



REPUBLIC OF KENYA



KENYA LAW
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**Ambwayo v Maseno Mission Hospital (Appeal 24 of 2022)
[2023] KEELRC 84 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 84 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 24 OF 2022
S RADIDO, J
JANUARY 25, 2023**

BETWEEN

ANNE AMBWAYO APPELLANT

AND

MASENO MISSION HOSPITAL RESPONDENT

*(Being an appeal from the judgment of C.M. Yalwala, the Honourable
Principal Magistrate in Maseno Senior Resident Magistrate's Court
Industrial Cause No. 1 of 2018 delivered on 18th December 2019)*

JUDGMENT

1. Anne Ambwayo (the Appellant) sued Maseno Mission Hospital and Comprehensive Care Centre (the Respondents) before the Maseno Magistrates Court alleging unfair termination of employment and breach of contract.
2. Upon hearing the Cause, the trial Court found the termination of employment unfair and awarded the Appellant the equivalent of one-month salary in lieu of notice (the other heads of reliefs were dismissed).
3. The Appellant was aggrieved and she lodged a Memorandum of Appeal with the Court on 26 July 2022 contending:
 - (1) THAT the learned Magistrate erred in law and in fact when he contradicted himself by finding that the employment of the Appellant was permanent while at the same time denying her what was due to her in the circumstances.
 - (2) THAT the learned Magistrate erred in law and in fact by failing to quantify and award the Appellant her dues having established that the Appellant's employment was terminated unfairly, wrongfully, and unlawfully.



- (3) THAT the learned Magistrate erred in law and in fact by failing to find the Appellant having been performing duties of a Data Manager was entitled to earn a salary commensurate with that position.
 - (4) THAT the learned magistrate erred in law and in fact when he imposed on the Appellant a higher standard of proof than is necessary in civil matters.
 - (5) THAT the learned Magistrate erred in law and in fact when he declined to award general damages for embarrassment, intimidation, and inhumane treatment having established that the Appellant had been recalled from a hospital maternity while still weak and bleeding which caused her mental anguish.
 - (6) THAT the learned Magistrate erred in law and in fact when he failed to take into consideration the fact the Respondents were not undergoing a close-up of the process and in fact, they are still in operation after employing someone else in her place.
4. The Court gave directions on 21 November 2022. The Appellant had in the meantime filed her submissions on 2 November 2022. The Respondents filed joint submissions on 14 December 2022.
 5. The Court has considered the record and submissions.
 6. In the submissions, the Appellant condensed the six Grounds of Appeal into three being:
 - i. What was the employment designation of the Appellant?
 - ii. Whether the Appellant's employment was wrongfully terminated and if she is entitled to compensation for wrongful dismissal?
 - iii. What was the salary due to the Appellant and whether or not she was fairly compensated?
 7. The Respondents set out the Issues for determination as:
 - i. Whether the employment of the Appellant was terminated unfairly, wrongfully, and unlawfully by the Respondents?
 - ii. Whether the Appellant was qualified to get remuneration set for a Data Manager?
 - iii. Whether the Appellant is entitled to compensation following the termination of the Appellant's employment contract?
 - iv. Who should bear the costs of this suit?

Role of Court of the Court on a first appeal

8. This being a first appeal, the Court is enjoined to re-evaluate the evidence before the trial Court and make its own findings on the evidence and facts but conscious that it did not see the witnesses.

Appellant's designation

9. The Appellant testified before the trial Court that she was assigned the functions of a Data Manager while her job description was that of a Data Clerk.
10. The Respondents' case was that the Appellant was a Data Clerk and that she did not have the qualifications to serve as a Data Manager.
11. The Court has reviewed the employment records placed before the trial Court. The Appellant was offered employment as a Data Clerk on 29 November 2010 on probationary terms.



12. It is not clear from the records whether the Appellant was confirmed after 6 months of probation.
13. On 23 May 2012, the 1st Respondent decided to move the Appellant to its payroll under the IT department.
14. On 30 April 2014, the Appellant was moved from the data office to the secretarial/reception desk.
15. The Respondent rescinded the move on 28 September 2015 and the Appellant was moved back to the data office.
16. On 20 September 2015, the Appellant applied to be employed as a Data Clerk, and on 30 October 2015, the 1st Respondent offered her a new contract as a Data Clerk in the Comprehensive Care Centre with effect from 2 November 2015 with an enhanced remuneration of Kshs 32,765/-. The contract was subject to 6 months of probation but its duration was not set out.
17. However, on 1 October 2016, the 1st Respondent offered the Appellant a six-month contract stated to lapse on 31 March 2017.
18. Under the contract, the Appellant was to serve as a Data Manager on a gross salary of Kshs 33,215/- (basic salary and house allowance). The contract was subject to renewal with a one-month notice of renewal upon mutual agreement.
19. On the basis of the documentary evidence, the Court finds that the Appellant served as a Data Clerk from 29 November 2010 until 30 October 2015, when the contract was renewed for an unspecified duration, and as a Data Manager from 1 October 2016 to 31 March 2017 when the contract ended.

Remuneration

20. The Appellant executed written contracts with the Respondents which set out the terms and conditions of service.
21. The Appellant contended that she was underpaid during her employment because a budget document indicated the salary of a Data Manager was Kshs 58,800/-.
22. The Court is not convinced by the arguments of the Appellant.
23. The budget document produced before the trial Court had a timeline of 1 April 2017 to March 2018. The Appellant's contract lapsed on 30 March 2017, before the projected budget dates.
24. Further, a budget by itself is an estimation of revenue and expenses over a period of time and unless there was a promise to the Appellant, it cannot be used to assert the salary proposed therein.
25. The budget, in the Court's view, could not override or displace the written contracts between the parties as to the terms and conditions of service including remuneration.

Unfair termination of employment

26. The separation between the Appellant and the Respondents was not on account of misconduct, poor performance or physical incapacity as contemplated by section 41 of the [Employment Act](#), 2007. It was also not a case of redundancy.
27. The Appellant was on a fixed-term contract which was due to lapse, on 31 March 2017. The contract was renewable.
28. Clause 1 of the contract provided:



The agreement of employment is for 6 months from 1st October 2016/31st March 2017 inclusive. The agreement is renewable by mutual agreement between the two parties. Notice of the renewal will be given in writing 1 (one) month before the expiry of the agreement.

29. Strictly speaking, the employer and the employee were expected to give notice of renewal a month before the expiry of the contract. The Appellant did not give an indication to the Respondents that she was interested in the renewal of the contract.

30. The Respondents on their part did also not give any indication within the agreed period. The Respondents only informed the Appellant of the non-renewal through a letter dated 12 March 2017. This fell short of the 1 month agreed by the parties.

31. The trial Court appreciated as much when it found:

The evidence herein is that the Claimant was given notice of termination on 16th March 2017 to take effect on 31st March 2017. She was thus not given the requisite one-month termination notice as required by the law. The Respondents however led evidence that they paid the Claimant's salary for April 2017, to cover the one-month notice not given. They relied on a copy of a pay slip for April 2017 contained in their list of documents. That pay slip has a provision for a signature. The same though was not signed. As the Claimant denied being paid as such and as her signature is not appended to the copy of pay slip produced herein, I find that there is no proof that the payment was made.

Therefore, to the extent that the employment of the Claimant was terminated with without the requisite notice and without the requisite payment in lieu of notice, I find that the Claimant's employment was terminated unfairly, wrongfully and unlawfully by the Respondents.

32. This Court finds no error in the conclusion by the trial Court.

Compensation

33. The trial Court held that since the termination of the Appellant's employment was not based on the grounds set out in section 46 (sic) of the *Employment Act*, 2007, he would not award compensation save for the pay in lieu of notice.

34. The separation between the Appellant and Respondents was because of expiry of contract (non-renewal).

35. The Court agrees with the conclusion reached by the trial Court not to award any other compensation since compensation under section 49 of the *Employment Act*, 2007 is discretionary.

36. The Appellant did not demonstrate that the trial Court exercised its jurisdiction injudiciously.

37. Before concluding, the Court observes that though the Appellant brought up the question of her pregnancy/maternity during the period preceding the separation, that was more of a coincidence rather than a sign of unfair labour practice on the part of the Respondents.

38. The trial Court, therefore did not fall into an error of law or fact when it declined to award general damages for inhumane treatment, embarrassment or intimidation.

Conclusion and Orders

39. After considering the record and submissions, the Court finds no merit in the Appeal. It is dismissed with no order on costs.



DELIVERED VIRTUALLY, SIGNED AND DATED IN KISUMU ON THIS 25TH DAY OF JANUARY 2023.

Radido Stephen, MCI Arb

Appearances

For Appellant Nandwa & Co. Advocates

For Respondents Owiti, Otieno, Ragot Advocates

Court Assistant Chrispo Aura

