



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 49 OF 2017

DORICE MAKOBE.....CLAIMANT

VS

HOTEL BARACUDA INN LTD.....RESPONDENT

JUDGMENT

Introduction

1. By her Memorandum of Claim dated 23rd October 2017 and filed in court on even date, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Reply on 19th January 2018.
2. When the matter came up for hearing, the Claimant testified on her own behalf and the Respondent called its Manager, Damaris John and House Keeper, Mercy Mwashigadi.
3. The parties also filed written submissions.

The Claimant’s Case

4. The Claimant states that she was employed by the Respondent as a Room Steward effective 19th January 2009. She earned a monthly salary of Kshs. 9,200 which was increased to Kshs. 10, 500 as at the time of leaving employment.
5. The Claimant claims that she worked diligently for the Respondent over a period of eight (8) years. She adds that she worked daily from 7.00 am until 7.00 pm, without any off day or leave.
6. On 1st September 2017, a guest reported a theft incident in his room and the hotel management suspected the Claimant and her two co-workers as they were on duty at the time the theft was said to have occurred.
7. The Claimant and her co-workers were interrogated and later handed over to the Police in Watamu. The Claimant states that after taking their statements, the Police found no evidence to implicate her and her colleagues. They were therefore released to go back to work.
8. On 2nd September 2017, the Claimant reported to work but later on the same day, the House Keeper told her that the Respondent’s Manager had given instructions that the Claimant’s employment be terminated.
9. The Claimant further states that she was not issued with any termination notice nor was she paid her terminal dues. She adds that for the month of August, she was paid a reduced salary of Kshs. 9,200.
10. The Claimant’s case is that there was no valid reason for the termination of her employment and the Respondent failed to follow due procedure in executing the termination.
11. The Claimant now claims the following from the Respondent:
 - a) 6 months’ salary in lieu of notice.....Kshs.63,000
 - b) House allowance for 92 months.....193,200
 - c) Leave allowance.....78,400

- d) Service fees.....56,000
- e) Underpayment.....322,000
- f) Damages for wrongful dismissal.....126,000
- g) Costs plus interest

The Respondent's Case

- 12. In its Response dated 11th January 2018 and filed in court on 16th January 2018, the Respondent admits having employed the Claimant but denies that she worked diligently.
- 13. The Respondent states that there had been several complaints by guests in rooms cleaned by the Claimant, for which she was given verbal warnings.
- 14. The Respondent avers that the Claimant worked from 8.00 am to 5.00 pm with a one-hour lunch break between 1.00 pm and 2.00 pm. The Respondent further avers that the Claimant was given her off days.
- 15. The Respondent claims that the Claimant was a casual worker paid on prorata basis. The Respondent states that the Claimant was not in full time employment but was engaged when the Hotel had guests.
- 16. Regarding the incident leading to the Claimant's exit from employment, the Respondent admits that the Police at Watamu reported that they found no evidence to support criminal charges against the Claimant and the other suspects. The same Police however advised the Respondent to surcharge the Claimant and her colleagues for the lost money.
- 17. The Respondent states that the Claimant had not been totally terminated but had been given 2 weeks to stay at home after which she was to report back to work but she chose not to go back.
- 18. The Respondent concedes the claim for one (1) month's salary in lieu of notice but denies all the other claims.

Findings and Determination

- 19. There are two (2) issues for determination in this case:
 - a) Whether the Claimant has made out a case of unlawful termination of employment;
 - b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

- 20. In her testimony before the Court, the Claimant stated that on 1st September 2017, her employer accused her of stealing money from a guest upon which she and her two colleagues were handed over to the Police at Watamu.
- 21. The Claimant further testified that upon reporting to work on 2nd September 2017, she was notified by the House Keeper that her employment had been terminated.
- 22. The Claimant pointed out that she was the only one whose employment was terminated.
- 23. The Respondent's Manager, Damaris John confirmed that following the theft incident, the Claimant was suspended for two weeks without pay. In addition, the Claimant together with the House Keeper and other Room Stewards were surcharged for the lost money.
- 24. The Respondent's House Keeper, Mercy Mwashigadi testified that out of all the employees caught up in the incident, only the Claimant was suspended allegedly because she was the main suspect. Mwashigadi added that the Claimant was suspended to satisfy the guest.
- 25. As held by this Court in *Kefa Omae Obiri v Imani Marianist Organization [2018] eKLR* suspension is a neutral action by which an employee is required to step aside to allow for unfettered investigations. It should therefore not attract any adverse action, such as withholding of salary unless there is a statutory provision for such an adverse action.
- 26. The Respondent's action against the Claimant was wrong in many respects; first, there was no justification for targeting the Claimant for suspension while leaving out her colleagues; second, by suspending and surcharging the Claimant for the same offence, the Respondent subjected her to double jeopardy; and third, if the Claimant's suspension was to allow for investigations as submitted by Counsel for the Respondent there was no basis for withholding her salary during the suspension.
- 27. Cumulatively, the Court finds and holds that the Respondent's actions enumerated above made the Claimant's employment untenable and amounted to constructive dismissal as defined by the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai*

Remedies

28. Pursuant to the foregoing findings, I award the Claimant six (6) months' salary in compensation. In making this award, I have considered that the Claimant was serving on short seasonal contracts and has moved on. I have also take into account the Respondent's callous conduct in handling the Claimant's case.

29. The claim for one month's salary in lieu of notice is admitted and is payable.

30. The Claimant further claims house allowance. Section 31(1) and (2) of the Employment Act provides the following:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

31. The Respondent did not provide any document to prove that the Claimant was paid house allowance. In the result, I allow the claim for house allowance at 15% of the basic salary and adopt the resultant figure of Kshs. 12,075 as the Claimant's monthly salary for purposes of this claim.

32. Noting from the Claimant's own testimony that she worked on the basis of seasonal contracts during the high season running from July to March, I will limit the claim for house allowance to the period of three (3) months from July to September 2017.

33. In her witness statement dated 20th December 2017 and filed in court on 16th January 2018, the Respondent's Manager states that the Claimant was not entitled to leave ostensibly because she was a casual employee.

34. However, the averment that the Claimant was a casual employee was not supported by any evidence. In fact, the Respondent conceded to the claim for one month's salary in notice pay, which would not be payable to a casual employee. I will therefore allow leave pay for one year.

35. The claims for service fees and underpayment were not proved and are dismissed.

36. In sum I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs.72, 450
- b) 1 month's salary in lieu of notice.....12, 075
- c) House allowance for 3 months @ Kshs. 1575.....4, 725
- d) Leave allowance for 1 year(12,075/30*21).....8, 452

Total.....97, 702

37. This amount will attract interest at court rates from the date of judgment until payment in full.

38. The Claimant will have the costs of the case.

39. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF FEBRUARY 2020

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JUDGE

Appearance:

Mr. Nyongesa for the Claimant

Miss Wambui for the Respondent