



Case Number:	Cause 1542 of 2013
Date Delivered:	18 Mar 2016
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Mathews Nderi Nduma
Citation:	Catherine Rotich Holden v Board of Governors,Nairobi International School & another [2016] eKLR
Advocates:	Mr. Okoth for Claimant Mr. Waigwa Gichuki for Respondent
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Cause awarded
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO 1542 OF 2013

CATHERINE ROTICH HOLDEN.....CLAIMANT

Versus

BOARD OF GOVERNORS,

NAIROBI INTERNATIONAL SCHOOL1ST RESPONDENT

RADHIKA LEE.....2ND RESPONDENT

Mr. Okoth for Claimant

Mr. Waigwa Gichuki for Respondent

JUDGMENT

1. This suit was commenced vide a Statement of Claim on 25th September, 2013. The Claimant was employed by the Respondent on 27th July, 2012 as human Resource Manager and Student Counselor at Nairobi International School (the School) with effect from 1st September, 2012.

2. The duties of the Claimant included administration of various personnel policies, processes and employment agreements, collaborate with the school senior management team to implement and maintain service and programmes consultant and advise the school on personnel issue and co-ordination and recruitment of staff.

3. The Claimant states that she was paid a gross salary of Ksh.200,000 per month and was employed on a fixed term contract of 34 months.

4. The Claimant worked as the Facility Human Resource Administrator and Staff Development Coordinator at the Institute of Education University, London (the University) and was eligible to work till her retirement age of 65 years earning a monthly salary of £2,861.91 an equivalent of Kshs.400,000 per month.

5. The Claimant states that she abandoned jobs in London to join the Respondent based on the offer made to her and she had in fact dropped another job offer by Neuerth General Trading LLC, a fact known to the Respondents.

6. In order to persuade the Claimant to join the Respondents, the Respondents offered to pay the Claimant freight charges from London to Nairobi and relocation expenses as a way to entice the Claimant to join the Respondents in their school. The Claimant relies on Appendix 'CRH5' in the respect.

7. As a further incentive, the Respondents advanced an interest free loan to the Claimant to enable her settle in Kenya. The loan would be recovered from the Claimant's salary by monthly instalments of Kshs.24,566 per month for the entire period of 34 months.

8. The Claimant avers that from 1st November, 2012, she diligently and studiously executed her work at the school as Human Resource Manager and Student Counsellor. Indeed, the 2nd Respondent complimented her and referred the Claimant to third parties as seen in Appendix 'CRH6'.

9. The students appreciated her work as seen in Appendix '7'.

10. The Claimant had no adverse record whatsoever during her tenure with the Respondents.

11. On or about the end of June, 2013, the Claimant sought 10 days leave from work beginning 17th July, 2013 to enable her attend her wedding and honeymoon which the 2nd Respondent was aware of. The 2nd Respondent, verbally agreed to the Claimant's request for leave. The claimant filed out an online leave application on the 17th July, 2013 for record purposes. The Claimant's user account in the school was disabled by the 2nd Respondent on 29th July, 2013 so the Claimant was unable to access the leave form.

12. On 16th July, 2013, the Claimant filled a reminder manual leave application to be away from work from 17th July, 2013 and handed over the reminder leave application form to the 2nd Respondent, the school Operation Manager. The Claimant worked on the eve of her wedding up to 3.00 O'clock in the afternoon.

13. As at 16th July, 2013, the Claimant had taken less than six of her annual leave.

14. On 17th July, 2013 the 2nd Respondent called the Claimant to congratulate her on her wedding and wished her luck in her marriage. The Claimant proceeded to her honeymoon up to 29th July, 2013. Appendix 'CRH8' is evidence of Claimant's marriage.

15. On 30th July, 2013, the Claimant reported to her work in the school. The 2nd Respondent summoned the Claimant to her office and the 2nd Respondent handed to the Claimant a letter dated 29th July, 2013 terminating the Claimant's services as a Human Resource Manager without any warning or notice. The Claimant's IT access was immediately disabled. The termination letter is 'CRH9'. The Claimant was asked to leave the school immediately. The 2nd Respondent purports to declare the claimant redundant as a Human Resource Manager at the school but said nothing about Claimant's role as Student Counselor.

16. The Claimant states that the termination was unlawful and unfair and a total disregard of the employment and labour laws obtaining in Kenya. The claimant states that the action by the 2nd Respondent was cavalier, callous and hemorrhaged her dignity as a human being and betrayed the trust and confidence that she had in the 2nd Respondent not only as her employer but also as her supposed friend of many years.

17. That the action by the 2nd Respondent prompting the Claimant to terminate her stable and permanent employment of many years in London in order to join the Respondents in the school and subsequently terminating her employment in such an instantaneous, diabolical and obtuse manner, the Respondents acted unfairly contrary to Article 41 (1) of the Constitution of Kenya.

18. That trauma was added to her by virtue of her newly acquired status as a married woman by a

friend of long standing.

19. The claimant prays for a declaration that the Respondents jointly and severally unlawfully and unfairly terminated the employment of the Claimant.

20. That the Respondents be ordered to pay to the Claimant,

a. Twenty five months salary being the remainder of the Claimant's 34 months fixed term employment at Nairobi International School @ Kshs.200,000 per month amounting to Kshs.5,000,000.

b. Four months salary in lieu of notice @ Kshs.200,000 per month amounting to Kshs.800,000

c. General damages

d. Costs

e. Interest on the amount

f. Order directing the Respondent to provide the Claimant access to her property left at school

g. An order directing the Respondent to issue the claimant with a certificate of service not prejudicial to the Claimant

Defence (under protest) and Counter Claim

21. The Respondents filed a Statement of Defence and Counter Claim on 15th November, 2013 in which the particulars of Employment of the Claimant are admitted with savings.

22. The gross salary of Kshs.200,000 per month is admitted. The period of a fixed term of 34 months is however denied by the Respondents. The Respondents rely on the assertion on Appendix 'CRH2' produced by the claimant herself.

23. The Respondents deny knowledge of the employment circumstances of the Claimant in London as alleged or at all and state that, quite to the contrary, the Claimant kept pleading with the 2nd Respondent to get her a job in Kenya. That the Claimant did not disclose at the time that she had any "stable job and promising career ahead of her....."othathad".....droppedanothejoboffeshad received from a multinational company called Neurth General Trading LLC".

24. That the Claimant was very happy when she was offered a job by the Respondents and the allegations she has made in the Memorandum of claim are completely untrue. The Respondents rely on annexure 'NS2(a)' and 'NS2(b)' in this respect.

25. That the payment of the freight charges for the claimant was on her own request and was not an

enticement as alleged or ta all. Appendix 'CRH5' contradicts her assertions and depicts her dishonesty and lack of gratitude to the 2nd Respondent. That the claimant undertook to refund the relocation expenses as per annexures NS3, NS4; NS5, NS6, NS7 and NS8 to the Statement of Defence.

26. That the Claimant spent a total of Kshs.632,756/82 (GBP 4,610.00) on her relocation upon her request and the Claimant has not refunded the amount as may be seen from annexure 'NS9' 'NS10', 'NS11' and 'NS12'.

27. The Respondent advanced an interest free loan to the Claimant in the sum of Kshs.835,250 whose monthly repayment was Kshs.24,506 and was not conditional for repayment within any fixed period. This facility is available to all staff of the Respondents per annexure 'NS13'.

28. That the Claimant owes the Respondent (Kshs.614,156 + 632,756/82) totaling Kshs.1,246,912.82 to which the Respondents counter Claim.

29. The Respondents have no issue with the Claimant's competence and ability to work but as a Student Counsellor her character became an embarrassment to the school in that, unknown to the Respondents, the Claimant was a practicing musician and dee jay. That the Claimant's performances in certain clubs portrayed the school in bad light, see annexure 'NS14' 'NS15' and 'NS16'.

30. That the Claimant did not disclose this character to the 2nd Respondents at the time of engagement and this came out as an embarrassment to the school.

31. The Respondents state that the averment in paragraphs 16 – 27 of the Memorandum of claim are irrelevant to the suit except that the 2nd Respondent was concerned that the Claimant was negatively getting involved in her son's life and family matters.

32. The Respondents state that the Claimant was informed of reasons for her termination from employment in the meeting held on 15th June, 2013 as per annexure '17'. The Respondents deny that they terminated the employment of the claimant unlawfully and unfairly and put the Claimant to strict proof thereof.

33. The Respondents also deny that the Claimant was declared redundant and state her employment was lawfully terminated in accordance with the law and her terms of contract of service. That her final dues in lieu of notice were fully applied on her outstanding loans. The Claimant was not entitled to four (4) months' notice. The allegation that the Respondent violated Article 41 of the constitution and Article 14 of the ILO termination of Employment Convention No. 158 of 1980 are denied in toto.

34. The Respondent prays that the Claimants suit be dismissed with costs.

Counter Claim

35. The Respondent prays for the payment of Ksh.632,756/82 paid in respect of freight charges for relocation from London to Kenya. To date the said amount has not been refunded.

36. The Respondent further claim outstanding loan to the claimant in the sum of Kshs. 624,156. Total claim by the Respondent from the Claimant is Kshs. 1,246,912.82. The amount is claimed with interest

and costs.

37. The Claimant filed a Reply to the Statement of Claim and Counter claim on 12th June, 2014 in which she joins issues with the Respondents and denies the particulars of Counter claim and puts the Respondents to strict proof thereof. The claimant adds that the unlawful termination of employment frustrated the repayment of the balance of the loan in the sum of Kshs.614,156. The Claimant restates that the Respondent was fully aware of the opportunities she forfeited to join the Respondents and the 2nd Respondent enticed her with incentives and promise of a good career in Kenya.

38. That the 2nd Respondent was well aware of her interest in music which was well indicated in her Curriculum vitae attached as appendix 'CHR1' at page 20. The 1st Respondent in fact hired the services of the Claimant as a deejay during school ceremonies and in particular, on the 1st Respondent's 50th birthday party as per appendix 'CHRA' and during the end of the year Christmas Party in December, 2012 at the Ghanaian high Commission per Appendix 'CHRB'. The Claimant states that the freight charges were offered by the Respondent and claimant was to repay only 50% of the charges. The rest of the allegations are denied.

39. The Claimant testified under oath extensively and was closely cross-examined by Mr. Waigwa, Gichuki Advocate for the Respondents on the salient feature of this case. The 2nd Respondent also testified at length and was cross-examined extensively by Mr. Okoth for the Claimant.

40. Upon a careful analysis of the evidence before court, the following issues stand out for determination;

- i. Whether the termination of the employment of the Claimant was for a valid reason and if it was implemented in accordance with a fair procedure
- ii. Whether the Claimant is owed the reliefs sought
- iii. Whether the counter has merits and if so, the amounts payable to the Respondents in respect thereof

Determination

Issue i

41. It is apparent that the Claimant and the 2nd Respondent were very close friends for a considerable long period. The Claimant was a student of the 2nd Respondent in high school and when she went to study abroad, their relationship continued. Indeed, the 2nd Respondent considered the Claimant as her daughter. It is this close relationship which led the Claimant to leave employment in London and join the employment of the Respondents on the position of Human Resource Manager/Student Counsellor.

42. It is in dispute whether the Claimant approached the 2nd Respondent to get her employment in

Kenya or the 2nd Respondent lured the Claimant to leave her employment in London and join the Respondent's school. What is without a doubt is that by fact of their close relationship, the Claimant and 2nd Respondent confided in each other and therefore it is not far-fetched to conclude that the two had discussed in detail their personal circumstances at the time before the Claimant travelled from London to join the Respondents.

43. High emotions were expressed by the Claimant and the 2nd Respondent during the hearing of this case and as a result, the court tried to get the parties to negotiate an out of court settlement with a view to preserve their longstanding friendship. However, it became clear that the differences between the two had become irreconcilable. It is regrettable that human relations often end up in this manner.

44. In the words of the 2nd Respondent, the Respondent had no issue in the work performance of the Claimant. Her work record was good and she was a high achiever with no adverse record at all arising from her work.

45. It is common cause that the good relationship between the Claimant and the 2nd Respondent continued but the 2nd Respondent unbeknown to the Claimant felt that the Claimant and the 2nd Respondent's son had developed a strong friendship which the 2nd Respondent considered detrimental to the life of her son. There is no evidence that the 2nd Respondent shared her fears with the Claimant. What is clear is that these fears were fully blown following the participation of the 2nd Respondent's son and his girlfriend in the wedding of the Claimant.

46. The 2nd Respondent was not aware that her son was going to be involved in this wedding including being a best man until, wedding photos were uploaded in the social media.

47. The 2nd Respondent was seriously aggrieved by this development and immediately wrote a letter terminating the employment of the Claimant while she was still in her honeymoon. Upon the Claimant's return to work, the 2nd Respondent summoned the claimant to her office. The 2nd Respondent explained her disappointment in the conduct by the Claimant in involving her son in her wedding without the 2nd Respondent's knowledge and handed to her the letter terminating her employment dated 29th July, 2013. The letter states that 'we hereby regret to inform you that the Institution no longer requires a Human Resource Manager and therefore we shall no longer be requiring your services and are forced to terminate your services with immediate effect'.

48. As stated earlier, as at 29th July, 2013, the Claimant was on annual leave and in her honeymoon, after her wedding held on 17th July, 2013.

49. The 2nd Respondent told the court that the Claimant's employment was not terminated for any wrong doing even though she had embarrassed the school in joining her husband in deejay work especially in notorious nightclubs which conduct placed the school in bad light, especially because the claimant was a Student Counsellor and therefore had big influence on the student. It is a fact that the claimant was not formally questioned about this conduct, was not warned to desist from engaging in deejaying nor did she face any disciplinary action in respect of this conduct, the 2nd Respondent apparently was not happy about.

50. The Court finds that as a matter of fact that the Respondents were aware at the time they employed the claimant that she was "keen on music and provides entertainment, PA and DJ services through a co-owned company (with her future husband) Digital Dreams DJs" reflected in the Human Resource profile of Cathy Holden, which the claimant submitted to the Respondents via email before the claimant had been employed by the Respondents. It is also apparent from the evidence before court

that the Respondents engaged the claimant to provide entertainment during school activities. It is therefore not correct for the 2nd Respondent to say, as she did before court that she had no knowledge whatsoever that the claimant was involved in entertainment activities during her free time. It is also clear that no effort was made by the Respondents to stop the Claimant from such engagements.

51. The totality of the evidence before court has led the court to the inevitable conclusion that the termination of the employment of the claimant was actuated by extraneous matters removed from her work.

52. That the Respondents chose to hide under the euphemism that, her services were no longer required without warning, notice or opportunity to showcause why her services should not be terminated.

53. The Claimant had made big commitment in leaving Europe and choosing to come back to Kenya to serve the Respondents. The Respondents gave her favourable terms and advanced personal loans to her toward enhancing her comfort in the service of the Respondents.

54. The sudden termination of employment, while on annual leave, for no apparent reason, and immediately after a major step in life of marriage struck the claimant like a thunderbolt. This shock was reflected in the animosity shown by the parties in court and immense mutual pain by the claimant and the 2nd Respondent as a result of the breakage of what may aptly be described as a parent/child relationship.

55. This notwithstanding, the Respondents were bound to respect the law of the land in terminating the employment of an estranged dear child.

56. Section 43(1) of the Employment Act, 2007 provides,

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45”.

57. Section 45 (1) of the Act provides,

“45(1) No employer shall terminate the employment of an employee unfairly”; whereas section 45(2) provides

“45(2) A termination of employment by an employee is unfair if the employer fails to prove –

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason –*
 - i. *related to the employees conduct, capacity or compatibility; or*

i. *that the employment was terminated in accordance with fair procedure*”,

58. It is the court's finding that the Respondents have failed to provide a valid reason for the termination of the employment of the claimant related to the Claimant's conduct, capacity or compatibility.

59. The claimant has therefore proved on a balance of probability as is required of her under Section 47(5) that the termination of the employment was wrongful and unfair substantively and procedurally.

Issue ii

60. To this end, the claimant is entitled to compensation in terms of Section 49(1) (c) as read with Section 49(4) of the Act. Section 49(1) (c) provides for maximum compensation of 12 months salary for unlawful and unfair termination of employment. On the other hand Section 49(4) provides the matters to be taken into account by the court in assessing the compensation payable to the Claimant.

61. In this regard, it is the court's finding that the claimant was not employed on a fixed term contract. The claimant was a very good performer and had no adverse record at work. The claimant did not contribute to the termination of employment having received no warning of any misconduct, notice to show cause or subjected to a disciplinary hearing.

62. The timing of the termination was most callous coming while she was on annual leave and on her honeymoon after a wedding.

63. The claimant had made a major personal commitment to relocate from London where she worked to join the Respondents. The relocation led her to get into financial debts to facilitate her new life in Kenya. It is in this light that the freight charges and the personal loan given to her by the Respondent is to be looked at.

64. The claimant did not receive any payment upon termination and was required to leave her employment immediately. The claimant was not permitted to retrieve her personal information from the computers and to take other personal belongings.

65. The claimant was subjected to human indignity in the manner her exit was implemented and she suffered personal loss and damage. The Claimant did not receive a certificate of service from Respondents to enable her get a new job quickly.

66. Taking all above factors into consideration the court finds that the claimant is entitled to;

- i. An equivalent of 12 months' salary as compensation/general damages for the unlawful and unfair termination from employment in the sum of (200,000 x 12) Kshs.2,400,000.
- ii. The claimant is also awarded one month's salary in lieu of notice in the sum of Ksh.200,000.

Total amount is Kshs.2,600,000.

67. The sum is awarded as against the 1st and 2nd Respondents jointly and severally.

Counter Claim

68. The claimant admits owing a balance of Kshs.614,156 in respect of an interest free loan given to her by the Respondent. The Respondents are awarded this amount.

69. With regard to the claim for freight charges for relocation to Kenya in the sum of Kshs.632,756/82 the court notes that ordinarily, a prospective employer normally meets the travel and freight charges for an employee relocating from a foreign country to another for purposes of employment. These matters ought to be canvassed in the employment contract, but this was not done in this case. The claimant has however admitted that the parties had agreed to share the freight costs at 50% each.

70. Accordingly, the court awards the Respondent 50% of the freight charges in the sum of Kshs.316,378.28.

Total award to the Respondents is Kshs.930,534.28

71. This amount is to be set off as against the award made to the Claimant (2,600,000 – 930,534.28) leaving a net payable to the claimant **in the sum of Kshs. 1,669,465.72** within 30 days from todate.

72. The award to the Claimant is payable with interest at court rates from date of filing this suit till payment in full. The Respondents are also to pay the costs of the suit taking into account their overall conduct and contribution to this dispute.

73. The Respondents are directed to provide a certificate of service to the Claimant within 30 days from the date of this judgement.

Dated and delivered in Nairobi this 18th day of March 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE



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