



Mbulu v Red Court Hotel t/a Boma Hotel Limited (Cause E317 of 2022) [2024] KEELRC 1396 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1396 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E317 OF 2022
NZIOKI WA MAKAU, J
JUNE 12, 2024**

BETWEEN

ANN MUTINDA MBULU CLAIMANT

AND

RED COURT HOTEL T/A BOMA HOTEL LIMITED RESPONDENT

JUDGMENT

1. In the Statement of Claim dated 12th May 2022, the Claimant raises against the Respondent Hotel issues of unfair and unlawful termination of her employment and failure to pay her terminal dues and compensation. She averred that on or about 16th December 2016, she was employed by the Respondent as a Food and Beverages Supervisor at a monthly salary of Kshs. 90,000/- inclusive of house allowance. That she worked for the Respondent diligently and faithfully until on or about 31st March 2020 when the Respondent sent her on an illegal and unconstitutional unpaid leave for an indefinite period of time, on alleged grounds of Covid-19 and with a promise that it would notify her of resumption of duty. She contended that she was on unpaid leave for two years without any communication from the Respondent and that her efforts to seek feedback on the status of her employment were in vain. The Claimant further stated in her Witness Statement that on or about February 2020, the Respondent reduced her salary to Kshs. 46,653/- and a house allowance of Kshs. 10,863/-.
2. It was the Claimant's case that prior to the Respondent sending her on the unpaid leave, no redundancy notice had been issued either to her or the labour office indicating an intention to declare her redundant. That she never received any salary for the period between March 2020 and March 2022 and after termination of her employment on 31st March 2020, she did not get her service gratuity as provided under clause 27 of the Collective Bargaining Agreement (CBA) between the Respondent and her Union (KUDHEIHA). The Claimant thus claims four months' salary in lieu of notice, salary during the unpaid leave period, leave for 2020 and 2021, service gratuity for 11 complete years, salary arrears for 10 months, 12 months' salary as compensation for the unlawful and unfair termination,



service charge, Kentours Sacco deductions, unremitted pension deductions, and a certificate of service. She further prays for judgment against the Respondent for a declaration that the termination was unlawful and unfair and that the Claimant be paid her full terminal dues and her salary arrears as set out in the Statement of Claim. In addition, that the Court do issue such orders and directions as it may deem fit to meet the ends of justice and that the Respondent be made to pay the costs of the instant Claim.

3. In reply, the Respondent filed a Statement of Response dated 31st August 2022, wherein it denied that the Claimant's unpaid leave was unconstitutional and illegal. It explained that being a hotelier with customers that are both local and international tourists, it was hard hit by the Covid-19 pandemic which had resulted to a nationwide lockdown. That its business was therefore unable to generate the projected revenue and it could as such not meet its financial obligations, more so towards its employees and suppliers. That consequently, it had to send some employees, including the Claimant, on unpaid leave until it was able to financially recover. The Respondent averred that it communicated the predicament to the affected employees through an internal memo, notice and had several consultative meetings/discussions and agreement with the Claimant. That the Claimant did not raise any objections or seek clarification on the same but accepted the proposal to go on unpaid leave and that it was therefore a surprise that the same was raised after two (2) years. According to the Respondent, it eventually recalled the Claimant back to work but she failed to turn up. That it had no intention to declare the Claimant redundant as the measures taken were only temporary and aimed at mitigating the unforeseen financial crisis it had found itself in. It asserted that it had since not fully recovered from the pandemic.
4. The Respondent asserted that since the Claimant was never terminated from employment, the need to pay service gratuity never arose and that in any event, it had been remitting NHIF and NSSF contributions on her behalf by virtue of section 35(6) read with section 36 of the of the Employment Act. It fronted that the Claimant is also not entitled to four months in lieu of notice because it did not terminate her employment contract and since she did not work for 24 months, such payment would be an unjust enrichment. It denied the claim for annual leave, asserting that the Claimant had a total of six (6) leave days at the time she was sent on unpaid leave and that there was also no pending salary owed to her. The Respondent further denied the claims for salary reduction and unremitted pension deductions and noted that the Claimant's certificate of service was ready for collection. It prays that the Claimant's suit against it be dismissed with costs.
5. The Claimant's rejoinder in her Reply to the Defence dated 28th October 2022 was that she was never called back to work as alleged and that the letter dated 21st March 2021 attached to the Defence was not sent to her. She also denied having received an internal memo and cast aspersions on the minutes produced by the Respondent, which she noted do not bear hers or her colleagues' signature.
6. Evidence
The Claimant testified that she did not attend any meeting that is alleged to have taken place and maintained that she never received any communication from her former place of work, including a dismissal letter. She asserted that the Respondent employed her on 16th December 2011 and had worked for it for 9 years up to 2020 and that 2016 is when she was promoted. The Respondent's witness, Mr. Faustine Andera (RW1), stated under cross-examination that an email was sent to the Claimant inviting her for a meeting but receipt of the same was not acknowledged and the said email communication was not filed in Court. RW1 denied the allegation that the Claimant's salary was reduced and noted that there was no evidence before Court of reduction of her salary. He confirmed that the last salary the Claimant received was in March 2020. In re-examination, RW1 stated that when the Claimant was employed in 2011, she was under Union Grade 7 and was later promoted to



managerial position that was not under the CBA and that the Claimant was thus not under CBA at the time of the unpaid leave. RW1 asserted that the Claimant was entitled to only one (1) month notice.

7. Claimant's Submissions

The Claimant submitted that the issues for determination before this Court are:

- a. Whether the Respondent had valid and justifiable reasons for terminating the Claimant's employment.
 - b. Whether the Respondent observed procedural fairness and/or principles of natural justice in terminating the Claimant's employment.
 - c. Whether the Claimant is entitled to the terminal benefits sought in the statement of claim.
 - d. Who should bear the costs of the suit?
8. The Claimant cited section 43 of the *Employment Act*, 2007 which provides that 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. She fronted that the Respondent did not have a valid reason to terminate her employment and that it relied on the Covid-19 Pandemic to send her on an indefinite unpaid leave. She noted that the criteria used to select the employees to go on the unpaid leave was also not explained to this Honourable Court. It was the Claimant's submission that considering the Respondent did not close down its operations and is now stable, it is only hiding behind Covid-19 to deny the Claimant her terminal dues. That the Respondent has failed to prove it had a valid reason to terminate her employment because no communication of the its intention to terminate her services for absconding duty or whatever reason was ever made to her.
9. The Claimant submitted that she was also was entitled to a fair disciplinary hearing process as envisaged under section 41 of the *Employment Act*, 2007 and affirmed by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited [2017]* eKLR. She asserted that there was no procedure followed before her services were terminated or even declared redundant and that the Respondent had failed to prove the same. Moreover, that the lack of communication since being sent on unpaid leave amounted to unfair termination and unfair labour practices that is outlawed under Article 41 of the Constitution of Kenya. She urged this Court to thus hold that the termination was unfair and unlawful within the meaning of section 45 of the Act and that the Respondent did not follow a fair procedure prior to termination of her services.
10. It was the Claimant's submission that having not been issued with any notice, she is entitled to payment in lieu of notice as under section 35 of the *Employment Act*, 2007. That clause 9(c) of the CBA provides that the notice period to be given to an employee who has served for ten years or more years is to be three months or four months' pay in lieu of notice. She noted that having served the Respondent for 11 continuous years and was not given the three months' notice or payment in lieu of the same at the time of termination, she is entitled to the claim for notice pay as prayed. She further submitted that being on unpaid leave for more than three years is unlawful and that she should therefore be paid her salary for the said period as claimed. That she claims leave for 2020 and 2021 because she had not proceeded for her annual leave when she was sent away on unpaid leave and that she is entitled to service gratuity pursuant to clause 27(b)(ii) of the CBA, which provides for payment of termination gratuity for an employee who has served for ten years. The Claimant posited that she is entitled to maximum compensation as under section 49 as read with section 50 of the Act once it is demonstrated that her dismissal was wrongful or that the termination was unfair. She maintained her averments on the remaining reliefs sought and prayed for costs of this suit.



11. Respondent's Submissions

According to the Respondent, the issues for determination are whether the Claimant's employment has been terminated; and whether the Claimant is entitled to the reliefs sought. The Respondent submitted that the decision to send the Claimant, among other employees, home on unpaid leave was made and communicated to her as well as to the Union and to which no objection was raised as essentially there was no work to be done given the business heavily relies on human traffic and it was not generating any income. It maintained that it indeed called the Claimant back but she never went back to work and did not make an application when she was asked to re-apply. It asked the Court to take judicial notice of the fact that the outbreak of Covid-19 led to the nationwide and international lockdown which essentially paralysed businesses such as that of the Respondent Hotel, and it had no option but send its employees on unpaid leave. It was the Respondent's submission that it is evident from its acts and the testimony of RW1 that the Claimant is still an employee of the Respondent and can as such go back to work if she so desires because her employment has never been terminated.

12. The Respondent further submitted that based on the fact that the Claimant is still an employee of the Respondent, she is not entitled to the reliefs sought and that payment of the same would amount to an unjust enrichment. It cited Nairobi High Court Civil Case No. 1263 of 1992, Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others [2003] eKLR in which the Court while discussing the doctrine of unjust enrichment, stated that the same is intended to prevent a person from retaining money or some benefit derived from another. The Respondent maintained that since the Claimant is an employee at Management level, she was not a member of the Union and as such, she does not benefit from the CBA between the Respondent and KUDEIHA. It nevertheless submitted that the claim for service charge fails because the same was not captured in the pay slip produced as evidence before this Court and that the Claimant has failed to prove the claims for salary for the unpaid leave period, Kentours Sacco deductions and pension deductions. The Respondent asked the Court to thus strike out the present claim with costs to the Respondent as the Claimant has not successfully proven her claim.

13. The Claimant was sent on an indefinite leave courtesy of Covid 19. The Respondent from all accounts never called back the Claimant. It was hard pressed to demonstrate that it had notified the Claimant of her return to work. As such, the Respondent seems to have disguised its intentions to terminate the Claimant by taking cover behind the Covid 19 scourge. The Claimant was not notified of the inability of the enterprise to retain her in its employ. The documents availed as an 'explanation' by the Respondent do not have any notation that these were brought to the Claimant's attention.

14. There is therefore reason and basis to hold the Claimant's termination was contrary to the provisions of section 40 of the Employment Act. This would be egregious enough to attract 6 months salary compensation given the level of service and the duration of the stint she was at the Respondent which is 6 years. She is entitled to the following reliefs as a consequence:-

- a. Service pay – $(90,000/2=45,000*6)$ Kshs. 270,000/-
- b. One months salary as notice – Kshs. 90,000/-
- c. Leave pay – Kshs. 78,000/-
- d. Compensation – Kshs. 540,000/-
- e. Interest at court rates on the sums in (a), (b), (c) and (d) above from the date of judgment till payment in full.
- f. Costs of the suit.



g. Certificate of service in terms of the *Employment Act* section 51.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

