



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 883 OF 2013

PURITY MBOGO NYAMU CLAIMANT

VERSUS

REGIONAL AIDS TRAINING NETWORK RESPONDENT

M/S Owino for Claimant

Mrs. Oketch for Respondent

JUDGMENT

1. The suit was first brought before the Chief Magistrate Court in case Number 5651 of 2005 seeking the following orders:

- a. a declaration that the contract of employment between the Claimant and the Respondent was effectively terminated on 19th January 2005 upon the Claimant's resignation;
- b. payment of Kshs.667,670/= being;
 - i. unpaid salary in the month of December 2004 in the sum of Kshs.59,249/=;
 - ii. salary for 19 days in January 2005 in the sum of Kshs.115,710/=
 - iii. gratuity for November, 2004 to 19th January, 2005 in the sum of Kshs.115,150/=; and
 - iv. Kshs.381,564/=, being amount wrongly deducted from the plaintiffs benefits.

2. On 12th April 2013, the matter was by consent of the parties transferred to the Industrial Court which Court adopted all the pleadings as filed in the Chief Magistrate's Court.

Particulars of the case

3. It is alleged that the Claimant was at all material times an employee of the Respondent by virtue of a contract of employment dated 31st October 2003. She was employed in the capacity of a Finance and Administration manager.

4. On or about 29th November 2004, the Defendant suspended the Plaintiff from duty allegedly to pave way for investigation into the Plaintiff's conduct following a penalty that had been imposed on the Defendant by the Kenya Revenue Authority as a result of late submission of PAYE returns.

5. That upon suspension, the Claimant was never called to a hearing to defend herself and or make an explanation on the matter neither was the result of the investigation communicated to her inspite of several demands.
6. Due to the frustration of the contract of employment, the Claimant opted to resign from the Respondent's employment on 19th January 2005.
7. That at the time of resignation, the Respondent owed the Claimant various sums of money amounting to Kshs.1,561,006/=. That after resignation, she was only paid Kshs.244,952/= and therefore claims the balance as stated hereinbefore.
8. That the Respondent purports to have dismissed the Claimant from its employment on 21st December 2004, before her purported resignation but the Claimant denies any such happening as no such communication was given to her.

Statement of Response

9. In its defence statement, the Respondent admits that the Claimant was its employee as stated and that it had suspended her as alleged in paragraph 4 of the plaint.
10. However, the Respondent avers that the Claimant was on several occasions informed of the outcome of the investigation through mail and meetings. That the Claimant elected not to answer questions put to her by the investigators and Defendant's representatives.
11. The Respondent further avers that the Claimant did not resign from the employment of the Respondent on 19th January 2005, as alleged but infact her employment was terminated by the Respondent on 21st December 2004.
12. That upon termination, the Claimant was paid all her terminal dues as follows;
 - a. leave pay Kshs.497,619/=;
 - b. days worked Kshs.128,897/=;

Total Kshs. 626,516/=;

 - c. less debt owed by the Claimant Kshs.381,564/=;

Balance paid Kshs.244,952/=.
13. Both parties called oral evidence in support of their respective positions. The Claimant (CW1) testified at length and produced documentary evidence in support of her case.
14. From the payslips for the Claimant from November 2003 to November 2004, Claimant had a basic pay of Kshs.247,250/= as at November 2004 and a travelling allowance of Kshs 14,000/= making a Gross salary of Kshs.261,250/=. The salary for December was paid up to the date of purported termination but the Claimant claims salary up to the date of her resignation on 19th January 2005.
15. The Claimant told the Court that she was entitled to payment of gratuity at 15% of her basic salary at the end of the contract for each year of service. This is contained in her employment contract. The contract of employment was produced and was for a two year period from 1st November 2003 to 31st October 2005.
16. The Claimant was entitled to 30 days annual leave.

17. Furthermore, the contract was terminable by either party giving a month notice or payment in lieu thereof.

18. In terms of the letter of suspension dated 29/11/2004, the Claimant was to remain at home and she was informed as below;

“You as the officer concerned may be required at the convenience of the investigating officer to answer questions and clarify issues pertinent to the investigation. In this regard communication to you in the form of written notice will be sufficient.”

19. The Court notes that:

- i. The suspension was indefinite;
- ii. The Claimant was not asked to show cause and or give an explanation on the alleged misconduct within a specific period;
- iii. The suspension was on full pay;
- iv. No address for communication while on suspension was requested or provided in the letter of suspension;
- v. She was required to countersign a copy of the letter as evidence of receipt which the Claimant had done on 29th November 2001, at 9.25 a.m.

20. The Respondent delivered at the Claimant’s residence a letter dated 10th December 2004, requesting her to report to office without fail on 14th December 2004.

21. The Claimant responded to the letter on 14th December 2004, wanting to be told the outcome of the investigation since she had not received any communication from the office since the date of suspension.

22. She declined to report to the office before the outcome of the investigations was known to her since she had not been summoned to any disciplinary hearing. She also gave her address for purposes of future correspondence as c/o E. Muigai and Co. Advocate 3rd floor Hughes, building, Kenyatta Avenue, P. O. 5505-00200, Nairobi, Kenya.

23. On 14th December 2004, Respondent responded to the Claimant’s letter and the response was addressed to C/o P. O. Box 12650-00100 GPO Nairobi. In terms thereof, the Claimant was given the last chance to report to the office on 16th December 2004 at 10 a.m.

24. Apparently, she was required to answer questions and clarify issues pertinent to the investigation.

25. The Claimant attended the meeting but the same did not proceed well since the Claimant requested to be availed RATN official documents related to the allegations made against her. She required that the matter sought to be clarified be put in writing to enable her answer appropriately because she would have to recall matters in documentation to which she had no access.

26. She also requested an agenda for the meeting. She affirmed willingness to attend further meetings for this purpose. This is in a letter dated 16th December 2004 to the Executive Director.

27. The Respondent did not provide the requested documentation to the Claimant but instead wrote the Claimant a short letter dated 18th December 2004, requesting the Claimant to report to RATN office on 21st December 2004 to meet the Executive Director on matters related to her employment.

28. On 21st December 2004 the Claimant wrote to the Respondent regarding the proposed

meeting to discuss her services to RATN. She requested the findings of the investigations so as to guide discussions on her services to RATN. She also requested to be paid her salary for December and the yearly bonus paid out to all staff at the end of the year. She further requested to be paid in lieu of 40 leave days.

29. On the same date, 21st December 2004, a letter of summary dismissal was written to the Claimant and a certificate of service was apparently enclosed therein. The Claimant states that she did not receive this letter which does not indicate its author and has no address of the Claimant. The place for acknowledgment of receipt is also not signed.

30. The Claimant denies ever receiving this letter nor the certificate of service purportedly enclosed therein.

31. The Respondent on the other hand told the Court that the letter was delivered by Securicor Courier Service who reported that the Claimant had declined to receive the same.

32. A Registered letter dated 5th letter dated 5th January 2005 purports to convey the document to the Claimant at P. O. Box 12650-00100 Nairobi. The Claimant states that the same was not received by her.

33. It is her case that she decided to resign pursuant to the conduct by the Respondent of keeping her indefinitely under suspension without subjecting her to a disciplinary process in terms of the law.

34. The Claimant states that she had a good record of service at the Respondent's employment which matter is confirmed by a letter of reference given to her by the chairperson of the Respondent Mr. Peter Kiuluku.

35. In the said letter of reference dated 25th March 2005, the chairperson had confirmed that the Claimant had resigned from the service of the respondent.

36. **Mr. Kiuluku** gave evidence in this matter purporting to repudiate the contents of the letter and especially his confirmation to the World Bank, a prospective employer of the Claimant, that she had resigned from the employment of the Respondent.

37. This testimony from the chairman of the Respondent could not be taken seriously by the Court.

38. With respect to the deduction of Kshs. 381,564 from her terminal dues, the Claimant denies that she owed any money to the Respondent and the money should be refunded to her forthwith. The Respondent asserts that the deduction was in respect of unpaid loan by the Claimant.

39. The claimant told the Court that she was wrongly accused of stealing a motor vehicle from the Respondent. The motor vehicle was lawfully transferred to her husband by the Respondent upon full payment of the purchase price on 22nd June 2001 to the field director who ordered an alternative car, a Subaru, which he had opted for.

40. The motor vehicle did not belong to the respondent at all, except that, a Tax Exemption was granted using the Respondent's name. The Claimant paid duty for the motor vehicle KAN 857R and then had it transferred to her husband. She produced the Kenya Revenue payment slip No. 013871 and personal account slip from Barclays Bank. She produced all the documentation in support of the transaction. She lamented that the Respondent had in bad faith, unlawfully caused her to be arrested by the police on false allegations of theft of this particular motor vehicle. The car was released to her after investigations by the Criminal Investigation Division (CID) officers. As at the time of this case, she still was in possession of the car.

41. She further gave explanation on why there was delay in remittance of PAYE on two occasions telling the Court that the allegations against her were without basis and so was the suspension which led to her resignation.

42. **Dr. John Mark Mwesigwa**, the former Executive Director (RW2) testified for the Respondent. He worked for the Respondent between September 2003 to October 2008.

43. He told the Court that the Claimant was not a good employee and her poor performance caused the Kenya Revenue Authority to surcharge the Respondent for late submission of PAYE returns. This matter led to her suspension but she was not co-operative in the investigation that followed hence her dismissal on 21st December 2004.

44. He accused her of unlawfully transferring a motor vehicle belonging to the Respondent to her husband. He did not however produce documentation in support of this allegation. To the contrary, the documentation produced by the Claimant shows that the motor vehicle was transferred to her husband upon full payment of the motor vehicle and the customs duty.

45. He could not explain why this issue was raised long after the transfer had taken place and only after the Claimant had been suspended on unrelated matters.

46. He told the Court that a forensic Audit showed that the Claimant owed Kshs.381,564/= in respect of a loan taken and not repaid plus interest hence the deduction.

47. That with respect to gratuity, the Respondent had paid her gratuity in October 2004 and therefore there was no outstanding gratuity at the time of termination on 21st December 2004. He added that Claimant having been dismissed was not entitled for payment of salary from the date of dismissal as claimed or at all.

Issues for determination

- i. Did the Claimant resign on 19th January 2005, or was her employment terminated on 21st December 2004?
- ii. Is she entitled to a salary for the period 21st December 2004 to 19th January 2005?
- iii. Is the Claimant entitled to gratuity for the period November 2004 to 19th January 2005?
- iv. Is she entitled to refund of Kshs.381,564/=?

Finding

48. From a careful analysis of the evidence by the Claimant vis a vis that by the RW2, and having considered the documentary evidence produced in this matter the Court found that;

- i. the Claimant was not charged with any offence nor was she given a notice to show cause upon suspension;
- ii. She was kept on suspension without pay indefinitely;
- iii. there is no evidence that the Claimant received the letter of termination dated 21st December 2004 and the Court finds that the Claimant indeed resigned from employment on 19th January 2005;
- iv. pursuant to the finding in (iii) above, the Claimant is entitled to a salary for the period 21st December 2004 to 19th January 2005 as claimed;
- v. further, the Claimant is entitled to *prorata* gratuity for the same period 21st December 2004 to 19th January 2005 as claimed;
- vi. with regard to the claim for the refund of the money deducted, no tangible evidence has been placed before Court to rebut the claim by the Claimant that this money was wrongfully deducted from her salary;
- vii. reference to a forensic audit, remained just that because no witness who participated in that

exercise came before Court to give an account of the allegations by the Respondent. The Claimant was not sur-charged or asked to explain any failure to repay a loan. This was therefore an arbitrary decision by the Respondent;

viii. the Court finds that all the claims set out under paragraph 8 (a) (b) (c) and (d) of the plaint have been proven on a balance of probabilities.

49. Accordingly the Court awards the Claimant as against the Respondent:

- a. unpaid balance of salary for the period 21st December 2004 to 19th January 2005 in the sum of Kshs.174,956/=;
- b. gratuity from 1st November 2011 to 19th January 2005 in the sum of Kshs.111,150/=;
- c. amount wrongly deducted from the plaintiff's benefits in the sum of Kshs.381,564/=;

Total award Kshs.667,670/=;

- d. interest at Court rates from 19th January 2005 to date;
- e. costs of the suit.

Dated and Delivered at Nairobi this 4th day of June, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE