



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MALINDI

CAUSE NO. 79 OF 2018

AGNES KAVUMBI KITULA.....CLAIMANT

- VERSUS -

OASI BEACH MANAGEMENT LTD T/A OCEAN BEACH RESORT AND SPA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 01.11.2018 through Kyalo Matata & Company Advocates. The claimant prayed for judgment against the respondent for terminal dues of Kshs. 615, 384.00 including:

- a) One month pay in lieu of termination notice Kshs. 40, 000.00.
- b) Service pay for one year 4 months Kshs. 30, 769.00.
- c) Pro rata-leave for 1year 4 months Kshs. 43, 077.00.
- d) 14 days worked in September 2017 Kshs. 21, 538.00.
- e) Compensation for unfair termination Kshs. 480,000.00.
- f) Certificate of service.
- g) Costs of the claim plus interest.

The respondent employed the claimant initially as a Cashier on 01.06.2016 and later as an Accounts Clerk by the contract dated 01.03.2017 and reporting to Finance Head / General Manager. She was to handle the day to day operations of the accounts department. Her monthly pay was Kshs. 40, 000.00.

By a letter dated 20.06.2017 she was suspended for 14 days on account of arrogance and lateness. On 05.07.2017 she wrote protesting that the suspension was unjustified because she had already served the suspension and apologised as she had been instructed. The respondent's letter dated 01.07.2017 the respondent relieved the claimant's duties as part of management team and she was designated Accounts Clerk to work 8.00am to 5.00pm as an Accounts Clerk. The administrative duties having been withdrawn, her monthly pay was reduced to Kshs. 30, 000.00 from 40, 000.00 and she would report to the Accountant. The claimant appealed against the reassignment of duties but the management replied by the letter dated 06.07.2017 upholding the reassignment and quoting the contractual clause that her functions and duties may be altered at any time at the discretion of the management. By the letter dated 07.07.2017 the claimant stated that the reassignment was a suspect punishment and her appeal be relooked into.

The claimant received the letter to show cause dated 11.09.2017 stating that she had been verbally warned severally not to report on duty while drunk or drinking while at work but, on 09.09.2017 she had been on duty while drunk. She was to show-cause by 1400 hrs the same 11.09.2017. The claimant replied by her letter of 11.09.2017 stating that on 09.09.2017 she was not intoxicated but she had been feeling unwell. She had visited hospital and the doctor gave attended to her showing she was unwell. The medical notes exhibited showed that she was treated at Town Medical Clinic on 09.09.2017 and given 2 days of bed rest. The medical letter dated 12.09.2017 shows she had been attended to but it contradictory states she was put on 5 days' rest. The claimant's case is that when she resumed duty after the rest, she was locked out. Her case is that the termination was constructive, without notice, without a hearing and unfair.

The respondent filed the reply to the memorandum of claim on 28.11.2018 through Ruttoh Erica & Associates Advocates. The respondent's case was as follows:

- a) The respondent admitted employing the claimant but after re-assignment of duties her last salary was Kshs. 30, 000.00 per month and not Kshs. 40, 000.00.
- b) The respondent admitted the correspondence as pleaded for the claimant took place.
- c) On the material date the claimant was drunk while on duty and went for medical attention thereafter.
- d) The pay for 14 days in September 2017 during suspension was fully paid after she resumed duty.
- e) Due to her drinking behaviour the claimant absented herself from duty.

The claimant testified to support her case. The respondent's witness was the Human Resource Manager (RW). Parties failed to file respective submissions within the time directed by the Court. The Court has considered the material on record and makes findings as follows:

- 1) The Court finds that the claimant was employed by the respondent at Kshs. 40, 000 per month and after the re-assignment withdrawing the administrative duties her monthly and last pay was Kshs.30, 000.00. The Court finds that the salary reduction and withdrawal of the administrative duties was not challenged in the instant case but appears to have been part of the chain of events leading to the separation but was not the immediate proximate cause of the separation.
- 2) While alleging that after 09.09.2017 she was treated and reported back at work but was locked out, the claimant in a contradictory manner testified that her last day at work was on 14.09.2017. She also testified in cross – examination thus, “**I left work on 14.09.2017 of my own volition**”. The Court has considered that evidence and finds that the claimant voluntarily left employment following the embarrassing conduct on 09.09.2017 during which she was at work drunk and having vomited at the office per the respondent's evidence as testified by RW. The allegations and claims of unfair termination are found not justified at all. Further she is therefore not entitled to notice pay as claimed. For avoidance of doubt the claimant testified thus, “**On 09.09.2017 at 7.00pm I vomited at office. General Manager came together with Director and Human Resource Manager.**” She never raised the issue of being unwell at that point and there is no reason to doubt the account by RW that the claimant went to hospital after she had been found drunk at work on 09.09.2017.
- 3) The claimant was a member of NSSF and she is not entitled to service pay under section 35 of the Employment Act, 2007.
- 4) RW testified that she had no evidence on payment of leave or leave given and under section 28 of the Act and on a balance of probability, the Court finds that the claimant is entitled to leave **Kshs. 43, 077.00** as prayed for.
- 5) The claimant's last day at work being 14.09.2017 she is entitled to the **Kshs. 21, 538.00** as pay prayed for.
- 6) The claimant is entitled to the certificate of service per section 51 of the Employment Act, 2007.
- 7) As parties did not file and serve submissions within the timelines set by the Court, there will be no orders on costs of the suit.

In conclusion, judgment is hereby entered and the suit determined with orders:

- 1) The respondent to pay the claimant a sum of **Kshs. 64, 615.00** by 01.09.2021 failing interest to be payable thereon at court rates from the date of filing of the memorandum of claim till full payment.
- 2) The respondent to deliver the claimant's certificate of service within 30 days from the date of this judgment.
- 3) No orders on costs of the suit.

Signed, dated and delivered by video-link and in court at **Mombasa** this **Friday 16th July, 2021.**

BYRAM ONGAYA

JUDGE