



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2508 OF 2016

ZELPHA KHAGOITSI LUGALIA.....CLAIMANT

VERSUS

THE AGAKHAN UNIVERSITY HOSPITAL.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 5th December 2016 against the Respondent alleging unlawful termination of her employment. A brief facts of the case her case is that the Respondent employed her in April 2012 as a Patient Attendant and Unit Assistant in the Aga Khan University Hospital Nairobi. She further averred that she served the respondent with diligently until 06/02/2015, when the Respondent unlawfully and without any reasonable cause terminated her employment on account of redundancy and failed to pay her full terminal benefits. She therefore prays for the following reliefs: -

- a) 3 months' salary in lieu of notice (Kshs. 34,524 x 3) Kshs. 103,000/=*
- b) Service for 3 years (Kshs. 17,262 x 3) Kshs. 51,786/=*
- c) Underpayment of salary up to 6th February 2015*
(Kshs. 9,855 hrs x {251-137} Kshs. 1,123,470,000/=
- d) Leave days for 3 years earned but not utilise*
(Kshs. 34,524 x 3 years) .. Kshs. 103,572/=
- e) General damages for unlawful termination equivalent*
to 12 months' pay (Kshs. 34,524 x 12) .. Kshs. 114,000/=
- TOTAL Kshs. 1,796,688/=**

2. The Respondent filed a Response to Memorandum of Claim dated 27th March 2017 contending that the Claimant and other unit attendants were successfully interviewed in January 2012 and placed in its database, commonly referred to as "pool workers", for purpose of being contacted and engaged on an hourly basis when the Respondent needed additional labour at the hospital. She further averred that she engaged the claimant at a negotiated wage of Kshs. 137 per hour less PAYE payable at the end of each month for ease of payment and clarified that the agreed hourly wage was not pursuant to a CBA between the Respondent and the union because the Claimant was not a member of the said union. Finally, she averred that she contractually engaged the Claimant intermittently as a pool worker from May 2012 to March 2015 when she declined a call to report for work, and intimated that she had secured employment elsewhere. She therefore denied terminating the claimant's services on account of redundancy and prayed for the suit to be dismissed with costs because the claimant is not entitled to the reliefs sought.

Evidence

3. The claimant testified as Cw1 and contended that she joined the respondent in March 2012 and worked continuously until 6.2.2015 when she was laid off with many others. She further contended that all the other staff were paid terminal benefits except herself and when she went to see the HR Officer, she was told that her name was not in the list prepared for payment of the terminal dues. She then brought this suit to claim the reliefs set out in her Claim.

4. upon cross-examination, she confirmed she was being paid at the end of the month and stated that she was never told her name was put in a register for pool workers. She admitted that in May 2012 she worked for 60 hours and that she never worked at all in March 2013. On being shown in *appendix 2 at page 1 to 51* of the defence bundle, she admitted that on 28/08/2012 she worked from 12 noon to 7 pm; on 02/11/2012 she worked from 7am to 1pm; and on 21/04/2012 she worked from 7am to 11am. She further admitted that she had agreed to be paid on an hourly rate pay of Kshs. 137 and that the monthly pay varied depending on the total hours worked per month as shown in the payslips filed by the Respondent. She confirmed that she had no complaint about the hours worked before the termination in February 2015. She further confirmed that she used to clock in and out every day she attended work and also sign manually on the *appendix 2*. She contended that the Respondent gave her the letter dated 06/03/2015 without asking for it. She further contended that she was a member of the union but admitted no union dues were deducted from her pay according to her payslips. She reiterated that she was denied the benefits which were paid to her colleagues.

5. RW1, Roselyn Njeru adopted her witness statement as her evidence in chief and produced a bundle of documents which the court marked as **Exh D.1-4**. She confirmed that the claimant was employed by the respondent in 2012 as a pool staff for call whenever there was work to do. She contended that the claimant was not a regular employee on permanent terms but casual employee paid on hourly basis at the rate of kshs.137 per hour. For emphasis, she relied on *appendix 2 (Exh D2)*, a pool form for pool workers signed to confirm attendance and hours worked.

6. Rw1 confirmed that she is the one who did and signed the recommendation letter dated 06/03/2015 for the Claimant and contended that the claimant requested her for the same because she had secured another job elsewhere. She further confirmed that the last pay to the claimant was made in March 2015 for the hours worked in February 2015. She denied that the claimant was a member of any union.

7. Upon cross examination, Rw1 contended that the payslips were prepared on the basis of the pool forms she signed but admitted that she cannot tell whether there were errors on the payslips because she never checks them. She further contended that the claimant was not entitled to the benefits set out in the CBA because she was not member of the union. Finally, she reiterated that the claimant was a pool employee on call whenever there was need like if an employee fell sick.

Claimant's Submissions

8. The Claimant submits that she stayed in the respondent's employment continuously for 3 years and as such the Respondent ought to have converted her to permanent employee as under **Section 37 of the Employment Act**. She further submitted that the Respondent failed to give her any written contract of service despite her 3 years' diligent service. She further submitted that her dismissal was malicious because the respondent did not tender any evidence to prove that her employment was terminated after following a fair process. She further contended that the Respondent has failed to prove that there were any reason warranting termination of her employment contract and as such the termination was unfair.

9. She further submitted that she was discriminated against by being denied payment of allowances for reason that she was not a member of KUDHEIHA; and that, the fellow employees who were terminated alongside her were paid their full terminal benefits but she was denied the same. She also submitted that she worked for the Respondent for a long time and as such she deserves all benefits payable to long serving employees. She therefore prayed the court to find she was entitled to full terminal benefits and to grant the same as set out in the Statement of Claim.

Respondent's Submissions

10. The Respondent submitted that the Claimant has admitted in her testimony that she was a Pool work and that she worked on hourly basis and further admitted that she worked for the hours demonstrated in the respondent's exhibit / Appendix 2 and received the payment shown in exhibit /Appendix 1. She relied on **Krystalline Salt Limited –v- Kwekwe Mwakele & Others [2017] eKLR** where the Court of Appeal found that the four main types of contracts of service recognised by the Employment Act include: contract for an unspecified period of time; contract for a specified period of time; contract for a specific task (piece work); and contract for casual employment. The Respondent submits that its engagement with the Claimant was a contract for an unspecified period of time and that the relationship was negotiated and agreed upon, which terms of service the Claimant did not object to in court.

11. The Respondent further submitted that the claimant has failed to prove that she was unfairly terminated and contended that **Section 47(5) of the Employment Act** provides that in any complaint of unfair termination of employment or wrongful dismissal, the burden of proving occurrence of unfair termination of employment or wrongful dismissal rests on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer. For emphasis she relied on **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR**.

12. As regards the reliefs sought, the respondent submitted that the Claimant did not plead issues of discrimination in her Memorandum of Claim and neither did she put forth evidence of discrimination and as such that the same should be rejected. She further contended that the claim for salary in lieu of notice is not payable because the Claimant has not proven unfair termination and that it is instructive to note that the letter of recommendation of 06/03/2015 was issued while the Claimant was still working after she asked Rw1 for the same to seek for employment elsewhere.

13. She further denied the claim for service pay because the claimant was a beneficiary of NSSF and as such disqualified from service pay under Section 35(5) and (6) of the Employment Act. Likewise, she denied the claim for underpayment and submitted that the Claimant has not demonstrated how she arrived at the figure of Kshs. 1,123,470. She further contended the Claimant's pay per month depended on the number of hours she worked. She also denied the claim for leave because the claimant adduced no evidence to prove the same and contended that according to *page 52 of the Respondent's Bundle of Documents*, the Claimant took leave in April 2013 and January 2014. Finally, she contended that damages for unfair termination fails because the Claimant did not prove unfair termination.

Issues for determination

14. There is no dispute that the claimant was employed by the respondent as an employee for payment of wages on hourly basis. There is further no dispute that the claimant never worked for equal number of hours per day and there were days and months she never worked at all. It is further not disputed that the claimant's monthly total pay was not constant but varied from month to month depending on the number of hours worked in each month. Finally, it is common knowledge that the claimant worked for the respondent between April 2012 and February 2016. The issues for determination arising from the pleadings, evidence and submissions, are:

- i) Whether the Claimant's casual employment converted to employment on permanent terms
- ii) Whether the Claimant's employment was unlawfully terminated by the Respondent on account of redundancy.
- iii) Whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim.

Analysis and determination

(a) Whether the Claimant's casual employment converted to employment on permanent terms

15. Conversion of casual employment to term contract is done under section 37 of the Employment Act which provides as follows: -

“37. Conversion of casual employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month;

or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.”

16. In this case the claimant was employed as casual employee on hourly rate and although she worked between 2012 and 2016, the claimant admitted that she never worked continuously. She confirmed that there are days she never reported to work and even when she did so the number of hours she worked were not the same. She further confirmed that her earnings per month differed depending on the number of hours worked in each month. She did therefore not prove that she worked continuously for at least one month to qualify for conversion under section 37 above.

(b) Whether the Claimant's employment was unlawfully terminated by the Respondent on account of redundancy.

17. The Claimant pleaded that she was unfairly terminated by the Respondent through redundancy but she never produced any evidence in court to demonstrate that her position was declared redundant. Considering my finding above that her casual employment never converted to term contract under section 37 of the Act, it is obvious that the issues of redundancy or unfair termination could arise. On the other hand, even if the casual employment had converted, which is not the case, I must agree with the respondent's submission that the claimant has not discharged her burden of proof in respect of the alleged unfair termination, as required under section 47(5) of the Employment Act.

18. In **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR**, the court held that:

“19. Therefore, the Plaintiff must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the Claimant presents prima facie evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case on a balance of probabilities.

21. Even though, the Respondent did not call any witness in this case, and only relied on the pleadings and documentary evidence presented, the Claimant had not presented sufficient evidence to prove his case on a balance of probabilities.

22. The court finds that the Claimant failed to discharge the burden of proof placed on him under sections 107 and 108 of the Evidence Act.”

19. Applying the foregoing precedent to the facts of this case, I find that the claimant has failed to prove on a balance of probability that her casual employment was unfairly terminated through redundancy or at all. It follows therefore that the only plausible explanation is the one by Rw1 that the Claimant secured an alternative job and voluntarily separated from the respondent in March 2015.

Reliefs

20. Having concluded that the Claimant was not unfairly terminated, the claims for notice pay and general damages for unlawful termination must fail. Likewise, the claim for service pay is dismissed because the Respondent has produced payslips showing that she remitted all the Claimant's statutory dues for NSSF. Under section 35 (6) of the Employment Act, a beneficiary of NSSF is disqualified from claiming service pay.

21. The claim for underpayment is also dismissed because the Claimant did not prove that Kshs 137 per hour was an underpayment. In addition, she was not a member of the union (KUDHEIHA) and she also never paid any agency fee to the union and as such she did not qualify to enjoy the terms of service negotiated by the union.

22. The claim for leave must also fail because she was a casual employee and she did not prove that she worked for consecutive 12 months or at least 2 months in order to qualify for annual leave.

23. In conclusion, I find that the claimant has not proved her case on a balance of probability and I proceed to dismiss it with costs.

Dated and delivered at Nairobi this 24th day of January, 2020

ONESMUS N. MAKAU

JUDGE