



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 167 OF 2012

BETWEEN

PAULINE NJERI BWIBOCLAIMANT

VESRUS

JAN RUNDGREN

INGEGERD GUSTAFSSON t/a

**SWEDISH DENTAL CLINIC
LABORATORY.....RESPONDENTS**

Rika J

CC. Leah Muthaka

Mr. Olemba instructed by Nyiha Mukoma & Company Advocates for the Claimant

Mr. Njoroge instructed by Igeria & Ngugi Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed her Statement of Claim on 3rd February 2012. The Respondents filed their Statement of Reply on 24th February 2012. The Claimant testified, and closed her case on 9th May 2013. The Respondents called two witnesses Janet Kalegi Kidula a Dental Nurse who gave evidence on 9th May 2013, and Alina Anleong Seng Mugo, a Dentist who testified on 27th June 2013. The Respondents informed the Court they did not have more witnesses to call on 23rd July 2013, and the hearing was marked as closed. Parties were directed to file their Final Submissions within 14 days, and advised Award would be delivered on Notice.

2. The Claimant stated she was employed by the Respondent’s predecessor Dental Practice that operated under the name and style of Gunilla Skarman Dental Clinic. She was employed on or about 1st January 1993 as a receptionist, at a starting salary of Kshs. 14,500 all –inclusive. She worked well and in due course performed other duties such as payment of the Clinic bills, typing office letters, filing, ordering stationery, filing in-patient medical forms, banking, receiving payments from patients, handling office

petty cash, paying staff salaries and submitting staff taxes. Her contract was terminated on or about 10th June 2009, without cause or notice. At the time of termination, she earned a consolidated monthly salary of Kshs. 28,828.80. She did not receive any letter of termination. She prays for:

- a. A declaration that termination was unfair;
- b. On month salary in lieu of notice;
- c. Unpaid annual leave days for the 16 years at the rate of Kshs. 28,828.80 per month, totaling Kshs. 461,251.20;
- d. 12 months' salary in compensation at Kshs. 319,065.60;
- e. Costs ;
- f. Interest on [b], [c] and [d] at Court rate; and
- g. Any other relief the Court may deem fit to grant.

3. The Claimant testified she is presently working as a Farmer and Shopkeeper. She was initially employed under her maiden name Pauline Njeri Kibinge. Bwibo is her husband. She was retained by the new owners of the Dental Clinic when ownership changed. Her contract was terminated by the Respondents without reason. Dr. Alina Mugo just went to the Clinic and told the Claimant to leave. The Claimant and another colleagues called Agnes were informed by the Doctor they were not being fired; the Respondents were just carrying out investigation. The Claimant served as the Cashier, while Agnes was the Receptionist. They were told to leave, but never received any further communication from the Respondents after they left.

4. In the Statement of Reply, the Respondents alleged that the Claimant had misappropriated Kshs. 86,000. There were different Doctors. Patients paid through cash, visa cards or cheques. Doctors signed the receipt books at the end of each day. They counterchecked what was declared to have been received. The Claimant was baffled to hear that the Respondents alleged she misappropriated Kshs. 86,000. She heard this for the first time from her Lawyers when the Statement of Reply was filed. Doctors confirmed the payments made each day.

5. On cross-examination, the Claimant testified she worked for 10 years for the Respondents from 1999 to 2009. She enjoyed cordial relationship with her Employer. She banked the money which was paid by the Patients. She did this once each morning. She would fill the Banking Slips and send the Messenger to Bank the money. Doctors used to collect the liquid cash from the Clinic. What the Claimant banked were the cheques. She only dealt with petty cash. In all the 10 years, there were no missing funds. Dr. Alina gave the Claimant 5 minutes to leave the Clinic. There was no explanation why the Claimant was asked to leave. She heard about the missing money from her Lawyer. It was not true that the Claimant tried to assault one of the Doctors. Termination was in 2009, but the Claimant only filed her Claim in 2012. She explained that she delayed because she was searching for a good Lawyer.

6. Redirected, the Claimant stated she delayed in bringing the Claim to Court because the Respondents had written through their Lawyers asking for with-holding of legal action. She had worked for the Clinic from 1993 without disciplinary warnings. All money collected on each day was confirmed by the different Doctors. All cash collected was given to the Doctors daily. Cheques were taken to the Bank through the Messenger. Visa transactions were paid through the Clinic Visa Machine. The Claimant did not recall being violent. She never went back to the Clinic. She left everything at the Clinic.

7. The Respondents conceded the Claimant was their Employee. She was appointed through a letter dated 31st May 1999. She misappropriated her Employers' funds through making of false entries in the books of accounts, resulting in the Respondents losing Kshs. 86,000. She was called to explain herself, but instead of doing so turned violent, threatened the Respondents, and stormed out of the Clinic. She deserted never to return. She was not summarily dismissed. She was only sent on compulsory leave to allow for investigations, but opted to abandon her work altogether. The Respondents deny that they are liable to meet any of the Claimant's prayers.

8. Janet Kalegi Kidula stated she had worked for the Respondents for 17 years by the time of her testimony in Court. The Claimant was employed after Kidula. On 10th June 2009, Kidula was in the

Sterile Room. She noticed the Claimant move out of the Clinic carrying something to her car parked outside. The Claimant appeared to be in a hurry. She returned and was heard by the Witness tell Dr. Alina, “*utaniona, nitakupeleka Kwa KRA.*” [Kiswahili for you’ll reckon, Ill report you to the Kenya Revenue Authority.’’] She moved out a second time carrying more stuff, and shouted at Dr. Alina saying, “*wewe!*” [You!]. For the third time the Claimant walked in again, dropped something and took more stuff out this time saying to Dr. Alina, “*umekuwa mbaya kwetu sana, utaniona.*” [You have been a very bad employer to us. You’ll reckon]. The Doctor moved away. The Claimant left in the company of Agnes and drove away. Agnes had also carried away most of her own stuff. After the Claimant was gone, the Witness found the Claimant had thrown the sugar dish to the ground and splashed sugar all over the room. Dr. Gustafsson was in with a patient during the episode. The Claimant and Agnes did not return to the Clinic after this. The Claimant did however return the Clinic keys to the Guard at the gate after a few days. Alina did not respond to the Claimant’s insults. Alina said she was about to send the two on leave, but Kidula did not know why they were to be sent on leave.

9. In cross-examination Kidula testified she is still working for the Respondents. She was alone in the Sterile Room when the incident happened. It took place at the Reception. The Witness did not know what caused the incident. She did not know if Police Officers were involved. The Respondents keep Employee Records. Kidula did not know if they attempted to reach the Claimant after she left through her known phone contact. She clarified on redirection that she did not know what happened before the commotion. The Claimant was her friend. She was not insulted by the Claimant and had no complaints against the Claimant.

10. Dr. Alina Anleong Seng Mugo testified the Claimant used to work at the front office as a Cashier. She joined in 1997, but had been working earlier for the previous Management. Her relationship with her Employer was alright. The Accountant brought it to the attention of the Doctors that there were payments at the Bank indicated to be cheque payments. There were no cheques in the Bank and the Respondents undertook to investigate. It was the duty of the two front office Employees to receive money, issue receipts and bank the following day. The Accountant would reconcile what was collected. The Respondents decided to send the two Employees on leave pending investigations. The Claimant became violent, threw things around, disrupted everything and threatened Alina. The Doctor pressed the alarm button. The Claimant and Agnes walked out and drove away never to return. It is not true that the Doctor asked the Claimant to clear within 10 minutes from the Clinic. Dr. Jan Rundgren was there, as was Kidula and others, during the episode. Patients witnessed the altercation. The Respondents intended to investigate the issue. Alina testified that she restrained herself during the altercation as she did not wish to escalate the dispute. The Claimant was paid all her terminal dues.

11. Alina testified on cross-examination that the Claimant was employed by the Clinic before her. The Respondents renewed her contract of employment. The Claimant enjoyed a good relationship with the Respondents. It was only at the last day of work that she was noted to be violent. Alina could not tell why the Claimant left. There were discrepancies in the accounts calling for investigations. The Respondents alleged Kshs. 86,000 was lost. This amount was given to the Respondents by the Accountant. It was an allegation. It was not reported to the Police. The Respondents had prepared letters sending the Claimant and Agnes on leave pending investigations, but never got the opportunity to hand over the letters. The loss was over a period of time. The Doctors did not confirm cheque receipts all the time. Doctors were human and trusted the two Employees to perform their roles honestly. There were no charges pressed against the Claimant. She stormed out and did not even allow the Respondents to send her on compulsory leave. Alina explained on redirection that she did not give the Claimant the letter of compulsory leave owing to the Parties’ relationship. They had worked many years together. The Claimant was not suspended or dismissed; she deserted. Dr. Alina knew the Claimant well. She saw the Claimant’s children being born; she sold the Claimant her baby cot; and considered the Claimant as family. The Respondents pray the Claim be dismissed with costs.

The Court Finds and Awards:-

12. The Court is persuaded by the evidence of the Respondents that the termination of the Claimant’s contract of employment was not initiated by the Respondents. The Respondents raised query over the

banking of cheques received from Clients. The Claimant and her colleague Agnes were handling dental fees paid by Clients. They were advised by Dr. Alina, who had worked with the Claimant for many years, to step aside as investigations got underway. The Claimant did not take this well, and created a scene, while hurling insults at her Employer, and making it very difficult for the Employer to carry out a proper termination process. The Court believes the evidence of Kidula and Dr. Alina. Both had worked with the Claimant for long, were her friends, and would have no reason to give false testimony against the Claimant. Dr. Alina considered the Claimant as family, having witnessed the birth of the Claimant's children, and even sold the Claimant a baby cot. The Claimant seems to have abused this trust and friendship, and showed utmost disrespect for Dr. Alina, when the Doctor attempted to exercise a normal management prerogative. The Court is convinced the Claimant issued unwarranted threats to Dr. Alina. These threats were grave enough to cause the Doctor to press the Clinic's alarm button.

13. The Claimant did not wait to be issued with the formal letter of suspension, or submit herself to the investigations initiated by the Respondents. She walked away in fury, throwing things around in the presence of other staff and patients, while threatening the Respondents that she would report them to the Kenya Revenue Authority over an undisclosed offence. She deserted work, rather than co-operate with the investigators. It would be unrealistic to expect the Respondents to move on to show valid reason or reasons for termination of the Claimant's contract of employment; there was no termination carried out by the Respondents. The Claimant would only have herself to blame for walking out of the employment place.

14. Dr. Alina stated that the Claimant was paid all her dues. The Claimant ought to have let the matter rest at that. Employers have the right to investigate any allegations against their Employees, and instigate any disciplinary processes which may be found necessary. Employees have the duty to submit to such processes. It is unreasonable for Employees to refuse to participate in such processes, and then come to the Court alleging their contracts were unfairly terminated. This is what the Claimant, a long serving Employee of the Clinic did. The Court is unable to assist her. ***In the end, the Court finds the Claim to have no merit. The same is dismissed with no order on the costs.***

Dated and delivered at Nairobi this 22nd day of January 2014

James Rika

Judge