



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 1845 of 2011

MATHEW LUCY CHERUSA.....CLAIMANT

VS

**POVERELLE SISTERS OF BELGAMO T/A
BLESSED LOUIS PALAZZALO HEALTH CENTRE.....RESPONDENT**

AWARD

Introduction

1. By a Statement of Claim dated 31st October and filed in Court on 2nd November 2011, the Claimant sued the Respondent for unfair termination of employment and withholding of benefits.
2. The Respondent filed a Memorandum of Response on 20th February 2012 and the matter was heard on 27th November 2012 and 6th February 2013 with Mr. Njoroge instructed by Lesinko & Njoroge Advocates appearing for the Claimant and Mr. Masese instructed by the Federation of Kenya Employers appearing for the Respondent.

The Claimant's Case

3. The Claimant testified that she was employed by the Respondent on 1st December 2006 in the position of Nurse at a monthly basic salary of Kshs. 9,000 subject to an annual increment of 25% (contract of service is marked Annexure 1 in the Claimant's documents). After the first year, the Claimant's contract was extended for a further 2 years.
4. The Claimant worked as a Nurse/Midwife until 30th September 2011, when the Respondent terminated her employment verbally and without notice. The Claimant pleaded that prior to her termination, the Respondent had on 28th February 2009 extended the Claimant's contract but proceeded to frustrate the performance of the said contract by failing to pay the annual increment of 25% (renewal letter is marked Annexure 2 in the Claimant's documents).
5. The Claimant contended that the termination of her employment was triggered by her refusal to sign a fresh contract whose terms were inferior to the ones contained in her previous contract (new contract is marked Annexure 3 of the Claimant's documents). The Claimant stated that she had sustained a clean employment record and that prior to termination of her employment, she was not given an opportunity to be heard.
6. The Claimant therefore sought the following reliefs:
 - a) A declaration that the termination of her employment was irregular, unfair and inequitable

- b) Damages for breach of contract and unfair termination
- c) Salary arrears for the years 2009, 2010 and 2011.....Kshs. 171,000
- d) One month's salary in lieu of notice.....28,821
- e) Severance pay at 15 days for every year of service.....60,500

The Respondent's Case

7. The Respondent pleaded that sometime in the month of July 2011, the Respondent issued the Claimant with a one year contract of employment to run between 1st January and 31st December 2011 at an enhanced salary of Kshs. 24,000 consisting of basic pay, house allowance, medical allowance and responsibility allowance (contract is marked Appendix 1 in the Respondent's documents). The Claimant was required to sign and return the said contract but she declined to do so.

8. On 30th September 2011 the Claimant absented herself from duty without the Respondent's permission and had not resumed duty since. On 4th October 2011, the Respondent wrote to the Claimant inquiring of her whereabouts and demanding that she resumes duty within 4 days from the date of receipt of the letter. The Respondent also reminded the Claimant that she had not returned her contract. The Claimant did not respond to the Respondent's letter (the Respondent's letter to the Claimant is marked Appendix 2 in the Respondent's documents).

9. On 13th October 2011, the Respondent wrote to the Claimant again, this time requiring her to appear before a disciplinary panel to show cause why disciplinary action should not be taken against her for absenting herself from work without permission, converting the Respondent's property and failure to submit her contract duly signed (letter is marked Appendix 3 in the Respondent's documents). The Claimant did not honour the summons to appear before the disciplinary panel.

10. The Respondent denied having dismissed the Claimant. The Respondent further denied frustrating the Claimant's employment contract, stating that the 25% claimed by the Claimant was an annual benefit paid as gratuity at the end of each year and not a salary increment. The Respondent added that the Claimant had not raised any issue with this arrangement prior to institution of this case (muster roll extract showing payments made to the Claimant is marked Appendix 4 in the Respondent's documents).

Findings and Determination

11. The first question for determination is whether the Respondent terminated the Claimant's employment and if so, whether the termination was lawful and justifiable. The Claimant claimed that her employment was terminated verbally, without notice and without lawful cause. The Respondent in turn accused the Claimant of desertion of duty. It was common cause however that there was a disagreement between the parties on the terms of a contract for period between 1st January and 31st December 2011 issued by the Respondent to the Claimant, which the Claimant refused to sign.

12. The Claimant and the Respondent's witness, Sister Jacqueline Mandere differed on the circumstances leading to the eventual cessation of the Claimant's employment. Nevertheless, the Claimant admitted having received the Respondent's letter dated 4th October 2011 vide which the Respondent demanded the Claimant's resumption of duty as well as letter dated 13th October 2011 inviting the Claimant to appear before a disciplinary panel.

13. The Claimant did not respond to the Respondent's letters because according to her she had already been dismissed and a demand letter had been sent by her Advocates to the Respondent. No further evidence was adduced in this regard and while it is true that the relationship between the parties had deteriorated, the Court was unable to establish termination of employment at this stage. There were real grievances between the parties needing to be addressed and the Respondent was well within its right to summon the Claimant. In the case of **Jackson Butiya Vs Eastern Produce Kenya Limited (Industrial**

Court Cause No 335 of 2011)

this Court stated that:

An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.

14. From the evidence on record, I find that the Claimant failed to avail herself of the internal grievance handling procedure provided by the Respondent and cannot therefore complain that she was not heard. For this reason the claims for unfair termination and one month's salary in lieu of notice fail and are hereby dismissed.

15. I will now deal with the claim for salary arrears for the years 2009, 2010 and 2011. The point of contention in this regard has to do with the meaning assigned by the parties to the phrase:

Annual increment is 25% of basic salary depending on satisfactory Appraisal (evaluation) by the employer.

16. None of the parties raised the issue of appraisal and the Court therefore took it that there was no contention on this matter. The only issue for determination therefore was the meaning to be assigned to annual increment. The Respondent took the view that the intention of the parties was to provide an annual gratuity to the Claimant. I respectively disagree with this view. Annual increment and gratuity are two distinct forms of remuneration that have no chance of being mixed or interchanged. I therefore find that the Claimant's contract dated 1st December 2006 and renewed by letter dated 28th February 2009 did provide for 25% annual increment on the Claimant's basic salary. Consequently, I award the Claimant the sum of Kshs. 171,000 being salary arrears. Severance pay which is payable in cases of redundancy is not applicable in this case and this head of the claim therefore fails.

17. Each party will bear their own costs.
Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF APRIL 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**