



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 347 OF 2014

NAOMI RUWA.....CLAIMANT

VERSUS

PETER ODOTE (CHAIRMAN) STEVE OKENA

(SECRETARY) PATRICIA SCOTY

(TREASURER) (Sued in theirs

capacity as officials of LITTLE

THEATRE CLUBS MOMBASA).....RESPONDENTS

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the Claimant's contract of employment by the Respondents on 3.6.2014. In total the Claimant seeks to recover Kshs.314,000 plus Certificate of Service.
2. The Respondents have denied the alleged unfair terminal of the Claimant's employment and averred that it is the Claimant who terminated the employment contract without prior notice through resignation and/or absconding from duty protesting redeployment. They therefore prayed for the dismissal of the suit with costs and claimed one month salary in lieu of notice from the Claimant.
3. The suit came for pretrial directions on 17.5.2017 when the parties agreed to dispense with oral hearing of witnesses and instead agreed to adopt their written statements and documentary evidence on record and dispose of the suit by way of written submissions.

Claimant's Case

4. The Claimant stated that she was employed by the Respondent Club on 9.8.2010 as the Club Manager earning Kshs.15,000 per month without House Allowance and worked upto January 2012 when he took a break. She rejoined the Club in January 2013 in the same capacity and worked upto 3.6.2014 when she was unfairly and wrongfully terminated for alleged poor performance and incompetence.
5. She contended that the termination was done without following the due process as stipulated by the Labour Laws. She therefore prayed for one month salary in lieu of notice. Accrued leave for the period between August 2010 and January 2012, unpaid salary for November 2011 and December 2011 service pay at the rate of one month salary for year of service, certificate of service and compensation for unfair termination totaling to Kshs.314,000 plus costs and interest.

Defence Case

6. Mr. Gilbert Owino Origi, a member of the Club's committee stated that the Claimant was employed as the Club's Manager on 9.8.2010 at a gross salary of Kshs.15,000 per month. The Claimant was also entitled to 21 days annual leave after serving 12 months consecutively, she however left work in January 2012 without prior notice and returned in January 2013 when she was re-employed on the same terms as before but with added responsibilities. Her performance was however below expectations.
7. In 2014 the Club sought to redeploy her to the post of Assistant Club Manager on the same salary. Despite several meetings with the

Claimant to discuss the said redeployment, she refused the proposal and absconded from duty without serving any notice. As a result, the Club released her by letter dated 3.6.2014 and requested her to calculate her terminal dues. However, she refused to cooperate and instructed her lawyer to serve demand letter.

8. Mr. Peter Odotes, the Club's Chairman echoed the written statement by his colleague Mr. Gilbert Owino Origi verbatim. I will therefore not repeat it herein.

Analysis and Determination

9. There is no dispute that the Claimant was employed by the Respondent Club from August 2010 to January 2012 and again from January 2013 to 3rd June 2014. The issues for determination are:

- a. Whether the Claimant resigned or he was unfair terminated;
- b. Whether the reliefs sought should be granted

Resignation or Unfair termination

10. The Claimant contends that she was unfairly terminated by the Respondents. On 3.6.2014 without following the due process laid down by the Labour Laws. The Respondents have however accused her of terminating her own employment by resignation and or absconding from duty to protest against the proposal to redeploy her to the post of Assistant Club Manager.

11. I have carefully considered the evidence and the submissions presented to the Court by both parties and especially the Respondent's letter dated 3.6.2014. The letter refer to the proposed redeployment and appreciates that despite several meetings and telephone conversation, the Claimant had declined to take the proposed redeployment. The letter then states in paragraph 3 that:

"In view of this development, the Club has little choice but to release you to pursue possibility of employment elsewhere with effect from June 6th 2014, the day your annual leave terminates. The main course for this is the complete failure to meet any of the requirements of then responsibilities bestowed upon you at your appointment."

12. The foregoing excerpt of the letter leaves no doubt that it was notifying the Claimant that her services were terminated with effect from 6.6.2014. The letter does not accuse her of any absconding or resignation without notice alleged by the defence witnesses. It appreciates that she was on her annual leave, which was ending on 6.6.2014. Consequently, I find and hold that the Claimant has proved on a balance of probability that she was terminated by the Respondent and proceed to dismiss the defence allegation that the termination was by the Claimant through resignation and/or absconding from duty.

13. The question that follows is whether the termination was unfair.

Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

Reason for termination

14. In this case, the reason for termination was poor performance. According to the termination letter dated 3.6.2014, the Claimant was accused of failure to meet any requirements and responsibilities bestowed upon her at the appointment. The letter however did not outline the said requirements and responsibilities which were not met. No performance appraisal was done to rate the Claimant as a poor performer. The termination letter only made generalised statement of alleged poor performance without any particulars and facts to substantiate. Consequently, I make a finding of fact that the Respondent has no proved on a balance of probability that the Claimant had indeed poorly performed her duties and proceed to hold that the Respondents have failed to prove and justify the reason for the termination of the Claimant's employment as required by Section 43 and 47(b) of the Act.

Procedure followed

15. There is no doubt that the procedure followed to terminate the Claimant's employment was not fair within the meaning of Section 45 and 41 of the Act. Section 41 of the Act provides in mandatory terms that before terminating the contract of service on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee, in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which termination is contemplated, and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. Failure to follow the said mandatory procedure in addition the failure to prove and justify the reason for the termination rendered the termination of the Claimant's employment contract unfair, and it is so held.

Reliefs

16. Under Section 49 of the Act the Claimant is entitled to salary in lieu of notice plus compensation for unfair termination. I award her Kshs.30,000 being 2 months' salary in lieu of notice as per the contract of employment. I will also award Kshs.45,000 being 3 month salary as compensation for the unfair termination. In granting the said compensation, I have considered the fact that she had worked for the Club for a fairly short period of time.

17. The claims for Kshs.14,000 for leave for 2010/2011 and Kshs.30,000 salary for November and December 2011 have not been contested by evidence by the defence and they are granted as prayed. The claim for service pay is granted at the rate of the conventional rate of 15 days pay per year of service. The Claimant served for one and a half years after re-employment. He will therefore get Kshs.7,500 as service pay. Finally, the claim for certificate of service is not disputed and it is granted.

Disposition

18. For the reason that the termination of the Claimant's employment was unfair, I enter judgment for her against the Respondent society and its members for the sum of Kshs.126,500 plus costs and interest. The Claimant will also get Certificate of Service.

Dated and signed at Nairobi this 23rd day of February, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 2nd day of March, 2018

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JUDGE