



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 966 of 2010**

JULIA WACHUKA GITAHU.....CLAIMANT

V

DIGITAL ADVISORY LEARNING CENTRE.....RESPONDENT

**JUDGEMENT**

1. The Claimant herein filed her claim on 25<sup>th</sup> August 2010. She sought payment of salary for the month of April 2010, salary in lieu of notice, compensation, costs with interest and any other relief the Honourable Court may deem just and expedient to grant. She also sought a deposit of a reasonable amount as security for the judgment and costs. The Respondent filed a Memorandum of Reply to claim on 5<sup>th</sup> October 2010. In the Memorandum in Reply, the Respondent admitted employing the Claimant on 1<sup>st</sup> September 2009 but denied dismissing the Claimant. In reply to the Memorandum in Reply of Claim; the Claimant filed a Reply to Memorandum of Reply of Claim. The Claimant by the Reply rebutted the allegations in the Memorandum of Reply to claim filed to the Respondent. The Respondent also filed Further Reply to Memorandum of Claim in April 2012 which was 8 months since the filing of the Claimant's Reply to Memorandum in Reply of Claim on 24<sup>th</sup> August 2011. In the Further Reply to Memorandum of Claim, the Respondent tried to discredit the evidence of Christina Sullivan and attached documents allegedly penned by her subordinates at DALC.

2. The pleadings having closed, the parties set to have the case heard. The hearing scheduled for 12<sup>th</sup> June 2012 did not take off and case was fixed for hearing on 5<sup>th</sup> November 2012. By then, new Judges had been appointed under Article 162(2) of the Constitution and the hearing that took place before me on 5<sup>th</sup> November 2012 was under a new dispensation.

3. The Claimant Julia Anne Wachuka testified. She testified that she worked for 7 to 8 months at DALC. The Claimant denied that she resigned from her employment with the Respondent. She testified that she

was requested not to report back by one Christina Sullivan at the behest of the Respondent's Founder. She was subsequently summoned to report on 24<sup>th</sup> April and she met Dr. Oborah the Chief Executive Officer and Christina Sullivan at the Boardroom where she was advised that her services were being terminated. She was accused of causing losses in DALC. She claimed the salary for 1 month and the salary in lieu of notice. She admitted payment was received in May for her services in March. She was claiming salary for April 2010 and a month's notice.

4. In cross-exam, the Claimant testified that the CEO Dr. Oborah is the one who advised her that the positions she had applied for were too low. She submitted her CV online. She testified that the certificates she gave were for courses she had completed some of which were diplomas at post graduate level. She denied the CV produced by the Respondent was hers. She denied responding to some of the emails sent to the email assigned to the office. She stated the emails produced had been manipulated. She testified the online system did not show that she had given an indication that she was pursuing a PhD. She denied the emails produced by DALC and asserted they were manipulated by DALC. She admitted knowing a Mr. Juma who was a lecturer. She denied being trained by Mr. Juma. She denied being helped by Mr. Juma. She denied receiving the emails from Dr. Oborah. She testified that Dr. Oborah did not complain and that her salary was at first 50,000/= and later was raised to 60,000/= per the Bank statements she had attached to the claim. In re-exam, the Claimant confirmed she attended the interview and was paid on basis of her qualifications. She testified that she was not given a contract.

5. Counsel for the Claimant Mr. Onindo sought an adjournment so as to call Christina Sullivan to testify. The Counsel for the Respondent Mr. Muriuki was opposed to the application for adjournment on the basis that the Claimant had all along had the opportunity to call Mrs. Sullivan. The Court in the interests of justice granted the adjournment and deferred further hearing to 23<sup>rd</sup> January 2013. On 23<sup>rd</sup> January 2013 both Mr. Muriuki and Mr. Onindo closed the Claimant's case. Both advocates proposed 11<sup>th</sup> February 2013 for further hearing. The case was thus fixed for further hearing on 11<sup>th</sup> February 2013.

6. On 11<sup>th</sup> February 2013, the Respondent called Prof. Humphrey Oborah the Founder and Trustee of DALC Education Trust. He testified that the Claimant applied for the position of Head of Academics. He testified that she indicated online that she had an MBA from Herriot-Watt University UK. He testified that when she came for interview she stated she had cleared the coursework and was doing her dissertation for which he needed time. He testified that the qualifications stated were in the online application which the Respondent produced as DALC 8. The witness said he interviewed her and when he wrote to her seeking the additional documents she did not avail them. He denied doctoring the documents produced by the Respondent. He testified that the 2 CVs looked similar. He stated the online information did not tally with the CV. He testified the Claimant would come in late and leave early. He stated that on one occasion she did not show up for a meeting which reflected very poorly on the staff. He stated the Claimant never signed the contract of employment which he had sent by email. He testified that the Claimant just deserted work. He alleged it was due to failure to meet the performance contracts and speculated it might have been the toll of the work on her.

7. In cross-examination the witness testified that the Claimant interviewed well and that at the onset there was nothing to make him believe she was unqualified. He stated he complained via email and that he

would only know she received the mail if she responded. He denied that he edited the emails. He stated he dealt with the Claimant directly. He testified that to do the contract, he need the documents. He stated that the details on the online application are entered online by the applicant. He testified that the information from the online application differed somewhat with the documents. He stated to advertise, interview, hire then fire immediately was not humane. He testified that he gave her opportunity to improve. He reiterated that he gave her the contract but she did not sign it.

8. The Respondent called the second witness Mr. Benson Juma. He stated that he was Head of Finance and Administration and before then was Deputy Head of Academics at DALC. He stated he knew the Claimant Julia Wachuka when she was appointed Head of Academics. He testified that after 2 months the Claimant would delegate some of her duties to him such as monitoring lecturers and this continued till late 2010 and the timetable was not effective starting 1<sup>st</sup> December 2010. He testified that in December and January she was not coming to work in time.

9. In cross-examination he stated he had a problem with Wachuka who was his supervisor. He stated she was absent and he raised that with her. He stated as the Deputy, he could not just sit by and he therefore did the timetable. He stated that he reported the issue to the Executive Director and he stated he did not put it in writing. The Respondent closed his case on that note and parties agreed to put in written submissions.

10. The Claimant filed submission on 27<sup>th</sup> March 2013 and the Respondent filed submissions on 26<sup>th</sup> March 2013. In the submissions parties reiterated their claims. The Claimant's submissions were that she was asked to return in April as there was restructuring going on. She stated she was not notified of the nature of the restructuring. She submitted that she was terminated on account of handling of the April 2010 academic timetable. She submitted that she was not given notice of any misconduct or any warning. She submitted that she had provide the case on balance of probabilities and thus prayed that the Court grants the prayers sought on Claimant to wit salary for the month of April Kshs. 56,000, one month's salary in lieu of notice, Ksh. 56,000, reasonable damages for unlawful termination, costs of the suit and interest at court rates. The Claimant also submitted that she was entitled to 4 months salary as damages on the strength of the case of **Boniface Kabaka v. Mugasia & Kenya Railways [2006] eKLR**.

11. The Respondent submitted that the Claimant had not proved her case to the required standard. The Respondent submitted that the Claimant failed to call Mrs. Christina Sullivan and this there was no corroboration of the Claimant's testimony. The Respondent submitted that the Head of Missions - the 1<sup>st</sup> witness for the Respondent denied the instructions to Mrs. Sullivan. The Respondent submitted that the Respondent's Head of Missions complained of the perceived desertion of duty by the Claimant.

12. The Respondent submitted that only 2 issues were up for determination and these were:-

i. Was the Claimant's employment terminated by the Respondent or was it a case of desertion of duty?

ii. Is the Claimant entitled to any of the reliefs sought?

13. The Respondent submitted that the Claimant misled the institution at the time she was hired and that she never had the qualifications she alleged to have had. Thus, the Respondent prayed that the Court dismisses the suit with costs.

14. The evidence adduced and the testimony of witness all indicate the souring of the relationship between the employee and the employer. The Respondent asserts there was desertion the Claimant asserts there was a constructive dismissal. The case before me has been complicated somewhat by the introduction of what amounts to witness statements by the Claimant and Respondent and the consequent failure to call the witness. Only Mr. Juma was called. The rest - Sullivan, Momanyi, Shumila and Atieno were not called. The evidentiary weight of their "statements" cannot be ascertained. The case for the Claimant was that she was sent on some leave by the Respondent and when she was recalled she was dismissed. That was in April 2010. The Respondent asserts she deserted duty and the termination took place in April as a result of her desertion. The Respondent thus had no obligation to pay salary in May 2010.

15. The Claimant was engaged in 2009 and worked for a few months. She admitted in cross-examination that she had not obtained some of the qualifications. She therefore to my mind did not meet the set criteria for engagement by the Respondent. I would find that though Mrs. Sullivan was not called and though there was an attempt to discredit Mrs. Sullivan, the Claimant was not accorded the safeguards under Section 41 of the Employment Act. She was alleged to have been a poor performer as evinced by the emails from the Head of Missions of the Respondent. She should have been given some opportunity to defend herself. As this was not done, I hold that the constructive termination that took place was unfair. I would therefore only award her a salary in lieu of notice as it seems from the evidence adduced before me the Respondent has case to terminate the services of the Claimant. I will not award the one month salary sought and the damages sought. The case cited before me is not on all fours.

16. In conclusion I enter judgment for the Claimant for Kshs. 56,000. There is no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this **10<sup>th</sup>** day of **May** 2013

**Hon. Mr. Justice Nzioki wa Makau**

**Judge**