



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 2 OF 2014

LONAH ALUMERA ANYERA.....CLAIMANT

-VERSUS-

ELDORET WAGON HOTEL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th September, 2014)

JUDGMENT

The claimant filed the statement of claim on 02.01.2014 through Maritim, Omondi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination as carried out was unlawful or unfair *ab initio*.
- b. Salary in lieu of one month notice being Kshs.8,000.00.
- c. Salary in lieu of leave not taken in 2013 being Kshs.8,000.00.
- d. Compensation for unfair termination under section 49(1) (c) of the Employment Act, 2007 Kshs.96,000.00.
- e. Underpayment for 12 years Kshs.165,217.33.
- f. Overtime worked between 8.01.2002 to 13.08.2013.
- g. Delivery of the certificate of service.
- h. Costs of the claim and interest.

The respondent filed the memorandum of response on 27.01.2014 through Kalya & Company Advocates and prayed that the claimant's claim be dismissed with costs.

It was not disputed that the claimant was employed by the respondent from 07.01.2002 to 13.08.2013 as a cleaner and later as a floor supervisor.

The claimant testified that the respondent terminated her employment on 13.08.2013 without a notice and without a formal termination letter. On 13.08.2013, her testimony was that she reported at work at 8.00 am and all departmental heads including the claimant were summoned to a meeting at the respondent's boardroom. The respondent was asked by the management to explain why the houses were not clean enough. She testified that her explanation was that from 2009 to 2012 her work performance had been excellent until she was placed under a manager. She was also asked to explain about alleged theft or lost

window fasteners which she testified was under the maintenance officer so that the issue was outside her scope of duty. After the meeting the respondent's director recalled the claimant to the boardroom and told the claimant that her work was not satisfactory. The director then handed the claimant a paper and asked her to write a resignation letter. The letter dated 27.01.2014 stated as follows:

“Dear Sir,

RE: RESIGNATION LETTER

It is my pleasure to thank you for the years we have been together. I am actually glad all the services and good time and assistance that you have given unto me. May God bless you as well as the work of your hands. It has reached a time that I want to depart. If there is anything that I wronged unknowingly please do forgive. If I will be of any value to you any other time, please you are free to call me.

Yours faithfully,

Signed

Lorna A. Anyera”

The claimant further testified that she was dissatisfied with the demands for her to resign as she wrote the letter of resignation. It was her evidence that the reason for her termination was alleged poor performance. The claimant's evidence was that the director had asked her to resign or suffer some adverse consequences; she became afraid, took the paper and complied by writing the resignation letter. Despite her request for time to think about the director's demand for her to resign, the director was adamant that the claimant writes the resignation letter. Upon termination she was paid full salary for August and September 2013 but she actually stopped working on 13.08.2013.

The respondent did not adduce evidence to rebut the claimant's evidence on the circumstances leading to her termination. The court finds that the reason for the termination of the claimant's employment was alleged poor performance. The court holds that the applicable procedure was notice and a hearing as provided for in section 41 of the Employment Act, 2007. Instead, the respondent opted to invent a procedure involving a staff meeting to review performance generally and followed with the director's directive to the claimant to write a resignation letter. The court finds that the procedure as invented by the respondent was devoid of due process and the resignation was not voluntary

The court has carefully considered the resignation letter and it is clear that the claimant desired to continue in employment thus, **“...If there is anything that I wronged unknowingly please do forgive. If I will be of any value to you any other time, please you are free to call me.”** A voluntary resignation, in the opinion of the court would not import a plea by the employee to be recalled by the same employer in future. The court holds that resignation must be voluntary and unconditional and not reserve the employee's intention to continue in employment. In this case, the court finds that the claimant's account was credible and she was desperately forced out of employment against her clear intention to continue in employment. The respondent's alleged reason for termination namely resignation was not valid and the termination was unfair both under sections 43 and 41 of the Act.

The court has considered that the claimant served with due diligence for over 12 years and she has by letters of commendation demonstrated her outstanding record of service. The court finds that the claimant did not contribute to her termination and she had an expectation to continue in employment for a long time before attaining the traditional retirement age. Accordingly, the court finds that she is entitled to 12 months salaries at Kshs. 8,000.00 being **Kshs.96,000.00** for the unfair termination.

The court has considered the evidence and the submissions. Except for the entitlement to the certificate of service under section 51 of the Act, the claimant did not provide the evidence and submissions to support the other prayers set out in the memorandum of claim and the prayers shall fail. The claimant has

admitted that she did not work after 13.08.2013 but she was paid full salary for August and September 2013. Thus, the court finds that she is not entitled to a month's pay in lieu of termination notice in view of that final two months' full pay.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.96,000.00** for unfair termination by 1.11.2014, in default, interest at court rates to be payable from the date of this judgment till full payment.
3. The respondent to deliver to the claimant the certificate of service by 1.11.2014.
4. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday, 19th September, 2014.

BYRAM ONGAYA

JUDGE