



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1696 of 2011

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1696 OF 2011

ESTHER NYAGA.....CLAIMANT

-VERSUS-

DHANJAL INVESTMENT LIMITED

T/A TRAVELLERS BEACH HOTEL & CLUB.....RESPONDENT

JUDGMENT

1. This is the judgment in the case of Esther Nyaga, the claimant against Dhanjal Investment Limited T/A Travellers Beach Hotel & Club. The claimant filed the memorandum of claim on 5.10.2011 through Waiganjo Wachira & Company Advocates and the respondent's memorandum of reply to the claim was filed on 03.07.2012 through the Federation of Kenya Employers.

2. The claimant is praying for:

- a) a declaration that she was wrongfully and constructively terminated;
- b) unpaid dues totaling Ksh.128,914.00;
- c) 12 months compensation for dismissal being Ksh. 420,000.00;
- d) certificate of service; and
- e) costs and incidental to this suit.

3. The claimant has pleaded as follows.

- a) By a contract dated 17.01.2011 being annex. EN1 on the memorandum of claim, the claimant was employed as Office Administrator at the respondent's Nairobi office with effect from 15.02.2011. under the contract the claimant was entitled to Ksh. 20, 000.00 being monthly salary; a production commission of 1% of all new business for the respondent hotel for 2.1 to 5.0 million sales; house allowance of Ksh. 10,000.00 and travel and airtime allowance of Ksh. 5,000.00 per month. Her gross monthly pay was therefore Ksh. 35,000.00.
- b) That the work was stressful but the claimant's performance was exemplary.

c) That by a letter dated 9.09.2011 being annex. EN2 on the memorandum of claim, the respondent terminated the claimant's services. The letter stated as follows.

“9th September 2011

Esther Nyaga

Office Administrator, Nairobi Sales Office

Sales and Marketing Department

Dear Esther,

RE: TERMINATION OF CONTRACT

With reference to this letter we are terminating your employment contract giving you two weeks notice as per your employment letter dated 17th January due to failure to perform duties to the expected standards, inability to follow instructions and insubordination. Effectively your last working day will be 22nd September 2011.

Kindly handover any pending work before your departure and any company property that may be in your possession to the General Manager, or any other manager as may be appointed by him. Upon clearance, your final dues will be calculated and paid to you at the earliest possible date by the Accounts Department.

We, on behalf of the hotel management, take this opportunity to thank your contribution to the company during your tenure and wish you all the best in your future endeavors.

Yours Sincerely,

TRAVELLERS BEACH HOTEL

SIGNED

SIGNED

GRACE KARIUKI

HUMAN RESOURCE MANAGER

CC: Managing Director

Finance Controller

Personnel File.”

FREDDIE KIURU

GENERAL MANAGER

d) The claimant wrote a demand letter through her Advocates dated 21.09.2011 being annex EN 5 but the respondent did not reply.

4. The respondent pleaded as follows.

a) The claimant was paid monthly Ksh.20, 000.00 salary plus Ksh. 5,000.00 being house allowance.

b) That the termination letter quoted above was issued to the claimant for failure to perform her duties to expected standards, inability to follow lawful instructions and insubordination. The termination letter gave her two weeks termination notice as per her agreement of service.

c) The claimant objected to the reasons for termination and the termination notice which was short because she had ceased to serve on probationary period. The claimant's letter of protest is dated 13.09.2011 being annex 3 on the memorandum of reply.

d) By the letter dated 21.09.2011 being annex 4 on the memorandum of reply the respondent upheld the termination and wrote to the claimant thus,

“Dear Esther,

RE: TERMINATION OF CONTRACT

Further to your request to know why you were terminated, kindly see below;

1. **On Thursday, June 23, you wrote a request to be away from 27th to 29th June to attend a school trip. Caroline responded on Friday, June 24 asking you to fill a leave form and send for approval. This was not done, yet you went ahead and left the office without anyone's approval. As a result the office was closed down for 2 days as Jemimah was already away with a sick child.**

2. During the May Sarit center expo2011, a sale was lost due to your carelessness and laxity. The client was a teacher well known to you and had you followed up we would have clinched that sale.
3. Tuesday, August 23 Mr. Nyakota requested Caroline to ask the Nairobi office to pick up an important letter from an insurance company. She then called you, asking that you mail it urgently to her email address. After waiting for some time you, Esther called Mr. Nyakota to ask if it was okay to send the letter as Caroline had asked, yet she was the one who had delegated the task to you. This showed a lack of follow through and inability to take instructions from your superior since Caroline is the current head of sales. This mail was almost delayed yet it was very urgent as you took time to verify with Mr. Nyakota.
4. On several occasions Caroline has issued directives that all mail correspondence to clients and confirmed bookings be copied in to all necessary departments including her email address to facilitate smooth operations, but there are still issues with the same.

According to Caroline Karumei, you were informed of the complaints and issues on several occasions. At some point Caroline went ahead to ask Jemmimah who is in charge of the Nairobi office to have a word with you and ensure that the office runs smoothly.

We have hereby decided that the termination stands, since we require cooperation between the Nairobi Office and this office throughout. However, your notice period has been extended by a further two weeks, till 8th October. Thank you.

Yours Sincerely,
TRAVELLERS BEACH HOTEL

SIGNED

SIGNED

GRACE W. KARIUKI FREDDIE KIURU
HUMAN RESOURCE MANAGER GENERAL MANAGER

CC: Managing Director, Finance Controller, Security Manager, Personnel File”

- e) That upon receipt of the termination letter extending the notice, the Claimant elected not to report on duty as expected on 23.09.2011. For the respondent that meant that the claimant had decided not to serve during the notice period and thereby opted to terminate her contract of employment. The management decided to work out her terminal dues up to 22.09.2011, leave on prorata basis, and leave travelling allowance on prorata basis. But that the claimant was to pay the respondent 14 days of the termination period she did not work. The grievant did not clear with the respondent to facilitate the payment of the terminal dues.
 - f) The grievant having worked from 15.02.2011 to 22.09.2011, she served the respondent for only 7 months
5. The cause came up for hearing on 29.10.2012 and the claimant testified to support her case. The respondent did not call any witness. The claimant stated in her evidence as follows:
 - a) That the respondent employed her as per the contract dated 17.01.2011 being annex. EN1 on the memorandum of claim.
 - b) That she was entitled to commissions as per the letter of appointment and as she pleaded in her claim. The respondent did not pay the commissions.
 - c) At the time of termination she applied for leave since she was a student of Master of Arts. She did not get the leave approval but instead she received the letter of termination.
 - d) Before the termination letter she received no warning or notice for misconduct or any hearing on the allegations.
 - e) The contractual termination notice was supposed to be one month but she did not receive it. Instead the termination letter gave her two weeks. After raising her concerns on the irregularity the respondent purported to extend the notice to one month, but long after the decision to terminate had been made.
 - f) She had not taken her annual leave. She prayed for judgment.
 6. The court has considered the pleadings, the submissions and the evidence on record and makes the following findings.

a) High court decision in **Samuel G. Momanyi Versus Attorney General and SDV Transami Kenya Ltd, Constitutional Petition No. 341 of 2011 at Nairobi** is upheld in finding and holding that section 45(3) of the Employment Act is unconstitutional in so far as it denies access to justice an employee who has been in employment for less than thirteen months immediately before the date of termination the right to complain that he has been unfairly terminated. Thus, any employee disregard the tenure of the previous service is entitled to seek redress in event of unfair termination and the court finds that the claimant was entitled to file and bring this cause even if she had not served for more than thirteen months.

The contract between the parties prescribed that either party was to give thirty days termination notice or salary in lieu of notice, thus, **“on confirmation, the appointment may be terminated by either party giving the other party thirty (30) days notice or salary in lieu of notice.”** The respondent failed to give the claimant the relevant notice and later purported to regularize the mistake. The termination was upheld in the subsequent letter when it stated, thus, **“We have hereby decided that the termination stands, since we require cooperation between the Nairobi Office and this office throughout. However, your notice period has been extended by a further two weeks, till 8th October. Thank you.”** The termination letter had on the other hand stated, thus, **“With reference to this letter we are terminating your employment contract giving you two weeks notice as per your employment letter dated 17th January due to failure to perform duties to the expected standards, inability to follow instructions and insubordination. Effectively your last working day will be 22nd September 2011.”** The subsequent letter having upheld the termination which was effective from 22.09.2011, the pretended extension of the notice period to make the thirty contractual days served no purpose. It was a statement that your last day at work will be on 22.09.2011 but if you are naïve and you cannot understand, so have your further days to make the thirty days; a fictitious further 14 days on whose basis the respondent seeks a pay back like one who eats his cake and wants to have it – a very shameful venture. The court finds that the respondent breached the contract of employment as it failed to give the claimant the agreed thirty days notice and the claimant is entitled to **Ksh. 20,000.00** in lieu of the notice.

b) The claimant would have worked for the whole month of September but for the respondent’s failure to serve the relevant notice. The court considers that the claimant would not have secured any useful employment between 22.09.2011 and the end of September, 2011. Thus, the court finds that the claimant was entitled to the gross salary for September, 2011 being **Ksh. 35,000.00**.

7. The claimant having served for only seven months and taken at least four of her leave days and being entitled to 26 leave days and public holidays, the court finds that she is entitled to **Ksh.25,000.00** for unpaid leave and as prayed for in the memorandum of claim.

8. The claimant has prayed for twelve months gross salary for unfair termination. The court finds that the termination was unfair because the respondent breached the due process for termination by failing to give the agreed termination notice. Further the respondent has failed to prove the reasons for termination as envisaged in section 43 of the Employment Act, 2007. The allegations against the claimant required notification and a hearing to establish the truthfulness as provided for in section 41 of the Act. Instead the respondent engaged in a monologue, setting up the allegations and then unilaterally finding the same to be true. The respondent did not even provide any evidence in court to show and establish the validity of the alleged misconducts. It is notable that considerable time elapsed between the date of the termination letter and the dates of the alleged misconducts so that in the opinion of the court the allegations were mere afterthoughts and therefore oppressive as offensive to expeditious administrative action expected of the respondent. It was submitted that as section 45(3) had not been found unconstitutional at all material times, the respondent should not be found liable for unfair termination since the claimant had served for only seven months. But is it not for the kind of injustice that the claimant suffered that the section was found unfair and unconstitutional? Could a patient be denied a certified potent medicine because the medicine had not been discovered and certified at the onset of the ailment afflicting the patient? The legitimate thing would be to save the life of the patient. Accordingly, the termination was unfair and taking all the circumstances of the case into account including the period served by the claimant, the court awards the claimant four gross monthly salaries for unfair termination being **Ksh.140, 000.00**.

9. The court finds that the claimant has failed to prove the claim for payment of commissions.

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

- a) the respondent to pay the claimant a sum of Ksh. 220,000.00 plus interest at court rates from the date of the judgment till full payment;
- b) the respondent to draw and deliver the claimant’s certificate of service; and
- c) the respondent to pay the costs of the cause.

Dated, delivered and signed at Nairobi this 9th day of November, 2012

Byram Ongaya
JUDGE