulatively to an actual breach.”***

17. I therefore from the above analysis find that the Claimant didn't voluntarily resign but was in fact constructively dismissed.

18. On the 2<sup>nd</sup> issue, the process envisaged before dismissal on termination is set out under Section 41 of Employment Act 2007 and it states as follows:

**“(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.”**

19. The Respondents own HR Manual from pages 34 to 38 sets out the process of disciplining errant staff. The process is set out as follows:

#### **4.10 Policy No. HR/30: Staff Discipline**

Key Aspects to the policy

FH/K values a disciplined work force which operates within the organisational, Christian and national norms. The organisation will not accept performance, attitude or behaviour contrary to its calling, professional or moral principles as a body working for the empowerment of needy communities.

In cases where an employee is found guilty of an offence other than gross misconduct or other lawful cause for dismissal, he/she may be given a written warning. There will be a maximum of three such warning letters and will be governed by the following guidelines:

- a. 1<sup>st</sup> warning

The first warning shall be a written one and shall remain valid for a period of twelve months from the date of issue.

b. 2<sup>nd</sup> warning

If the employee commits a similar or any other offence that does not warrant dismissal, he will be given a second warning, which will also be in writing. The two warnings shall remain valid for a period of twelve months from the date of the second warning.

c. 3<sup>rd</sup> warning

If the employee commits a further offence that does not warrant dismissal, he will be issued with a final letter of warning, which will make him liable to summary dismissal for any other offence that he may commit thereafter.

Warnings will remain valid for a period of 12 months only. For an employee to be dismissed from employment owing to having received three warning letters, all the letters must have been within 12 months period.

Any employee facing disciplinary action will be given a maximum opportunity to defend himself both in writing and verbally. This report shall be kept in the employee's personal file.

Grounds for disciplinary action include, but are not limited to, breaking the rules of the organization, interdiction, unsatisfactory work performance, insubordination, moral or ethical misconduct and any activity that jeopardizes a beneficiary or the work of FH/K.

In appropriate circumstances staff members may be counselled in order to modify behaviour, which might result in dismissal. However, FH/K reserves the right to dismiss members without such counselling.

Where there will be need for a disciplinary action the following steps will be employed:

<b>Nature of Conduct</b>	<b>Classification</b>	<b>Disciplinary Action</b>
1. Lateness	Minor breach	Verbal warning
2. Negligence or carelessness resulting in any injury to a person, loss or damage to property	Minor breach	Verbal warning  Pays for loss/damage as set by logists
3. Use of abusive, language harassment, or insulting language and gestures to a superior/	Misconduct	Warning letter

juniors, fellow employee  
 or other person in the  
 course of work.

4. Repeated carelessness                      Misconduct                      Warning letter

lateness or absenteeism  
 without permission from  
 relevant authority or  
 without adequate reasons.

5. Failure to follow written                      Misconduct                      Warning letter

policies, rules, and  
 procedures

6. Use of insults,                      Gross Misconduct                      Suspension

rumour mongering,  
 character assassination

7. Breach of confidentiality                      Gross Misconduct                      Suspension

that affects the  
 organisation

8. Absenteeism without                      Gross Misconduct                      Suspension

official leave for three  
 consecutive days.

9. Reasonable and sufficient                      Gross Misconduct                      Suspension

suspicion of having  
 committed any civil or  
 criminal offence

10. Involvement or                      Gross Misconduct                      Summary dismissal

knowingly failing  
 to report a fraudulent  
 act leading to organized

loss of FH/K's property/funds

11.Misappropriation or  
mismanagement of FH/K  
funds, making fake claims  
or returns, forging or altering  
receipts, bids, quotes, or  
other financial documents.

Gross Misconduct Summary dismissal

12.Soliciting or accepting  
bribes and favours from  
beneficiaries suppliers and  
others intended to compromise  
the official image of FH/K.

Gross Misconduct Summary dismissal

13.Drunkenness while at  
work or reporting to  
work while drunk.

Gross Misconduct Summary dismissal

14.Lawful arrest and  
detention for more  
than 14 days.

Gross Misconduct Summary dismissal

15.Conviction of a criminal  
offence in a court of law,  
becoming insolvent  
or bankrupt.

Gross Misconduct Summary dismissal

16.Evidenced lack of  
respect for one's  
senior or failure to obey  
a valid order by a  
superior i.e insubordination

Gross Misconduct Summary dismissal

17.Failure to initiate

Gross Misconduct Summary dismissal

and carry out impartial  
disciplinary or other policy  
action within reasonable  
time or as officially  
prescribed by FH/K.

#### **4.11 Policy No. HR/31: Summary Dismissal**

The following matters may amount to gross misconduct and may lead to summary dismissal without notice. Reference shall also be made to the Employment Act – 21007. (reasons for summary dismissal):

- i. Absenting oneself from the place of work without permission for a period of three days or more.
- ii. Willfully neglecting to perform one's duties consistently.
- iii. Disrespect for one's senior evidenced in written or use of malicious language on senior that can be witnessed by at least two other staff members.
- iv. Employee has already received three written warnings.
- v. Use of abusive or insulting language to any person placed in authority in FH/K.
- vi. Unauthorised dealings with sponsors and donors. Such dealings include soliciting for person support and favours as well as other dealings, which create conflict of interest.
- vii. Minor offences frequently repeated (e.g. lateness, indiscipline, carelessness etc).
- viii. Theft, fraud, misappropriation and mismanagement of FH/K's resources.

20. It is apparent that the Respondent did not follow this process. It is therefore this Court's finding that the termination of the Claimant was unfair and unjustified in terms of Section 45 (2) of Employment Act 2007 which states that:

***“A termination of employment by an employer is unfair if the employer fails to prove:***

- a. ***that the reason for the termination is valid;***
- b. ***that the reason for the termination is a fair reason:-***
  - i. ***related to the employee's conduct, capacity or compatibility; or***
  - ii. ***based on the operational requirements of the employer; and***
- c. ***that the employment was terminated in accordance with fair procedure.***

21. It is therefore this Court's finding that the Claimant was unfairly and unjustly terminated and I accordingly award her as follows:

- i. ***1 months salary in lieu of notice = 116,111/=***
- ii. ***12 months salary as compensation for unlawful***

***Termination = 12 x 116,711 = 1,400,532/=***

***TOTAL = 1,516,649/=***

- iii. ***Pension dues from the Pension Scheme.***
- iv. ***The Claimant should be issued with a Certificate of Service.***
- v. ***The amount awarded will attract interest at Court rates with effect from the date of this Judgment.***

22. The Respondents will pay costs of this suit.

Read in open Court this 14<sup>th</sup> day of December, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Respondent

No appearance for the Claimant