



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 326 OF 2016

RUTH WAIRIMU KAHOROCLAIMANT

VERSUS

NAIROBI UPPERHILL HOTEL LIMITEDRESPONDENT

J U D G M E N T

1. On 2nd March 2016, the Claimant filed a Memorandum of Claim dated 1st March 2016, making the following claim against the Respondent herein:-

- a. Unpaid salaries for September – November 2013 @ ksh83,000 per month.....ksh. 249,000
- b. Three months' salary in lieu of notice of termination ksh.....Ksh.249,000
- c. Leave pay for 2013.....ksh.83,000

Total.....Ksh.581,000

2. The Claimant pleaded that she had on 24/6/2013, been employed by the Respondent as a Sales Account Manager, earning a monthly salary of Ksh.83,000. That on or about 31st November 2013, the Respondent terminated the Claimant's services without any lawful justification or excuse, and without notice and/or salary in lieu of notice. The Claimant sought the following reliefs.

- a) General damages.
- b) A declaration that the termination of her services was irregular, unlawful and an order that the claimant be paid her dues and compensation at the sum of ksh.581,000.
- c) Costs of the claim and interest.

3. On 5th July 2019, the Respondent entered appearance through Maitei Nyawira & Associates Advocates, but did not file any response to the Claimant's claim, not even after the court gave it fourteen days to do so when the matter came up for pre-trial directions on 15/7/2019.

4. On 27th September 2019, the Respondent's said advocates filed a Notice of Motion (dated 26th September 2019) seeking leave to cease acting for the Respondent in the suit herein. The said application was allowed by the court on 5/11/2019.

5. When the matter came up for hearing on 26/7/2021, the Respondent did not attend court though it was shown to have been served with a hearing notice on 20/4/2021. The Claimant testified and adopted her witness statement dated 1/3/2016, and produced as exhibits the six documents listed in her appendix "A" dated 1/3/2016.

6. The Claimant states in her said witness statement:-

a. That by a letter of appointment dated 24/6/2013, the Claimant was employed by the Respondent as a Sales Account Manager with effect from 1/8/2013, and that she (the Claimant) started working on that date.

b. That she worked diligently as directed, but only received a salary for the month of August 2013. The salary for September to

November 2013 was not paid.

c. That she was just told to wait and her salary would be paid later as the Respondent was facing financial difficulties.

d. That on 31/11/2013, she was verbally informed that her services had been terminated. That she was not given any notice of termination or salary in lieu of notice, and was not paid her unpaid salary arrears and leave pay for 2013.

e. That she was not given a certificate of service, reason for the termination of her services, and was not requested to show cause why she could not be dismissed. She was not informed of any misconduct on her part and asked to defend herself.

f. That her rights to natural justice were violated and she was treated in a very inhumane manner, and claims general damages and her dues in the sum of ksh.581,000 as itemized in the Memorandum of Claim plus costs and interest.

g. That the Respondent has rudely refused to respond to all her correspondences or to pay her dues.

7. As already stated in this judgment, the Respondent did not file any response to the Claimant's Memorandum of Claim, and did not attend court on the hearing of the claimant's case. The Claimant's evidence was therefore neither rebutted nor controverted.

8. One of the documents produced by the Claimant in evidence was her letter of appointment/contract of employment dated 24/7/2013 and signed by both parties on 15/7/2013. Although the contract gives 1/7/2013 as the starting date, the Claimant testified that she started working on 1/8/2013. This was not controverted or rebutted. After all, the contract itself is shown to have been signed on 15/7/2013.

9. One of the Claimant's terms of employment was that she would be on probation for six (6) months and that during the probation period, the contract would be terminable by either party giving one(1) month written notice or by payment of an equivalent amount of wage in lieu of such notice (Clause16 of the contract of employment).

10. The Claimant testified that her employment was verbally terminated on 31/11/2013, and that she was neither given notice of termination, informed of any misconduct on her part and was not asked to show cause why she could not be dismissed. She stated in her witness statement that her right to natural justice was violated and that she was treated in a very inhumane manner.

11. The date of termination of the Claimant's employment (31/11/2013) falls within the contractual six (6) months probationary period. Issues emerging for determination appear to me to be as follows:-

a) Whether termination of the Claimant's employment during contractual probationary period is subject to statutory procedural fairness test set out in Section 41 of the Employment Act.

b) Whether termination was unlawful.

c) Whether remedies sought should issue.

12. On the first issue, I must refer to Section 42(1) of the Employment Act which provides:

"the provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract".

Section 42(1) of the Employment Act is craved in a mandatory manner as the word "**shall**" is used, leaving no doubt that it ousts the applicability of Section 41 of the Act to termination of probationary contracts of employment. The Claimant was therefore not entitled to notice and hearing before termination under Section 41 of the Employment Act.

13. Section 42(4) however provides that:-

"A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice"

14. Clause 16 of the Claimant's contract of employment on the other hand states:-

"you will serve a probationary period of six(6) months from the date of this appointment. During this period either party may give the other a one (1) months' notice in writing or by payment of equivalent amount of wage in lieu of such notice".

15. The Respondent was obligated to give one month notice of termination pursuant to Clause 16 of the Claimant's employment contract, or to pay the equivalent amount of wage(s) in lieu of such notice. The Respondent did not do so, and therefore contravened Section 42(4) of the Employment Act on the right to notice of termination and breached Clause 16 of the contract of employment. The termination for which no reason was given by the Respondent (the employer) was unfair, irregular, unlawful and was in breach of Clause 16 of the Claimant's contract of employment. I so declare. This deals with the second issue also and settles the same. The Claimant has, however, not specifically sought any relief / remedy for unfair termination of employment.

16. Turning to the third issue on whether remedies sought should issue, I will address the reliefs sought in the claimant's Memorandum of

Claim, each separately as follows:

a) **General damages**

General damages is a common law remedy and a claim thereof must always be specifically pleaded, particularized in the claimant's pleadings/statement of claim, and proved by evidence on a balance of probability. This has not been done in the present case and the prayer for general damages is declined.

b) The Claimant prays for a liquidated sum of ksh.581,000 which in paragraph 8 of the Memorandum of claim is shown to include:-

- i. Unpaid salaries for September to November 2013 @Ksh.83,000 per month – ksh.249,000
- ii. Three months salary in lieu of three month notice of termination – ksh. 249,000
- iii. Leave pay for 2013 – ksh.83,000

17. On the issue of unpaid salaries for the months of September, October and November 2013, it is to be noted that a claim for non-payment of salary is in the nature of special damages and ought to be quantified, pleaded and proved. The Court of Appeal stated as follows in the case of **Nelson Mwangi Kibe –vs- Hon Attorney General, Civil Appeal No. 164 of 2001:-**

“the letter of interdiction addressed to the Appellant on January 31,1996 by the Respondent informed him that he would be on half salary during the period of interdiction. Surely the Appellant ought to have intimated in his plaint that this was the position in order that the half balance which would, subject to the Respondent’s liability being established, be payable. The whole salary ought to have been quantified because claim for non-payment of salary is in the nature of special damages.”

18. The Claimant pleaded that her monthly salary under the contract of employment was ksh.83,000 and that although she worked from 1/8/2013 to the end of November 2013, she only received a salary for the month of August 2013. She exhibited her contract of employment wherein her total monthly earnings are shown to have been ksh.83,000. The claimant’s claim for ksh.249,000 being unpaid salary for three months (September, October and November 2013) has not been denied by the Respondent as the claim is undefended. The same has been proved and is allowed.

19. The claim for ksh.249,000 alleged to be three months salary in lieu of notice of termination is declined. I have already found in this judgment that the Respondent was obligated to give the claimant a one month notice of termination of the probationary contract or pay her an equivalent amount of wage in lieu of such notice. Under Clause 16 of the contract, I award the Claimant ksh.83,000 being one month salary/wage in lieu of notice.

20. The Claim for ksh.83,000 being leave pay for 2013 is declined. The Claimant pleaded, and indeed testified that she only worked for four (4) months, from August to November 2013. Section 28(2) of the Employment Act provides as follows:-

“where employment is terminated after the completion of two or three months of service during any twelve months leave earning period, to not less than one and three quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively”.

21. The Claimant did not address the issue of leave vis-a vis the number of months worked, either in the Memorandum of Claim or in her evidence. The claimant’s counsel also did not address the issue in the approximately one page written submissions dated 29/7/2021 and filed in court. Consequently I hereby enter judgment for the claimant against the Respondent for a total sum of ksh.332,000, plus interest at court rates from the date of judgment until payment in full.

22. As costs follow the event, the Claimant is awarded costs of this claim.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF SEPTEMBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

AGNES M.K. NZEI

JUDGE

Appearance:

Miss Kimanzi for the Claimant

No appearance for the Respondent