



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 75 OF 2013

MARIA WANJEHIA.....CLAIMANT

-VERSUS-

MIDLAND HOTEL (1977) LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 21st June, 2013)

JUDGMENT

The claimant Maria Wanjehia filed the memorandum of claim on 02.04.2013 through Githui & Company Advocates. The claimant prayed for:

- a. **a finding that the termination of the claimant's employment by the respondent was unjustified, unlawful, unfair, wrongful and illegal;**
- b. **the respondent to pay the claimant her statutory entitlements and terminal dues with interest at court rates being a computation for notice in lieu of termination, leave due, leave allowance and other statutory dues to be remitted for time worked; and**
- c. **the respondent to bear the costs of the case.**

The respondent filed on 08.05.2013 the response to the statement of claim together with the verifying affidavit and attached exhibits through Kipkoech Bernhard Ng'etich Advocate of c/o Gordon Ogola & Associates. The respondent prayed that the claim be dismissed with costs.

The claimant's written submissions were filed on 14.05.2013 and the respondent's submissions were filed on 20.06.2013. On 28.05.2013, by consent of the parties, the court made orders as follows:

- a. **Mention on 18.06.2013 at 9.00am to confirm filing of the consent and the respondent's written submissions.**
- b. **If parties do not agree and file the consent by the mention date case to be determined by the court on the basis of the documents filed in court by the parties.**

On 18.06.2013, the parties had not agreed on the terms of a settlement and no consent had been filed. The respondent had not filed the submissions as per the court order and sought, without any variation of the orders of 28.05.2013, to proceed by way of oral evidence. In such circumstances and in accordance with the orders of 28.05.2013, the court directed the parties to attend court on Friday 21.06.2013 at 9.00 am for the judgment.

The facts of this case are as follows. By the contract of employment being exhibit KC1 on the affidavit of Kiptoo Chesire, the respondent employed the claimant to the position of Human Resource Manager with effect from 7.12.2011. The appointment was on an initial probationary period of three months and the

claimant was confirmed in appointment with effect from 7.03.2012. The claimant continued in service with bumpy encounters as set out in the exhibits on the affidavit of Kiptoo Chesire. The uncomfortable encounters between the claimant and the respondent in the course of the employment and as can be made out from the exhibits include the following:

- a. Need to improve on the communication style as per KC3.
- b. Communicating to the management about demands of the employees about their rights such as compensation for overtime, payment in line with the designated grades, pay rise, and appreciation of good work at a staff party as set out in KC4. The respondent considered such communication by the claimant to amount to failure by the claimant to understand her mandate as she was understood as agitating for employee rights against the interests of the respondent.
- c. Alleged payments of terminal dues to an employee who had resigned as under KC5.
- d. Tendering the CV being KC7 that allegedly gave false information on previous employment and fictitious referees.

On 31st or 30th January, 2013, the claimant by e-mail received a termination letter. The letter dated January 30th stated as follows:

“Dear Maria,

When the decision to engage you was made, Midland had never had a formal Human Resource function.

It was hoped that the creation of this office would help the hotel streamline the HR function and bring it into line with best practices in HR.

Whereas there have been some changes, the absence of work schedules during the greater part of your tenure, the misinterpretation of management leave days at the expense of the company, the circulation of benefits for employees summarily dismissed as in the case of Willord, inter-alia have led to losses to the hotel. There has been insufficient HR planning, staffing, leave planning, appraisals, skills gap analysis and concomitant interventions to close skills gaps. There are no clear criteria for appointments, promotions and rewards and disciplinary action.

I also wish to point out the loss of trust, for example, when instructed to issue John Karanja with a dismissal letter. You subsequently telephoned me and informed me that he had resigned. This among other issues, has eroded trust in your ability to maintain confidentiality and indeed to act in the interest of the company. You will recall your e-mail on record, where your interest was again questionable when you met with the house keeping staff and sent me a list of their demands. You did not take the time to explain the position of the management, merely attending the meeting and recording demands which were all passed on to me. In my view, the role of a Manager, is to represent the company and not to take positions that are adverse to the company when there are no legal grounds to do so. You have taken several positions that have been against the company’s interest.

In view of the foregoing, I find your continued stay at Midland untenable.

You may proceed on leave with immediate effect. At the expiry of your leave, you will receive your terminal benefits in keeping with the law.

Wishing you well in your future endeavours.

Yours Sincerely,

Kiptoo Chesire

Director”

The issues for determination in this case are two. First, whether the termination was unfair. Secondly, whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.

Section 41 of the Employment Act, 2007 required the respondent by way of a notice to explain to the claimant the reason for intended removal on account of poor performance or misconduct. The section also required the respondent to hear the claimant in view of the allegations that were to be leveled against the claimant. In the opinion of the court, the notification of the reason and the hearing constitute the fair procedure for terminating employment as envisaged in section 45(2) (c) of the Act. The court finds that the respondent acted in breach of the fair procedure and finds that the termination was unfair.

The court has considered the period of slightly over a year that the claimant served the respondent. The court has also considered the unilateral lamentation by the respondent against the claimant that suggests a rather bumpy encounter between the parties. The court also considers that the unilateral allegations by the respondent were not investigated and established in a fair disciplinary process. The alleged reasons for termination, in the opinion of the court, cannot be said to have been genuine as provided for in section 43 of the Act.

In view of all the foregoing considerations and the unfair termination, the court finds that the claimant is entitled to **Kshs.300,000/=** being six months' gross salaries at the rate of Kshs.50,000/= per month.

As for the other remedies as prayed for and in view of the material on record, the court makes the following findings:

- a. The claim for pay in lieu of 25 leave days has been submitted for the claimant. The claimant took 24 leave days and 4 days sick leave as per exhibit KC9 on the affidavit. The parties agreed to 30 days for annual leave under clause 5 of the contract of employment and the court finds that the claimant is entitled to **Kshs.10,000/=** for the 6 leave days due but not taken.
- b. It is obvious that the claimant was not given any notice before the termination of her employment. The contract of employment exhibit CK1 on the affidavit did not provide for the period of the termination notice but in clause 12 it provided that the Employment Act, 2007 would generally apply. The contract of employment was for payment of a monthly salary and the court finds that it was terminable by giving 28 days notice under section 35(1) (c) as read together with section 36 of the Act. Thus, the court finds that the claimant is entitled to **Kshs.50,000/=** being one month salary in lieu of notice as the reasonable pay in lieu of the termination notice.

The respondent urged that the pay should be on the basis of the basic pay of Kshs.40,608/=. However, section 36 refers to such pay as remuneration which includes the allowances. The court upholds its opinion on the meaning of remuneration in **Fredrick Ngari Muchira, Howard Kipkoech Korir and 98 Others –Versus- Pyrethrum Board of Kenya, Industrial Cause No. 16 of 2013 at Nakuru at Page 21** of the judgment where it was stated:

“...The court has considered the meaning of remuneration and finds that it means gross pay made to an employee by the employer including the salary or wage and other payments such as allowances and benefits such as medical cover, bonuses and others. Remuneration as submitted for the claimants includes salary, allowances and monetary and in kind benefits in view of the employment relationship....”

- c. The court finds that the employment contract in clause 3 provided for leave allowance of **Kshs.10,000/=** and the respondent has not shown that the claimant was paid. The court finds that the claimant is entitled as submitted.

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

- a. A declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to pay the claimant a sum of Kshs.370,000/= by 1.09.2013, failing which interest to be payable from the date of the judgment till full payment.
- c. The respondent to pay the costs of the case.

Signed, dated and delivered in court at Nakuru this Friday, 21st June, 2013.

BYRAM ONGAYA

JUDGE