



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 443 OF 2013**

**FARANA YUSUF IBRAHIM .....CLAIMANT**

**VERSUS**

**DAVID ENGINEERING LTD. ....RESPONDENT**

Claimant in person.

Mr. Kuria for Respondent.

**JUDGMENT**

This suit was brought by a Memorandum of claim dated 2<sup>nd</sup> April, 2013 seeking maximum compensation for unlawful termination of employment in the sum of Kshs.962,000/= and terminal benefits as follows:

- a. Salary for the months of February and March, 2013 in the sum of Kshs.114,000/=;
- b. Payment in lieu of one (1) month leave in the sum of Kshs.57,000/=.
- c. Payment in lieu of one (1) month notice in the sum of Kshs.57,000/= and
- d. Payment of service gratuity for two years in the sum of Ksh.50,000/=.

The Claimant alleges in the Memorandum of claim and in her viva voce evidence before court that she was employed by the Respondent on 14<sup>th</sup> October, 2010 as a secretary in the Administrative Department at a monthly salary of Kshs.35,000/= and house allowance of Kshs.7,000/= totaling Kshs.42,000/=.

She reported to the Director **Mr. Gary Bangera**. The Respondent provided her with a written contract of employment dated 2<sup>nd</sup> October, 2010 attached to the Memorandum of claim.

That she worked continuously for the Respondent until the 25<sup>th</sup> March, 2013 when her employment was terminated by the Respondent by a letter of the same date. No reason for termination was provided in the letter of termination in which the Claimant was offered;

- i. Salary for days worked up to and including 31<sup>st</sup> March, 2013;
- ii. Service pay for 28 days for two complete years of service since 2<sup>nd</sup> October, 2010;
- iii. Thirty (30) days pay in lieu of notice; and
- iv. Payment in lieu of outstanding leave days.

She was requested to clear with the company to enable processing and payment of final dues less

outstanding liabilities to the company and DELI SACCO loans.

The Claimant received the letter under protest and on 27<sup>th</sup> March, 2013 wrote an appeal letter for consideration by the Managing Director protesting inter alia that she was not given a reason for the termination nor was she given a fair hearing. She alleged that the employer had violated Section 41 of the Employment Act, 2007 and Article 50 of the constitution of Kenya 2010.

As at the time of termination, the Claimant's gross pay was Kshs.57,000/= in terms of the payslip attached for the month of September, 2012. The payslip shows that statutory dues were duly deducted from her salary which included Paye As You Earn (PAYE); National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF).

The Respondent filed a Statement of defence dated 26<sup>th</sup> April, 2013 wherein, it is admitted that the Claimant's salary for February, 2013 was withheld to recover the salary paid for the month of September, 2012, because the Claimant was absent from work in the Month of September, 2012.

That the Claimant was absent from work from 23<sup>rd</sup> August, 2012 to 2<sup>nd</sup> January, 2013, an issue that had not been resolved. That her leave days were therefore rescheduled to cater for those days she was absent from work while attending to her sick children in India.

The Respondent states that in a letter to the Claimant dated 27<sup>th</sup> March, 2013, it is disclosed to the Claimant the reasons for her termination which included;

- i. Risk of breach of confidential information;
- ii. Failure to avail sick notices;
- iii. Not following company procedure; and
- iv. Not performing her duties diligently.

The Respondent however did not produce any such letter. Respondent also insists that it had accorded the Claimant a fair hearing before the termination.

### **Issues not in dispute.**

It is not in dispute that the Claimant worked for the Respondent from 14<sup>th</sup> October, 2010 to 25<sup>th</sup> March, 2013. It is also not disputed that at the time of termination she earned a gross monthly salary of Kshs.57,000/=. It is not in dispute that upon termination she was not given any notice nor was she paid in lieu thereof.

Furthermore she was entitled to service pay of 28 days salary for the two (2) years completed service,

The Respondent admits not paying her salary for the month of February, 2013.

The parties are agreed that the Claimant was in India for a period of three (3) months attending to her sick child, but disagrees on whether the period of three months comprised paid leave or not. The Claimant was also not paid for the month of March, 2013 upon termination.

On the basis of these undisputed facts, the court finds that the Claimant is entitled to payment of the following;

- i. Payment of Kshs.57,000/= in lieu of one month notice;
- ii. Payment of Kshs.57,000/= for the month of March, 2013;
- iii. Payment of service pay for 28 days for the two years served in the sum of Kshs.50,000/=. A cheque for the sum of Kshs.165,552/= was deposited with the Labour Office for collection by the Claimant.

## **Issues in dispute.**

The only issue in dispute is the claim for payment of one (1) month salary in lieu of leave in the sum of Kshs.57,000/= and compensation for the alleged unfair termination of employment.

The Claimant told the court that she obtained permission from the employer to proceed to India to take her sick daughter to hospital in August, 2012. That she stayed in India for three months with full knowledge and permission of the Respondent.

That in spite of the permission granted, the Respondent purported to deduct her salary for the days she was on compassionate leave. Her demand to be paid led to her termination.

Mr. Gary Bangera told the court that he was a Director of the Respondent and had employed the Claimant. He told the court further, that the Claimant was granted one (1) month leave to take her child to India for treatment. That she left on 23<sup>rd</sup> August, 2012 and returned on 2<sup>nd</sup> January, 2013. That the Respondent did not approve extension of her leave. She also absented herself severally whilst she was in Kenya and failed to produce sick sheets.

That she also had allowed unauthorised personnel to her office contrary to the company policy. That she was called to a Board meeting to explain her absence and misconduct but did not give a good explanation and her services were accordingly terminated.

This explanation by the Director is not supported by the letter of termination dated 25<sup>th</sup> March, 2013 produced by the Respondent as annex I.

The witness confirmed that the Claimant had since collected the cheque deposited with the Labour Office upon directions by the court to do so.

The Human Resource Manager, **Mr. Michael Omondi Ouko** testified. He told the court that though the Claimant had only 16 days outstanding leave in August, 2012, she was granted a full month. He told the court that the Claimant was paid full terminal benefits in the sum of Kshs.65,532/50 gross which amounted to Kshs.21,480/50 net.

He stated that the Claimant was accorded due hearing before the termination. He further explained that the Claimant was a good employee but did not follow the company's rules at times.

He said that the Claimant had no warning letter because it was withheld due to her sickly child. She only had verbal warnings. No record of the alleged disciplinary hearing was kept nor produced before court.

## **Conclusion.**

The Claimant's termination was abrupt and would appear emanated from her demand to be paid salary for the month of February which apparently the Respondent had withheld to cover for the September, 2012 salary.

This explains why the letter of termination dated 25<sup>th</sup> March, 2013 contains no reason at all for the abrupt termination. If there was a good reason to terminate her services nothing would have been easier for the Respondent to do than to stipulate those reasons in the letter.

To the extent that no reason at all was given and the unsatisfactory testimony by the Respondent's witnesses in this regard, the Respondent has failed to discharge the onus placed on it under **Section 47 (5)** of the Employment Act to justify grounds for the termination of employment.

To the contrary, the Claimant has shown that there was no good reason at all to terminate her employment taking into consideration all the circumstances of the case.

Accordingly, the termination of her employment was unfair in terms of **Section 45 (1) and (2)** of the Employment Act, in that the reason for the termination was not valid and the termination itself was not in accordance with fair procedure.

From the competing allegations by the parties, the court finds that the Claimant has failed to establish that she was owed any leave days. The court further finds that the terminal benefits claimed in this suit have been fully satisfied.

**Compensation for unlawful termination.**

The Claimant had served the Respondent for a period of two years. Though she was a good employee, her work was often interrupted by the sickness of her child. It is clear that she often absented herself from work but the respondent did not keep any record of such absenteeism.

The Claimant having served for a fairly short period and was absent from work for various reasons, though justifiably, for considerably lengthy periods does not warrant maximum compensation as claimed in terms of **Section 49 (1) (c)** of the Employment Act.

The court will in the circumstances award her two (2) months salary as compensation for the unlawful and unfair termination in the sum of Kshs.114,000/=. The Respondent is also to pay the costs of the suit to the Claimant. Though, a Certificate of Service has not been claimed, the Claimant is entitled to grant of a certificate to enable her seek employment elsewhere in terms of **Section 51** of the Employment Act. The Respondent is directed to issue to the Claimant a Certificate of Service accordingly.

It is so ordered.

*Dated and delivered at Nairobi this 28<sup>th</sup> day of January, 2014.*

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**