



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 28 OF 2020

HELEN MARY ALUOCH ILAVONGA.....CLAIMANT

- VERSUS -

SPIRE PROPERTIES KENYA LTD T/A DIANI REEF BEACH RESORT & SPA....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th March, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 09.07.2020 through I R B Mbuya & Company Advocates. The claimant changed her advocates on 21.07.2021 to Ganzala & Ganzala Advocates. The claimant pleaded and testified as follows. She was employed by the respondent as Human Resource Manager from 15.10.2018 to 01.05.2020. The employment was by the letter dated 15.10.2018. As at termination the claimant earned Kshs. 150, 000.00 per month.

The contract of employment was terminated by the letter dated 30.04.2020. The letter addressed to the claimant stated as follows:

“RE: TERMINATION OF CONTRACT

Following the recent epidemic Corona virus COVID -19 which has caused the government ban of international flights and ban of all conferences, this has caused lack of business in hotel industry hence left with no other option but termination of your contract with effect from 30th April 2020 until the condition improves. You will be paid all your dues as follows:

- 1. Salary up to and including 31.03.2020.**
- 2. One-month salary in lieu of notice as per your contract.**
- 3. Leave or off days earned and not utilised as at 31.03.2020.**
- 4. Less any statutory deductions.**

You are requested to seek clearance by surrendering all the company property in your possession to facilitate in the calculation and payment of your last and final dues.

We thank you for the time you have served at Diani Reef Beach Resort & Spa and wish you well in future career endeavours.

Signed

Jotham Mwang'ombe

Operations Manager

Cc: Managing Director

Financial Controller

Personal File”

The claimant’s case and testimony is that despite demand she was not paid the amount promised in the termination letter. Further, the respondent failed to settle medical bills on several occasions between April 2019 to September, 2019 contrary to the terms, rights and obligations as clearly stated out in the letter of employment. Further in the first week of March 2020 the respondent asked the claimant to take a paid annual leave. The respondent further imposed unpaid leave from 01.04.2020 to 30.04.2020 but, the respondent instructed the claimant to work for 8 days in April 2020. On 01.05.2020 the respondent’s Operations Manager called the claimant to convey that her employment had been terminated and asked her to collect the termination letter. The claimant collected the letter on 04.05.2020. The claimant’s case is that the termination was unlawful, abrupt and in contravention of the Constitution of Kenya, 2010; rules of natural justice; labour laws; and fundamental international labour conventions and declarations. In particular, it was unlawful, wrongful and unfair because, there was no valid or fair reason, no hearing prior to the termination, disregard of natural justice; no notice prior to termination, failure to pay accrued dues, and no certificate of service.

The claimant further alleged malice manifested through abrupt eviction from housing accommodation provided by the respondent; forcing the claimant to sign illegal documents to deny staff salaries; constantly being threatened by the Operations Manager that her employment would be terminated; failure to pay her medical bills per contractual terms; disconnecting power and water at her house to achieve eviction; and terminating her and promptly hiring her replacement.

The claimant alleged discrimination and suffering psychological pain, loss and damage. Despite demands, the respondent had refused to reinstate her back to employment. The claimant claimed against the respondent as follows:

1. One-month in payment lieu of notice Kshs. 150, 000.00.
2. Salary up to 31.03.2020 Kshs.80, 000.00.
3. Leave days 01.05.2019 to 31.03.2020 Kshs. 80,000.00.
4. Pro rate travelling allowance for 01.10.2019 to 31.03.2020 Kshs. 3, 323.00.
5. 1 day off compensation Kshs. 5,000.00.
6. 8 days worked for April 2020 Kshs. 40, 000.00.
7. Service pay for 15 days worked for each of the 2 years Kshs. 150, 000.00.
8. Compensation under sections 49 and 50 of Employment Act, 2007 Kshs. 1, 800, 000.00.
9. Total claimed above Kshs. 2, 308, 323.00.
10. Certificate of service.

The claimant prayed for orders in terms of (1) to (10) above and further for punitive damages; general damages for pain and suffering; and any further order the Court may deem fit to grant or that may be proved at the hearing of the cause hereof as Counsel may urge in the final submissions.

The respondent’s written memorandum of defence was filed on 18.08.2020 through Chimera & Company Advocates. The respondent pleaded as follows. It denied employing the claimant as was alleged for the claimant. The respondent denied the claimant worked without off days. The respondent denied all claims made for the claimant. It denied unlawfully, wrongfully and unfairly terminating the claimant’s employment. In alternative the respondent pleaded that if it employed the claimant, the termination was not unlawful or unfair. Further, upon the claimant’s termination, all her final dues were paid. Further, the contract of employment was frustrated following the outbreak of Covid 19 pandemic rendering the claimant redundant. The respondent prayed that the suit be dismissed with costs.

Despite the hearing date being fixed in presence of advocates for both parties, the respondent failed to attend the hearing on 10.02.2022 and the claimant’s case was heard ex-parte. The claimant filed final submissions. The Court has considered the material on record and makes findings as follows.

First, the evidence is that parties were in a contract of service as per the letter of appointment dated 15.10.2018. The agreed consolidated monthly payment was Kshs. 150, 000.00.

Second, the evidence is that the contract of service was terminated by the letter dated 30.04.2020 and on account of the outbreak of the Covid-19 pandemic.

Third, the Court has taken judicial notice of the outbreak and declaration of the Covid-19 pandemic in March 2020 and reckons that the reason for termination was genuine. However, the respondent failed to take into account the due procedure in section 40 for termination on account of redundancy. The Court finds that to that extent the termination was procedurally unfair. The Court has considered the factors in section 49 on award of compensation for unfair termination. The Court has considered that the reason for termination was valid and the respondent offered one-month pay in lieu of notice. The Court has considered the ravaging effects of the Covid-19 pandemic on enterprises particularly like the respondent’s hospitality undertaking. Such is found a serious mitigating factor in favour of the respondent towards

awarding the compensation. The further evidence is that beginning early March 2020 to the date of termination the respondent appears to have been striving to keep the claimant in employment but unsuccessfully so. The Court has considered that she had served only one complete year. She is awarded only one-month salary for the unprocedural termination making **Kshs. 150, 000.00**.

Fourth, per evidence and pleadings, the claimant is awarded the following accrued and contractual payments and also consequential to the redundancy:

1. One-month payment in lieu of notice **Kshs. 150, 000.00**.
2. Salary up to 31.03.2020 **Kshs. 80, 000.00**.
3. Leave days 01.05.2019 to 31.03.2020 **Kshs. 80,000.00**.
4. She claims Pro rate travelling allowance for 01.10.2019 to 31.03.2020 Kshs. 3, 323.00. The contractual basis of this claim was not established and it is declined.
5. 1 day off compensation **Kshs. 5,000.00** is allowed as due on a balance of probability.
6. 8 days worked for April 2020 **Kshs. 40, 000.00** is allowed per the claimant's evidence.
7. She claims service pay for 15 days worked for each of the 2 years Kshs. 150, 000.00. The evidence is that she had served for one complete year and construing the claim as severance pay under section 40 of the Act, she is awarded only **Kshs. 75, 000.00** being 15 days' pay for the one complete year served.
8. No submissions were made for the claimant to guide the Court on prayers for aggravated damages, punitive damages, and general damages for pain and suffering and the same are deemed abandoned.
9. She is entitled to a certificate of service per section 51 of the Act.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration the termination on account of the outbreak and declaration of Covid-19 pandemic was founded upon a genuine reason but was unprocedural for want of compliance with section 40 of the Employment Act, 2007.
2. The respondent to pay the claimant a sum of **Kshs. 580, 000.00** by 01.06.2022 failing interest to be payable thereon at Court rates from the dated of this judgment till full payment.
3. The respondent to deliver the respondent's certificate of service by 01.04.2022.
4. The respondent to pay claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH MARCH, 2022

BYRAM ONGAYA

JUDGE