



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 229 OF 2016

RAKERI WANJIRU WANJIKU.....CLAIMANT

-VERSUS-

MJENGO LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th May, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 13.10.2016 through Kangethe Kuria & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Payment of special damages Kshs. 173, 936.00 being Kshs.5,328.00 outstanding salary for December 2015; Kshs. 15, 328.00 per month for each of the months January, February, and March 2016 as unpaid salary; 7 years' pay for annual leave due and not taken Kshs.107,296.00; and one month pay in lieu of the termination notice Kshs. 15, 328.00.
- b. 12 months' salaries being compensation for unfair termination.
- c. Costs of the suit.
- d. Interest on (a), (b), and (c) above at court rates.
- e. Any other or further reliefs as the honourable court may deem just to award in favour of the claimant.

The statement of response was filed on 11.11.2016 through Ochieng', Onyango, Kibet & Ohaga Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

It is not in dispute that the parties were in a contract of employment. The respondent employed the claimant as a factory worker by the letter dated 28.10.2009 and effective 01.11.2009 at a gross monthly pay of Kshs. 7, 435.00. The claimant successfully completed the probationary service of six months and was confirmed in employment.

On 20.12.2015 the claimant was involved in a road traffic accident and she was admitted in hospital for treatment. The claimant pleaded that she was admitted in hospital until 12.02.2016. The claimant informed the respondent about her predicament and the respondent has pleaded that it received the letter

dated 18.02.2016 from PCEA Kikuyu Hospital notifying that the claimant had been admitted at the hospital with an injury on the right leg with associated foot drop secondary to a road traffic accident. The respondent's further case is that the respondent allowed the claimant to remain on sick leave in view of the injuries and the hospitalisation.

The claimant's case is that upon discharge from the hospital, she attempted to resume duty but the respondent informed her that her contract of service had been terminated and she was not welcomed to the respondent's premises. On the other hand, the respondent's case is that the claimant voluntarily opted to resign from employment by the letter of 16.03.2016 because she wished to resign owing to ill health resulting from the road traffic accident of 20.12.2015 which rendered her incapable of performing her duties.

The **1st and main issue** for determination is whether the claimant was terminated from employment or if she voluntarily resigned from employment. The claimant's testimony is that she wrote the address and she signed the blank sheet of the purported letter of resignation so that she never authored the body of the letter about the resignation. She had signed the blank paper for purposes of the Insurance Company paying her pension dues. The claimant's testimony was that the respondent's accountant called Bernard had assured her that she would resume duty upon recovery. RW, the respondent's human resource assistant one Anne Mulekye Ndunda testified that the claimant gave the resignation letter to RW on 16.03.2016 at the claimant's house. RW's account was as follows:

- a. RW was driven to the claimant's home on 16.03.2016 to check on the claimant's medical progress.
- b. During the visit the claimant expressed desire to access her contributed pension benefits and RW advised the claimant that certain documents would be needed. Upon the advise, the claimant wrote some letter in Swahili and which RW then authored in English by way of translating the same to English. The driver read the English version to the claimant, purportedly translating it to Swahili for the claimant to understand and confirm the content. The claimant then signed the English version filed in court.
- c. RW never retained the Swahili version that the claimant authored.

The court has considered the evidence. The evidence by RW is clear that the claimant never authored the resignation letter but it was authored by RW. It is also clear that the claimant did not understand English and the driver was never called to testify about the translation as was said to have been read to the claimant and as was alleged in RW's evidence. From the evidence of RW and the claimant, it is also clear that at all material time the claimant had no intention to resign but only desired to access the pension funds. Accordingly, the court returns that the claimant never resigned from employment because she never authored the resignation letter and at all material times, she never had the intention to resign.

The **2nd issue** for determination is whether the termination was unfair. The reason advanced for the respondent was that the claimant resigned but the court has found that there was no such valid resignation. Accordingly, the court returns that the termination was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007.

The **3rd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The court has considered that the claimant had served the respondent for over 6 years and the claimant desired to continue in employment. The court has considered the aggravating factor in the manner RW mislead the claimant and purported to cunningly procure a resignation that was never intended by the claimant. In the circumstances the claimant is awarded the maximum 12 months' gross salaries at Kshs. 13, 287.00 per month making a sum of **Kshs.159, 444.00** in compensation for unfair termination under section 49 (1) (c) of the Employment Act, 2007.

b. RW explained how the claimant was paid during her sick leave and as per section 30 of the Employment Act, 2007 so that the claims for outstanding salaries or unpaid salaries for December 2015, January, February, and March 2016 will therefore fail. RW relied upon the record on leave days taken by the claimant and the prayer on payment for annual leaves will also fail.

c. As submitted for the respondent the prayer for aggravated or exemplary damages was unjustified and the same will fail.

d. The claimant did not file and serve final submissions as was directed by the court and is therefore awarded only 75% of the costs of the suit.

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

a. The respondent to pay the claimant Kshs. 159, 444.00 by 01.07.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

b. The respondent to pay 75% of the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 5th May, 2017.

BYRAM ONGAYA

JUDGE