



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 497 OF 2012**

**JANET BOCHERE OKIABERA ..... CLAIMANT**

**VERSUS**

**KANYA AIDS NGO's CONSORTIUM..... RESPONDENT**

**JUDGMENT**

The Claimant herein Janet Bochera Okiabera filed suit against the Respondent Kenya Aids NGO's Consortium seeking the following orders:

- i. A declaration that the Claimant's dismissal from her employment was unlawful and wrongful.
- ii. The Claimant be paid her terminal benefits as set out in paragraph 12 herein above totaling to Kshs. 507,100/-.
- iii. The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of twelve (12) months gross salary.
- iv. The Honourable Court to issue such orders and give such directions as it may deem fit to meet the ends of justice.
- v. The Respondent to pay the costs of this claim
- vi. Interest on the above at Court rates.

The Respondent filed its statement of Response on 8<sup>th</sup> May 2012. In the Response it denied the claim and averred that the termination of the Claimant's employment was fair and lawful. It prayed that the claim be dismissed with costs.

The case was heard by me on 24<sup>th</sup> July 2013 and 5<sup>th</sup> February 2014. The parties thereafter filed written submissions.

The Claimant testified on her behalf while the Respondent called **ALLAN RAGE**, the Executive Director and **DENNIS GATURUKU**. The Claimant was represented by Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates while the Respondent was represented by Ms. Oduor of Nungo, Oduor & Waigwa Advocates.

The Claimant's case is that she was employed by the Respondent on 3<sup>rd</sup> November 2009 as a medical laboratory technician working in a Laboratory Clinic. Her first salary was Shs. 20,000/-. She was based in Rongai. On 7<sup>th</sup> July 2011 she went on maternity leave. While on maternity leave, on 4<sup>th</sup> August 2011 she received a letter dated 3<sup>rd</sup> May 2011 giving her one months' notice of termination of employment. Since she was still on maternity leave she responded to the letter pointing out that her maternity leave was expiring on 8<sup>th</sup> October 2011 and she also had 21 days pending leave. She thereafter received a letter reviewing her last date of employment to 10<sup>th</sup> October 2011. The letter also stated that

she was not entitled to annual leave after taking maternity leave. The letter further advised her that she may reapply for re-engagement after resuming duty.

The Claimant testified that she reapplied for employment and was called by the Clinical officer, Prisca Nzau to resume work on 11<sup>th</sup> October 2011. She worked up to 30<sup>th</sup> November 2011 but did not receive her Salary. At the end of November, she went to see the executive director who told her that she was a volunteer and chased her away. She did not go back to work after that. She wrote a reminder for payment of her salary on 6<sup>th</sup> January 2012 but did not receive any response.

The Claimant prayed for payment of 2 months unpaid salary, 1 months' salary in lieu of notice, 21 days salary in lieu of annual leave for 2011 and 12 months' salary as compensation for unfair termination. She also prayed for a certificate of service, costs and interest.

Under cross-examination, the Claimant denied writing a letter for application of employment stamped by the Respondent on 30<sup>th</sup> March 2011. She admitted receiving and signing for a letter dated 1<sup>st</sup> April 2011 renewing her employment contract. She also admitted knowledge that the Respondent was a non-governmental organization (NGO) funded by donor money. She testified that she did not know when the project on which she was working would end.

**RW1 ALLAN RAGI** testified that he was the Respondent's executive director. He knew the Claimant who worked on a project that started on 30<sup>th</sup> March 2004 and was to end on 30<sup>th</sup> March 2010 but was extended to 31<sup>st</sup> March 2011. The Claimant's contract was renewed on 1<sup>st</sup> April 2011.

However the project in which the Claimant was working was not extended. The Claimant was therefore issued a letter notifying her of termination of employment. The letter gave the Claimant one-months' notice effective from 4<sup>th</sup> August 2011. RW1 testified further that he explained to the Claimant the reasons for termination through a staff meeting which he held with the staff every 3 months. He extended the Claimant's notice period as she was on maternity leave so that the end of her notice would coincide with the expiry of her maternity leave on 8<sup>th</sup> October 2011. He was not aware that the Claimant worked beyond October 2011. He was informed by Prisca that the Claimant had approached her for a new contract but he did not receive the Claimant's application. He denied that the Claimant went to his office on 30<sup>th</sup> November 2011 and he chased her away. He explained that this was not possible as he does not deal directly with staff issues.

**RW2 DENNIS GATURUKU KAGUCHU** testified that he worked for the Respondent as a Program Officer. He worked with the Claimant in 2011 when he was a coordinator at Ongata Rongai Centre. He was in charge of the staff at the Centre as the team leader. He was aware about the Claimants application for maternity leave which he received on 11<sup>th</sup> July 2011. The Claimant did not go back to work after July 2011. All employees filled time sheets and he did not receive any time sheets from the Claimant after June 2011. Under cross examination RW2 stated that he received the Claimant's letter of termination. He however could not remember which month. The Claimant was not at work when he received the letter. He admitted there was a black book that every employee signed. He confirmed that the Claimant signed the black book up to November 2011.

There is no contest that the Claimant worked for the Respondent from 3<sup>rd</sup> March 2009 to 10<sup>th</sup> October 2011 when the extended notice for termination of her employment expired. What is contested is whether the Claimant resumed duty on 11<sup>th</sup> October 2011 and worked until 30<sup>th</sup> November 2011 for which period she was not paid salary.

The Claimant produced extracts of the attendance register which RW2 admitted was a true extract of what they referred to as the black book. RW2 also admitted that there were signatures of the Claimant signifying she reported to work in October and November 2011. The book was kept by a data clerk.

The Claimant also produced an email from Prisca who was a clinical officer in charge of the Ongata

Rongai Centre where the Claimant worked, addressed to RW1 informing him of the Claimants resumption of duty. RW1 did not deny the contents of the email. He only stated that he did not receive the Claimant's application for re-employment. The Claimant testified that Prisca called and asked her to resume work on 11<sup>th</sup> October 2011 while payment arrangement were being made.

The Claimant further testified that when she went to the office of RW1 to find out about payment of her salary for October and November 2011 he told her that she was a volunteer and was not entitled to any salary.

Both RW1 and RW2 denied that the Claimant reported back to work. They referred to time sheets filled by staff but none of the time sheets were produced in court. RW2 later confirmed that not all staff filled time sheets.

Under Section 10 (7) of the Employment Act it is the duty of employers to keep all records of staff and where such records are not produced the burden of proving or disproving an allegation by an employee in legal proceedings falls on the employer. I find that the Respondent has not proved that the Claimant did not resume duty on 11<sup>th</sup> October 2011 and worked until 30<sup>th</sup> November 2011 based on the email communication between the center Clinical Officer Prisca and RW2 and also the extracts of the attendance register which RW2 confirmed was maintained at Ongata Rongai Centre.

For these reasons I find that the Claimant is entitled to salary for the month of October and November 2011.

For the same reasons I find that having failed to pay her salary for October and November 2011, the Respondent constructively terminated her employment without giving her any reasons and without notice or pay in lieu thereof.

The termination was therefore unfair by virtue of Section 41, 43 and 45 of the Employment Act. The Claimant is thus entitled to pay in lieu of notice and compensation for unfair termination.

In her letter seeking extension of notice to 8<sup>th</sup> October 2011, the Claimant indicated that she had accumulated 21 days leave. This is confirmed by the Respondents reply which informed her that she did not qualify for annual leave after taking maternity. This is proof that the Claimant did not take annual leave for 2011.

Section 29 (7) of Employment Act provides that no female employee shall forfeit her annual leave on account of having taken maternity leave. For this reason I find that the Claimant is entitled to 21 days' pay in lieu of annual leave.

The Claimant has prayed for gratuity for 3 years. She does not qualify for service gratuity under Section 35 (5) and (6) of the Employment Act as she was a member of National Social Security Fund and her terms of employment did not provide for gratuity.

The Claim for gratuity is therefore not merited.

Certificate of Service is an entitlement to all employees who have served for a minimum period of 4 weeks. The Claimant having been in employment longer than 4 weeks is entitled to the same. The Respondent however confirmed that the Certificate of Service was collected on behalf of the Claimant on 23<sup>rd</sup> April 2012 while this case was pending in court.

For the foregoing reasons I enter judgment for the Claimant against the Respondent as follows:-

- i. One month's salary in lieu of notice in the sum of Kshs. 28,600/-.
- ii. Salary for October and November 2011 in the sum of Kshs. 57,200/-.
- iii. 21 days annual leave of Kshs . 20,020/-.

### **Compensation**

Having worked for only about 3 years and taking into account the manner in which her employment was terminated, I award the Claimant 6 months' salary as compensation in the sum of Kshs 171,600/-.

### **Costs and Interest**

The Respondent shall pay Claimant's costs for this case.

Interest shall be shall become due on decretal sum from date of judgment.

Orders accordingly.

Read in open Court this 4<sup>th</sup> day of June, 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Ms. Mochama holding brief for Nyabena for Claimant

No appearance for Respondent