



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.1032 OF 2017

FAITH MBEKE MUTHIANI.....CLAIMANT

VERSUS

BODY BY DESIGN FITNESS SPA.....RESPONDENT

JUDGMENT

I INTRODUCTION

1. Vide a memorandum of claim dated 31st May, 2017 and filed in court on 5th June, 2017, the Claimant prays for judgment against the Respondent in the sum of Kshs.508,777/= made up of various categories as set out in paragraphs 7 and 11 of the said memorandum of claim.
2. The sub-heads making up the total claim of Kshs.508,777/= are one month's salary in lieu of notice, salary for February 2017, unutilized leave days, off days, overtime, service pay, and one year salary compensation for unfair termination. The Claimant also prays for a certificate of service.
3. Together with the statement of claim was filed a verifying affidavit, Claimant's list of documents, and Claimant's list of witness.
4. On 27th July, 2017, the Respondent filed a response to the claim dated 26th July, 2017.

II PLEADINGS

5. The Claimant's case in summary is that she was engaged by the Respondent as a Spa Therapist for the period from 2nd May, 2016 to 23rd February, 2017. She states that she was unlawfully terminated as from 23rd February, 2017.
6. Further, the Claimant alleges that she was not paid her terminal dues and that this cause was filed in pursuance of the dues.
7. In the response filed, the Respondent admits that the Claimant was their employee and alleges that the period of employment was 2nd May, 2016 to 22nd February, 2017.
8. The Respondent further alleges in paragraph 3 of the said response that it is the Claimant who absconded duty from 23rd February, 2017 hence constructively terminating the employment. The Respondent hence states that it is the Claimant who denied herself an opportunity for due process.
9. The Respondent also accuses the Claimant of gross misconduct in terms of failing to account for monies belonging to the Respondent and also damaging a machine that the Claimant operated at the place of work.
10. The Respondent therefore denies in toto that the Claimant is entitled to any of the reliefs sought in the memorandum of claim. The Respondent dismisses the Claimant's claim as based on misrepresentations, falsehood, and outright bad faith, hence lacking in merit and prays that the same be dismissed with costs.

III THE HEARING

11. After the pleadings closed, the matter was certified ripe for hearing on 15th July, 2021 and fixed for hearing on 30th July, 2021.

12. On 30th July, 2021 the Claimant (CW1) testified in chief but was stood down to allow the placing on court file of Claimant's list of documents and the bundle of documents which was missing from the court file.

13. The hearing resumed on 4th August, 2021 when the (CW1) continued with her testimony in-chief, was cross examined, re-examined, and closed her case.

14. On the same date, 4th August, 2021, the Respondent called one witness, GEOFFREY NDUNG'U (RW1) who testified in-chief, was cross examined, and re-examined. The Respondent closed their case at that point.

15. The Claimant (CW1), as expected, testified in support of her cause based on the witness statement on record while the Respondent's only witness (RW1) testified in support of the Respondent's position which is largely in opposition to the position taken by the Claimant. It is not contested that the Claimant was in the employment of the Respondent for the period from 2nd May, 2016 to 22nd February, 2017. It is also not contested that the monthly salary for the Claimant was Kshs.20,000/=. This is because, although the monthly salary is clearly stated in the claim, the same is not denied or disputed in the response.

16. Therefore, from the foregoing, it is not in dispute that the Claimant was a Spa Therapist in the employment of Respondent at a monthly salary of Kshs.20,000/= for the period from 2nd May, 2016 to 22nd February, 2017, both days inclusive.

17. The court identifies the following issues for determination after due consideration of the pleadings filed, the oral testimony from both sides, and rival written submissions filed.

(i) Was the termination of the Claimant by the Respondent fair, procedural, and lawful?

(ii) If the termination was unlawful, what reliefs is the Claimant entitled to?

(iii) Who meets the costs of this litigation?

IV TERMINATION

18. The claimant, testified that she was orally dismissed on 22nd February, 2017 by one LILIAN WANJIRU, a director of the Respondent. From the evidence on record, the Claimant states that she was dismissed after a machine that she was operating broke down.

19. The Claimant maintained, even on cross-examination, that she was told by the above named director not to report to work on 23rd February, 2017.

20. The Claimant in her testimony stated that she was not subjected to due process in that no notice was issued to her and that no disciplinary hearing was held.

21. The Claimant stated that, after the oral termination, she could not force herself back to work and as such she was terminated unprocedurally and unlawfully.

22. On the other hand, RW1 for the Respondent testified that when the Claimant was questioned about the damage on the machine that the Claimant just walked away in huff and never reported back to work. RW1 could not, with certainty, tell if the Claimant left the place of work on 22nd or 23rd of February, 2017.

23. RW1 further testified that he was paid his monthly salary by the Respondent either in cash or via m-pesa depending on his preference. He admitted that there was no record for salary payment and that he and other employees, including the Claimant, did not sign anywhere for the salary payment.

24. As statement in another part of this judgment, it is not in dispute that the Claimant was an employee of the Respondent for the period from 2nd May, 2016 to 23rd February, 2017 at a monthly salary of Kshs.20,000/=.

25. In contravention of Section 9 of the Employment Act No.11 of 2017 (the Act), the court finds that the Respondent failed to reduce the employment contract into writing. This omission on the part of the Respondent leaves it to this court to discern the nature and the terms of the contract based on the provisions of the Act. (See the holdings in ***Robai Musinzi Vs Mohammed Sofdar Khan (2012) eKLR & Joseph Okelo Adhiambo and another Vs YJ Elmi & others (2012) eKLR***).

26. The submissions and the position taken by the Respondent's counsel, that the Claimant was not entitled to due process, having only worked for less than 13 months, based on Section 45(3) of the Act, is not tenable. There are two main reasons for this. One, the Claimant was not on probation, and even if she was on probation, Article 47 of the Constitution and the various provisions of the Fair Administrative Actions Act, provide that all persons to be affected by an administrative action shall have a fair hearing and due process in accordance with the rules of natural justice.

27. Secondly and more fundamentally, in ***ELRC Petition No.94 of 2016, Monicah Mumbi Kibuchi & 6 others Vs Mount Kenya University & Another, Section 41(2) of the Act***, which in proper interpretation of the law is the basis upon which Section 45 (3) of the Act is based, was declared unconstitutional.

28. The sum effect of the decision in the above petition is that all employees, nay all persons, to be affected by an administrative action shall be accorded a fair hearing in the due process.
29. It is therefore naïve and misleading to suggest and submit that the Claimant was not entitled to due process for the reason of having worked with the Respondent for less than 13 months.
30. There is no evidence on record whatsoever, to suggest that the Claimant was subjected to due process before, or even during the dismissal.
31. It cannot be true that the Claimant just walked away from her employment and the court is unable to believe the evidence tendered by RW1 in that regard.
32. The Claimant stated that she was terminated by one LILIAN WANJIRU, a director of the Respondent. It has not been denied by the Respondent that there exists such a director of the Respondent. RW1 was a fellow worker at the Respondent and there is no explanation given whatsoever as to why the said director was not called as a witness, as RW1 was not a supervisor to the Claimant.
33. The allegation by the Respondent that the Claimant had been arrested for misappropriation of funds is neither here nor there as no tangible evidence was adduced to that effect.
34. Even if the court assumed for a moment that the Claimant had damaged the alleged machine, the Respondent had the lawful option of surcharging the Claimant, or still terminate her after due process.
35. The Claimant produced a demand letter dated 14th March, 2017 that was produced as exhibit 2 during the hearing. No response thereto was adduced either orally or by a written response.
36. Further, there is no evidence on record whatsoever as to any efforts by the Respondent to subject the Claimant to due process by way of for example a written invitation to attend disciplinary proceedings.
37. It is by now clear, and the court has said enough, that the termination of Claimant's employment by the Respondent was unfair, unprocedural and unlawful.
38. Suffice for this court to categorically state that the facts, evidence, and the entire circumstances of this cause are different from the two decisions cited by counsel for the Respondent in *Wilson Mudogo Mulima Vs AGS Worldwide Movers (K) Limited (2014) eKLR* and *Eastern Produce (K) Limited Vs John Lumumba Mukosero, Eldoret Civil Appeal No.25 of 1998*.
39. As stated earlier, the Claimant made a formal demand to the Respondent, exhibit 2, before coming to court but the Respondent did not respond thereto. The Respondent did not adduce any evidence to illustrate any efforts to accord the Claimant due process.
40. Moreover, the director who is alleged to have dismissed the Claimant orally was not called as a witness to rebut that evidence. No director of the member of management team was called as a witness by the Respondent to rebut the evidence adduced by the Claimant in regard to her termination.
41. The court finds that on a balance of probability, the Claimant was unfairly and unprocedurally terminated by the Respondent.
42. Of course, the Claimant had a legal right to file her claim in court as she had been unlawfully terminated and her dues had not been paid.

V RELIEFS

43. Having found that the termination was unlawful and unfair in substance and form, the court now turns to the reliefs available to the Claimant.
44. A party to a cause is bound by the pleadings filed and hence the court has to examine paragraphs 7 and 11 of the claim.
45. The guiding principles in regard to reliefs available are found in Section 49 as read with Section 50 of the Act.

(i) One (1) month's salary in lieu of notice; the court finds that no notice was issued to the Claimant as required under Section 35 of the Act.

Under this head, the court awards as follows:-

$Kshs.20,000 \times 1 = Kshs. 20,000/=$.

(ii) On the salary for the month of February, 2017, the court notes that the Claimant worked upto and including 22nd day of February, 2017. The award, on prorata basis is as follows:-

$Kshs.20,000/30 \times 22 = Kshs.14,667/=$

(iii) On 21 unutilized leave days the court denies this claim for the reason that no record was produced in court to confirm if the Claimant had such unutilized days. If the Claimant believed that such records existed, she had the liberty to apply for the Respondent to produce the same in court in accordance with the law. The court finds that this claim must fail for lack of proof.

(iv) On 28 off days worked, for reasons given in (iii) above this claim fails.

(v) On overtime worked the court finds that the same was not proved as no evidence was tendered on the same. This claim fails on that account.

(vi) On service pay for 11 months the court returns that service pay is ordinarily based on every year completed, usually where the employee is not a member of a pension scheme, based on one monthly pay in every 12 months.

However, since the service is essentially an accumulation for the 12 months, it is logical to calculate the same on prorata basis as follows;

$$\text{Kshs.20,000/12} \times 11 = \text{Kshs.18,333/=}$$

(vii) The Claimant is entitled to a certificate of service under Section 51 of the Act and the Respondent is ordered to issue the same.

(viii) On the issue of compensation for unfair termination, the court makes the following observation in arriving at what it considers to be a fair quantum. The basis of this relief is Section 49 (1)(c) of the Act. The law caps the maximum award that may be made under this head at 12 months gross monthly wage or salary of the employee as at the time of dismissal or termination.

The court has found that the Claimant was unfairly, unprocedurally, and unlawfully terminated. The services that the Claimant offered in the employment of the Respondent have been described as Spa Therapist. There is no evidence tendered to demonstrate how unique or skilled the job is.

There is no evidence on the qualification of the Claimant or the qualification generally required for that job. Again, no evidence was adduced in regard to the availability of such a job in the market. There is no evidence on how long it took the Claimant to obtain another job, if at all she did.

In the circumstances, and doing the best that the court can do, guided by Section 49 as read with Section 50 of the Act, the court finds that an award of three (3) months gross salary as compensation should be fair in the circumstances of this matter and proceeds to award as follows;-

$$\text{Kshs.20,000} \times 3 = \text{Kshs.60,000/=}$$

VI COSTS

46. Costs ordinarily follow the event and there is no good reasons to depart from that general rule in this cause and therefore the Claimant is awarded costs based on the award made, same to be agreed between the parties or taxed.

VII DISPOSAL

To sum up this cause and dispose of the same, the court makes the following judgment.

(a) A declaration be and is hereby issued that the Claimant's termination by the Respondent was unfair, unprocedural, and unlawful.

(b) The Claimant is awarded the following;-

(i) One month's salary in lieu of notice - Kshs.20,000/=

(ii) Unpaid salary for the 22 days worked in February, 2017 - Kshs.14,667/=

(iii) Service pay on pro-rata basis Kshs.18,333/=

(iv) Compensation for unfair termination - Kshs.60,000/=

Total - Kshs.113,000/=

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This amount shall attract interest at count rates from the date of this judgement till payment in full.

(c) The Respondent is ordered to issue the Claimant with a certificate of service.

(d) Costs to the Claimant based on the orders in this judgment.

Dated, Delivered and signed at NAIROBI this 10th day of September 2021

DAVID NDERITU

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by 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.

DAVID NDERITU

JUDGE