



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1098 of 2012

ELIZABETH NGINA.....CLAIMANT

VERSUS

EAST AFRICA SAFARI AIR EXPRESS LTD.....RESPONDENT

JUDGEMENT

This is a claim dated 26th June 2012 for unlawful termination of the claimant Elizabeth Ngina. The Respondent filed their defence dated 29th October 2012. The claimant case proceeded for hearing on 31st October 2012 and defence case reserved for hearing on 23rd January 2013 but the respondent opted not to call evidence and parties made their written submissions.

It was the Claimant's case that she was employed by the respondent in November 2006 as a Reservations officer with a salary of kshs.21, 000.00 and a housing allowance of Kshs.4, 000.00 per month and she diligently performed her duties until her termination. That upon termination she was informed that the respondent wanted to outsource services and therefore her services were no longer required.

Claimant also stated that she had a contract of employment which spelled out her terms and conditions of work with 21 days of leave per year and one month notice before termination. That on 2nd May 2012 she was verbally informed that the respondent wanted to outsource and no longer required her services and she was not given one month notice as stated in her contract or paid for the days worked in the month.

In evidence the Claimant stated that as the Reservations Officer for the Respondent who operated airline services and Jomo Kenyatta International Airport (JKIA) her duties were ticketing, booking, reservations and responding to client calls and check-in of passengers and was therefore stationed at JKIA. That on 2nd May 2012 she reported to duty and the supervisor Mr. Nzoka informed her that she was needed at the head office in Kileleshwa, which she did and found Mr. Mohamed the Security Officer for a sister company Fly540 and Mr. Kivindyo the Director of respondent. They held a meeting chaired by Mohamed and it was indicated that claimant's job was to be outsourced and she was given two options to resign and get her dues or be terminated and lose her dues. She stated that she disagreed with the options given and decided that since it was the respondent who wanted to terminate her services they were the ones who should issue her with a termination letter and pay her dues since she did not agree with the options given.

That on 7th May 2012 she called Mohamed on her dues and he indicated that she should wait until they called her. On 9th May she called again and was advised not to call them again. On 18th May 2012 she wrote a demand letter through her advocates but there was no response. On 26th June 2012 she filed her claim out of frustration by the no-response of the respondent.

She now claims she was not given notice of termination or paid in lieu of notice and she is aware there was no outsourcing done on her job as there was an immediate replacement and therefore her termination

was unfair in the circumstances and seek notice pay and compensation. Further she claims for leave days not paid for 2010 and 2012 and her service pay.

On cross-examination the Claimant confirmed that she was on off-shift on 1st May 2012 but did not have evidence since the staff roll was kept by Respondent but on 2nd May 2012 at 5.30 am she was at her place of work at JKIA but at 8.30 am while at check-in counter, her supervisor informed her that she was required to go to the head office which she did and arrived at around 11.30 am and met the directors and by noon she had completed their meeting without an agreement on her termination and hence she worked on 1st and 2nd of May 2012. Her JKIA gate pass was withdrawn further indicating she was terminated

That every time she asked for leave she told that respondent had shortage of staff even though respondent does not allow staff to accumulate leave and verbally her leave was declined and hence since 2010 she had not taken her annual leave. That for 6 years served her service pay was due since she did not abscond and her termination was thus unfair.

In the defence the Respondent states that the Claimant absconded her place of employment from 2nd May 2012 only to turn around on 18th May 2012 indicating that she was verbally terminated and following the contract as between the parties the Respondent on 1st November paid Kshs.25,000.00 for 1 month salary in lieu of notice.

I note the extensive written submissions from both parties.

It is important to restate here that under the Employment Act, every employer has a right to terminate the services of any employee. Termination can be on notice or summary dismissal. However, whichever mode of termination applicable in any case, the same MUST be in writing. Under Section 35(1) (b):

(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing;

Thus a termination was to be in writing. There is no evidence of a written termination notice.

This requirement is very fundamental as in this written notice, the reasons for termination must be stated. By stating the reasons for termination, it serves as a guide as to what dues an employee is entitled to. In the absence of a written notice of termination the Court is not given the chance to assess the fairness or the unfairness of the termination and only the evidence before Court becomes very relevant.

I note that the Claimant was emphatic that she was not given a written notice of termination. That even though she reported on duty on 2nd May 2012, she was told by her supervisor to proceed to the head office for a meeting. There is no evidence to controvert this evidence, that indeed the Claimant reported to work and upon good reasons proceeded to the head office instead of being at her place of work. I note, it is the duty of an employer to keep staff records as to when they are at their place of work and when they are absent. If there was a requirement for staff to make a record of their presence once at work, these records should have been kept by the respondent. Therefore, without any evidence to confirm that indeed the Claimant was not on duty on this day, the Court will decide in her favour in confirmation that she was on duty on this day.

Further, noting the nature of respondent business and the duties allocated to the Claimant, her absence from duty should have warranted a sanction of a warning, a notice to show cause as to why she should not be dismissed or a summary dismissal. However this sanction should have been in writing as indicated in the contract of employment. In the contract of employment part 9:

Termination of Service.

One months' notice of termination of employment will be required in writing on either side. The Company, however, reserves the right of instant dismissal for breaches of honesty, security or for any gross misconduct.

This is the termination clause agreed upon by the parties herein. This Court is guided by the terms of this agreement and the applicable law. That a notice of termination was to be issued or in the alternative where there was a fundamental breach, the respondent was to issue ‘*instant dismissal*’.

Was there a termination notice? Both parties confirm this was not issued.

Did the respondent following a fundamental breach exercise their right of ‘*instant dismissal*’? In the defence and written submissions, the Respondent stated that from 2nd May 2012 the Claimant absconded from duty until 18th May 2012 when she wrote through her lawyers indicating that she was verbally terminated. However there is no evidence as to what action the respondent took upon realisation that the Claimant absconded from duty on 2nd as alleged.

An employee who absconds from duty is one who is absent, away, leave, gone, off, left, missing, departed, vanished, or in desertion. All these words without the knowledge and approval of the employer and thus faces serious sanctions as noted under Section 19(1)(c) :

...the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;

Such an employee will have a deduction from their wages an amount equivalent for the day he or she was absent. This is a legal sanction.

And more fundamental, the law allows for few instances where summary dismissal is sanctioned under Section 44 of the Employment Act: Section 44(4)(a):

... (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

in the case of ***Director General: Office of the Premier of the Western Cape & Another versus SA Association on Behalf of Broens and Others, (2011) 32 ILJ 1077 (LC) 22;***

... The provisions [of the law] create an essential and reasonable mechanism for the employer to infer ‘desertion’ when the statutory prerequisites are fulfilled. In such a case, there can be no unfairness, for the educator’s absence is taken by the statute to amount to ‘desertion’. Only in the clearest of case are covered. Where this is in fact not the case, the Act provides ample means to rectify or reverse the outcome.

And in the case of ***PAWUSA and Another versus Department of Education, Free State Province and Others, (2008) 29 ILJ 3013 (LC);*** in a case where an employee absconds from duty the Court found that:

The employee is accorded an opportunity to explain whether he or she indeed absented himself or herself from his or her official duties without permission of his or her head of department, officer institution ... the employer is then to consider whether or not to approve the reinstatement of that employee.

In this case, apart from the respondent pleading that the Claimant absconded from duty, they do not seem to have done anything about it to benefit from the terms and conditions as agreed between the parties. Thus in the absence of any notice for termination or an action by the respondent that indeed the Claimant absconded, this Court finds that she was verbally dismissed without grounds and find the same to be

unfair in the circumstances.

Having established that the termination was unfair, I will award one month pay as compensation amounting to Kshs.25, 000.00.

Notice was not issued and one month pay in lieu of notice will be awarded amounting to Kshs.25, 000.00.

The claim for work undertaken in May 2012 is therefore outstanding unpaid noting that the Claimant worked on 1st and 2nd may 2012 the date of her dismissal. This Court will award the sum of Kshs. 1,667.00

On the claim for leave, if this had been taken or forfeited where not accumulated the duty rested on the Respondent to confirm these averments. Claimant stated that for three years 2010, 2011 and 2012 she did not go on leave and was owed 21 days per year meaning by the time of her dismissal she was owed leave for 2 ½ years since she commenced work in November of 2006. This Court will therefore award leave for 2 ½ years amounting to Kshs.62, 500.00

On the claim for service pay, I note from the Claimants attachment No. 8 is her pay slip with statutory deduction for NSSF and NHIF. Under section 35(5) of the Employment Act service pay shall be payable to any employee on a contract for one month or more on termination of service however this section shall not apply to employees who are members of a pension scheme under Retirement Benefit Act, gratuity or service scheme under a Collective Bargaining Agreement or any scheme operated by an employer whose terms are more favourable or NSSF. To the extent that the statute so provides, this claim fails.

For the above reasons, this Court enters judgement for the claimant as against the respondent in the following terms:

1. the Claimant's termination was unfair and Court makes the following award;

- a. compensation for unfair termination amounting to kshs.25,000.00,**
- b. pay in lieu of notice amounting to Kshs.25,000.00,**
- c. unpaid dues in May 2012 amounting to kshs.1,667.00,**
- d. unpaid leave amounting to kshs.62,500.00,**

All total due amounting to kshs.114, 167.00

2. costs of the suit; and

3. I direct the Respondent to issue a Certificate of Service to the Claimant.

Dated and Delivered at Nairobi this 26th day of February, 2013.

M. Mbaru

Judge Industrial Court

In the presence of:

Court clerk

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