



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 989 of 2011

MARION MILLICENT WAIRIMU.....CLAIMANT

VS

RIFT VALLEY RAILWAYS (K) LTD.....RESPONDENT

Mr. Nyabena for the Claimant

Mr. Cecil Kayo for the Respondent

AWARD

The claim was filed on 30th May 2011 seeking from the Respondent payment of terminal dues and compensation for alleged unlawful and unfair termination of employment.

The testimony by the Claimant in support of the pleadings may be summarized as follows:-

By a letter dated 25th October, 2006 the Respondent employed the Claimant as a motor vehicle driver on Grade RG14 with effect from 1st November, 2006. The employment was subject to six (6) months' probation after which she would be employed on permanent terms.

She was on a fixed gross and consolidated salary of Kshs.26,000 per month. The Respondent made statutory deductions of PAYE, NHIF and NSSF and remitted accordingly. The Respondent also operated a pension scheme upon which she became a member upon confirmation on 11th July 2007. Letter of appointment and the payslip were produced as annexes 1 and 2 to the Statement of Claim. Her salary was raised to Kshs.34,450 upon confirmation as the payslip indicates.

On 22nd April, 2009 her services were terminated for failure to obey lawful instructions in that she failed to report on duty on 17th April, 2009 to take up an urgent assignment and refused to answer telephone calls from the secretary when the Human Resource Manager was looking for her with a view to get her to report to work. Her written explanation was found unsatisfactory and her employment was accordingly terminated. However, by a letter dated 18th June 2009, the decision to terminate was renewed and the dismissal was substituted with a final written warning valid for six (6) months.

The Claimant had already been paid terminal dues and placed on pension and therefore she was re-employed on a fixed contract of three (3) years with effect from 19th June 2009 renewable upon expiry subject to satisfactory performance.

On 9th July 2010, she was alleged to have used the fueling card twice within a span of three (3) minutes. Upon investigations, it was revealed that the card was used to fuel two different cars. She was called to a disciplinary hearing where she gave her explanation to the effect that this was caused by the petrol attendant's error and that no money was lost because the attendant whom she had called as a witness offered to refund the money.

Her explanation was rejected leading to the termination of her employment by a letter dated 10th December, 2010.

During cross-examination by Mr. Kuyo for the Respondent, the Claimant admitted that she had signed two receipts in duplicate but had only surrendered one set to the employer. The 2nd set was retained by the petrol attendant. This was clearly in an attempt to conceal the 2nd transaction.

The Respondent called Grace Muringo Wamithi, a Senior Human Resource Manager in support of the Respondent's case. She told the court that she was present at the disciplinary hearing held on 9th July 2010, and produced the minutes of the same marked as Appendix 'xy5' to the Respondent's Statement of Response.

According to her evidence, the double fueling was discovered during the end of the month reconciliation. The Claimant on the material day used a shell fuel card at Nyayo Stadium twice but only surrendered one receipt as a result Kshs.6,643 could not be accounted for. The Claimant admitted having signed for both receipts but only submitted one. The Management was not satisfied that this was as a result of an error, her integrity was brought to question hence the termination. The witness stood the intense cross-examination by Mr. Nyabena for the Claimant and insisted that the employer had a valid reason to terminate the employment of the Claimant in the circumstances of case.

Upon a careful analysis of the evidence by the Claimant and that of the witness for the Respondent and having considered the pleadings and the documentary evidence presented, it is without hesitation that the court finds that the Claimant dishonestly and with intention to steal from the Respondent used a shell fuel card on two different cars at the Nyayo Shell Station. She only surrendered one receipt and left the other with the petrol attendant so as to conceal the transaction. That the transaction was discovered by an hawk eye during the monthly reconciliation, thereby exposing the gross misconduct by the Claimant.

The Respondent has therefore satisfied the requirements of Section 43(1) of the Employment Act No.11 of 2007, in that it has established on a balance of probabilities that it had a valid reason to terminate the employment of the Claimant and that the termination was done in accordance with a fair procedure having given the Claimant adequate notice to explain her conduct at a duly convened disciplinary hearing.

Having said that in terms of Clause 3.3 of the Contract of the Claimant's employment, she is entitled to receive a Gratuity at the rate of 25% of the period she had served from 19th June 2009, to 10th December 2011, when she left the services in the sum of Kshs.129,442/=

The Respondent had infact offered to pay, the amount vide a letter dated 17th February, 2011 but had reversed its decision to pay the gratuity by a letter dated 7th March 2011.

A close reading of Clause 3.3 of the Contract of appointment does not place any pre-conditions whatsoever on the payment of the said gratuity except stating that the same is payable at the rate of 25% of the three (3) years emoluments at the expiry of the Contract. It is completely silent on payment upon termination of the contract by either party before the expiry of the contract.

Payment of gratuity by operation of the Employment Act No.11 of 2007 Section 35(5) thereof is calculated on the basis of every year worked. This is regardless of whether the termination was lawful or unlawful for the simple reason that, this payment automatically accrues with every completed day, month or year of service and cannot be affected by future conduct of the employee.

The Respondent did not summarily dismiss the Claimant but offered her payment of one month's salary in lieu of notice in the letter of termination dated 16th December 2010.

Accordingly, the court finds that the Respondent is liable to pay to the Claimant:-

- (a) Service Gratuity for the completed period of service in terms of Clause 3.3 of the letter of appointment in the sum of Kshs.129,442.
- (b) One month's gross salary in lieu of notice in the sum Kshs.34,450/=

The claim for compensation for unlawful dismissal is dismissed.

Each party to bear own costs of the suit.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 5th day of January, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE