



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 594 OF 2017**

**MINAZ ISMAIL KHAMISA.....CLAIMANT**

**- VERSUS -**

**BHAVIN MOTORS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> November, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 21.07.2017 through Nabwana Nabwana & Company Advocates. The claimant's case is that the respondent employed her as a receptionist from August 2008 to 18.05.2017 at Kshs. 30, 000.00 per month and she served for 8 years 10 months. Further on 18.05.2017 one Nikhil Bupen Rathob openly to the claimant to leave the premises – it was in presence of the director one Bipin and other staff. Further the director asked her to go home for some time and when she returned on 22.05.2017, the director informed her that she could not be kept at work and that her services were no longer needed. She claimed house allowance at 15% of Kshs. 30, 000.00 for the period worked purportedly under section 31 (1) of the Employment Act and for the entire period served. She claimed and prayed for:

- a) One-month pay in lieu of notice Kshs.34, 500.00.
- b) Unpaid house allowance Kshs. 477, 000.00.
- c) Unpaid 6 days' annual leave Kshs.7, 961.53.
- d) Unpaid salary for May 2017 Kshs.34, 500.00.
- e) A certificate of service to issue.
- f) Maximum compensation under sections 49 and 50 of the Act Kshs.414, 000.00.
- g) Release of personal passport Reg. No. A1246185.
- h) Damages for psychological torture and sexual harassment.

The response to the memorandum of claim was filed on 30.08.2017 through Tarus & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent denied terminating the employment and if at all there was termination, then it was fair and lawful.

The claimant testified to support her case. The respondent's witnesses included Omari Mbwana Kisusa (RW1); and Harsha Pandya (RW2). Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows:

To answer the **1<sup>st</sup> issue** for determination the Court returns that the parties were in a contract of service. The respondent employed the claimant as a receptionist for the 8 years and 10 months. For payment of salary the claimant confirmed that she used to sign the petty cash vouchers and payslips exhibited for the claimant. Her last monthly gross pay was **Kshs. 25, 000.00** per the record of the meeting before the Labour Office on 22.06.2017 and the claimant's own evidence. The payslips exhibited for the respondent show that she was paid a basic salary plus house allowance. The Court finds that the claimant's testimony that her last monthly salary was Kshs. 30, 000.00 because Kshs. 5, 000.00 was paid in cash under table is overruled as parties are bound by their documented monthly payment.

The **2<sup>nd</sup> issue** for determination is whether the claimant was terminated from employment and if yes, whether the termination was unfair and unlawful.

At paragraph (k) of the memorandum of claim the claimant states that on 18.05.2017 a Mr. Nikhil Bupen Rathob openly in front of the respondent's staff and the respondent's director called Bipin Rathob openly ordered the claimant to get out of the respondent's premises and ordered the director that it was either the said Nikhil who goes or leaves employment and the claimant went to the director Bipin to ask him what to do and, Bipin instructed her to go home for some time and wait to be called, leaving the claimant with no choice but to go home. At paragraph (l) of the memorandum of claim it is pleaded that she returned on 22.05.2017 and met Bipin and she asked if she could return but Bipin told her she could not be kept at work and that her services were no longer needed contrary to section 45(2) and section 46(g) of Employment Act.

The claimant in her witness statement does not specifically mention the details of the events of 18.05.2017 or 22.05.2017 as pleaded about. In her testimony at the hearing she stated that Nikhil Bupen Rathob terminated her contract by telling her to go home and without reasons being given – that was on 18.05.2017. She further testified that on 22.05.2017 she went to consult Bipin who told her that he had decided not to keep her any more. Further he told her to bring a letter of resignation which she was not ready to bring. Further, “**There was no notice of termination. There was no disciplinary process of any nature...**”

For the respondent it was testified that on 18.05.2017 the claimant had an exchange with Nikhil Bupen Rathob about the registration number of a client's car with the result that the claimant walked away from work. The Court has considered the evidence. The respondent did not call Bipin to testify and the Court returns that there is no reason to discredit the claimant's evidence that on 18.05.2017 Bipin told her to go home for some cooling time and when she returned on 22.05.2017 Bipin told her that he had decided not to keep her any more. As submitted for the claimant, the termination was unfair as it appears to have been grounded upon her grievances with Nikhil Bupen Rathob on 18.05.2017 and such was a valid grievance with a good foundation as envisaged in section 46(g) of the Act - but instead of resolving the grievance, Bipin decided to suddenly send her home and then abruptly terminate her employment upon her return on 22.05.2017. The Court further finds that as urged for the claimant, the respondent has not shown that the reasons for termination related to the claimant's conduct, compatibility, suitability and the respondent's operational requirements and the respondent cannot be said to have adopted a fair procedure to terminate the claimant in view of her pending grievance, and as was envisaged in section 45 (2) of the Act. The Court returns that the termination was therefore unfair in terms of procedure and substance. The respondent has failed to show that as at termination on 22.05.2017, there existed valid grounds for Bipin to terminate the claimant's employment and as envisaged in section 43 of the Act. The termination was unfair.

The claimant had served for 8 years 10 months. She desired to continue in employment. The Court finds that the aggravating factor against the respondent was that it failed to address the claimant's grievance flowing from her exchange with Nikhil Bupen Rathob on 18.05.2017. The Court further finds that the claimant did not contribute to her predicament and the evidence even as per the record of the Labour Office proceedings of 22.06.2017, the claimant had suffered similar humiliation's previously and as advanced by the same Nikhil Bupen Rathob. The Court considers such to have been serious aggravating factors and the claimant had more than once suffered humiliation and threats to leave work but the respondent failed to resolve the grievance. Under section 49 of the Act she is awarded 12 months' salaries in compensation plus one-month notice pay at Kshs. 25, 000.00 per month thus making **Kshs. 325, 000.00**.

The **3<sup>rd</sup> issue** is whether the claimant is entitled to the other remedies as prayed for. The Court finds that while urging sexual harassment in the evidence and final submissions, the claimant never pleaded the particulars of sexual harassment. In any event no submissions were made to guide the Court on the quantum on the prayer for psychological torture and sexual harassment at work. The prayer will fail as the related details of claim were not sufficiently pleaded or at all alleged and the same is found unjustified. The payslip showed that the agreed house allowance was paid and the prayer for unpaid house allowance is found unjustified. The respondent did not dispute the certificate of service and the same will be delivered. The 6 days' leave pay is found due on a balance of probability and is awarded at **Kshs. 4, 839.00** per the respondent's final computation to the Labour Office. Further the passport will be released and delivered as prayed for as a claim duly established when the claimant testified that the passport was withheld by the respondent as security for cash advanced being Kshs. 12, 000.00 and the respondent had refused to return it. Unpaid salary for 18 days in May 2017 is awarded at **Kshs. 14, 516.00** as computed by the respondent to the Labour Office. While awarding the claimant the Court finds that there was no evidence that the money the respondent stated to have deposited with the Labour Office as the claimant's final dues, had indeed been paid to the claimant by the Labour Office.

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

- 1) Payment of **Kshs.344, 355.00** by 01.02.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to deliver the claimant's certificate of service per section 51 of the Act and, her personal passport Reg. No. A1246185, by 01.12.2021.
- 3) The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 26TH NOVEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**