



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 258 OF 2011

KENYA NATIONAL LIBRARY SERVICES BOARD.....CLAIMANT

VS

BEATRICE N. AYOTI.....RESPONDENT

AWARD

Introduction

1. Beatrice N. Ayoti, the Respondent in this case worked for Kenya National Library Services Board, the Claimant herein for a period of twelve years. Upon the Respondent leaving employment without giving the requisite notice, the Claimant brought a claim against her by way of a Statement of Claim dated 17th January 2011 and filed in Court on 23rd February 2011.
2. The Respondent filed a Reply and Counterclaim on 5th April 2011 to which the Claimant responded on 2nd June 2011. The matter was heard on 10th April 17th June and 14th July 2014. The Claimant called its Principal Human Resource Officer, Miriam Wangui King'ori and the Respondent testified on her own behalf.

The Claimant's Case

3. The Respondent was employed by the Claimant as a Supplies Officer from 18th December 1995 to 31st January 2008 when she resigned from the Claimant's employment without giving the requisite one month's notice. Upon receiving the resignation letter the Claimant drew the Respondent's attention to the obtaining regulations governing resignations.
4. The Claimant states that at the time of resignation, the Respondent had occasioned loss of the following items which were under her care:
 - a. 1 laptop computer
 - b. 15 pieces of HP Laser Jet toner cartridges
 - c. 19 pieces of HP Laser Jet toner cartridges
 - d. 1 numbering and stapling machine
 - e. 1 wheelbarrow
 - f. 4-way multipurpose sockets
5. According to the Claimant the loss of these items was caused by the Respondent's negligence while she was the officer in charge of the Supplies Department. Following this loss, the Claimant's Board of Directors made a decision to surcharge the Respondent for the lost items. Deductions

from the Respondent's salary were therefore effected from May 2007 and by the time the Respondent resigned, there was an outstanding surcharge balance of Kshs. 374,374.50.

6. The Claimant therefore claims the following from the Respondent:
 - a. Kshs. 374,374.50 being outstanding balance on surcharge amount;
 - b. Kshs. 43,193.50 being one month's salary in lieu of notice;
 - c. Costs and interest.

The Respondent's Reply and Counterclaim

7. In her Reply and Counterclaim filed on 5th April 2011, the Respondent states that she was employed by the Claimant in 1995 in the position of Supplies Officer II. In 2006 she was transferred from the Supplies Section to the Audit Department.

8. The Respondent denies breaching her employment contract. She further states that the surcharge against her which was effected without any notice to her amounted to condemning her unheard. The Respondent denies the allegations of negligence made against her by the Claimant with respect to the items set out in the claim. The Respondent also takes issue with the decision by the Claimant's Board to surcharge her in spite of a handing/taking over report indicating that some of the items in question were not in the store when she took over. Some of the items were said to have been stolen while under the custody of the store keeper.

9. The Respondent pleads that the surcharge effected against her was unlawful. She therefore claims the following by way of counterclaim:

- a. Kshs. 90,000 being the amount recovered from her salary;
- b. Costs and interest.

Findings and Determination

10. From the pleadings, evidence and submissions filed in this case, the following issues emerge for determination before the Court:

- a. Whether the Claimant's claim is statute barred;
- b. Whether the Respondent's resignation was in breach of the terms of her employment contract;
- c. Whether the surcharge against the Respondent was justifiable and lawful;
- d. Whether the Respondent has made out a proper counterclaim against the Claimant.

Limitation of Action

11. In the final submissions filed on behalf of the Respondent it is submitted that the Claimant's claim against the Respondent is statute barred by dint of Section 90 of the Employment Act, 2007 which requires actions arising from contracts of service to be brought within three years of accrual.

12. However, the Employment Act, 2007 which came into effect on 2nd June 2008 is not applicable to the Claimant's claim which accrued on 31st January 2008. It follows therefore that the applicable limitation law would be Section 4(1) of the Limitation of Actions Act which provides a six year period for filing of actions arising from contracts. Consequently, the Court finds that the Claimant's claim filed on 23rd February 2011 was well within time.

The Respondent's Resignation

13. On 31st January 2008, the Respondent wrote to the Claimant as follows:

“Due to unavoidable circumstances, I hereby tender my resignation effective from 1st February 2008. I am requesting the Director to kindly waive the one month notice, as currently I have an urgent personal matter I have to attend to immediately.

May I take this opportunity to thank KNLS Board most sincerely, management and staff of goodwill who had supported me either directly or indirectly for the 12 years I have been here. I remember I had joined this establishment when my first-born twins were 6 months old and now they are 12 years. (sic) Thanks a lot.

My prayer is, may you continue working together as a team to take this wonderful organization to greater heights for future generations.

Kindly consider my earlier communication on resignation notice and application for annual leave canceled.

I shall be grateful to receive a positive response soon.

God bless you all.

Yours Faithfully,

BEATRICE N. AYOTI MCIPS

14. Resignation notice is a statutory requirement placed on both the employer and the employee with the aim of bringing an employment relationship to a smooth closure. From the employer's perspective, the notice period provides a window for handover by the departing employee and for the employer to source an appropriate replacement in order to assure uninterrupted continuation of operations.

15. In some specific circumstances, an employer may waive the notice period. However, an employee who requests for a waiver must await the employer's response before leaving the work place. A valid waiver of notice period must be express and not implied. As held by **Rika J in Carol Adhiambo Olela Vs Asterisk Limited [2014] eKLR** where an employee leaves employment on their own volition without giving the requisite notice they are bound to pay the employer for the notice shortfall.

16. In the instant case, the Respondent made her request and immediately left the work place. As it turned out her request was declined by the Claimant's letter dated 18th February 2008 and she was therefore deemed to have resigned without giving the requisite notice. The Court therefore finds that she is liable to pay the Claimant the equivalent of one month's salary in lieu of notice.

The Surcharge

17. On 29th May 2006, the Claimant wrote to the Respondent as follows:

“It has been reported that on 5th December 2005, you reported to the Executive Officer Mr Ruto theft of several toner Catridges i.e

(i)HP Laserjet Toner Catridge 14 pieces @ 7,000=KShs 105,000.00

ii. HP Laserjet Toner Catridge 19 pieces @ 6,200=KShs 117,800.00

On 11th December 2005, you further reported another discovery of missing items in the Store. These were twenty (20) pieces of Numbering Machines and nineteen (19) pieces of Stapling Machines. The breakdown is as follows:-

(i) Numbering Machines 20 pieces @ 2,784=KShs 55,680.00

(ii) Stapling Machines Rapid 19 pieces @ 1,450=KShs 27,550.00

This has been viewed as a case of negligence on your part. This office intends to take disciplinary action against you but before the same is instituted, you are called upon to show cause why you should not be held responsible for the loss and why you should not be surcharged.

Your reply should be received in this office within seven (7) days from the date of this letter.

Yours faithfully

F.G. Muchomba

FOR:AG. DIRECTOR”

18. In her response dated 2nd June 2006, the Respondent complained that investigations into the loss appeared to have been undertaken without her involvement. The Respondent also pointed out that the loss was uncovered in the course of reorganisation and stocktaking she herself had ordered upon resuming duty from study leave in the month of November 2005.

19. By its letter dated 28th May 2007, the Claimant communicated its decision to surcharge the Respondent to the tune of Kshs. 464,374 with recoveries being effected from 1st May 2007. In a subsequent letter dated 11th June 2007, the Respondent took issue with some of the items for which she was being surcharged namely; a wheelbarrow and 4 multipurpose sockets which she was not aware of. Additionally, the laptop cited as missing was not in the stores at the time the Respondent took over the Supplies Office from a Mr. T. Waweru on 30th September 2004. The Respondent also complained that her letters on the subject matter had not been taken into account.

20. The Claimant produced minutes of its Human Resource Management Advisory Committee meetings held on 12th April 2006 and 17th August 2006 as well as minutes of the Board meetings held on 17th August 2006 and 11th April 2007. From these records, it would appear that the issue of the missing items and the consequent surcharge against the Respondent were the subject of discussions within the Claimant's management and governance organs. There was however no evidence that the Respondent was ever called to any disciplinary hearing with a view to determining her culpability in the loss incurred by the Claimant.

21. Surcharge is a severe disciplinary action that not only dents the employment record of an employee but also adversely affects their financial position. Consequently, before an employer makes a decision to surcharge an employee, the employee must be afforded every opportunity to defend themselves. The Respondent told the Court that the Claimant ignored her pleas to present her defence before the Board.

22. In the case of ***Fred Makori Ondari Vs The Management Committee of the Ministry of Works Sports Club [2013] eKLR*** the Court reversed an unjustified surcharge against an employee. I take a similar path in the instant case and find that in reaching its decision to surcharge the Respondent, the Claimant ignored the rules of natural justice and thus rendered the surcharge irregular. Flowing from this finding, the Respondent's counterclaim for the sum of Kshs. 90,000 recovered from her salary on account of the surcharge succeeds and is allowed.

Final Orders

23. In the final analysis, I make the following orders:

a) The Claimant shall pay to the Respondent the sum of Kshs. 46,806.50 being the

difference between Kshs. 90,000 recovered from the Respondent's salary on account of the surcharge and Kshs. 43,193.50 being the equivalent of the Respondent's one month's salary in lieu of notice;

b) Each party will bear their own costs.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF NOVEMBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Ogutu for the Claimant

Mr. Ombati for the Respondent