



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 427 OF 2018

EMILY CATHERINE MASINDE.....CLAIMANT

VS

ALFAROOQ HOSPITAL *also known as*

ALFAROOQ HOSPITAL MANAGEMENT.....RESPONDENT

JUDGMENT

Introduction

1. By her Memorandum of Claim dated 19th June 2018 and filed in court on 20th June 2018, the Claimant has sued the Respondent for unlawful termination of employment.
2. The Respondent was duly served but did not file any response. The matter therefore proceeded by way of formal proof.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent on 1st October 2015 as a Theatre Support Staff, earning a monthly salary of Kshs. 13,350.
4. The Claimant worked for the Respondent until 1st May 2018, when her employment was terminated.
5. The Claimant complains that the Respondent subjected her to an uncondusive work environment by:
 - a) Routinely keeping her at work for 7 days per week without compensation for rest days not taken, contrary to Clause 2.4 of the Hospital Policies and Standards;
 - b) Keeping her at work for long hours daily without any compensation for the extra hours worked;
 - c) Failing to afford her appropriate housing facilities or house rent allowance as an alternative as is required by the law;
 - d) Requiring her to work throughout all public holidays without any compensation.
6. The Claimant claims that the termination of her employment was unlawful and unfair for the following reasons:
 - a) The Respondent failed to avail the Claimant an opportunity to challenge the grounds contained in the retrenchment notice dated 21st March 2018;
 - b) The Respondent failed to clearly state and justify the reason for the retrenchment;
 - c) The Respondent failed to justify the retrenchment selection criteria;
 - d) The Respondent specifically targeted the Claimant for retrenchment without offering any work evaluation report;
 - e) The Respondent failed to pay the Claimant her terminal dues and to issue her with a certificate of service.

7. The Claimant avers that prior to her retrenchment, the Respondent had embarked on a mass employment exercise. The Claimant disputes that there was reduction in the Respondent's business.

8. The Claimant states that during the entire period of her employment with the Respondent, she was not allowed to go on leave contrary to the Hospital Policies and Standards.

9. The Claimant's claim against the Respondent is as follows:

- a) Unpaid house allowance for 30 months.....Kshs. 60,075.00
- b) Unpaid leave from 1.10.2015 to 1.5.2018.....21,561.38
- c) 26 unpaid public holidays.....26,699.92
- d) 12 months' salary in compensation.....160,200.00
- e) Certificate of service
- f) Costs

Findings and Determination

10. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

11. On 21st March 2018, the Respondent wrote to the Claimant as follows:

"RE: NOTICE OF RETRENCHMENT

This is to bring to your attention the management's decision to retrench part of the staff from May 2018 due to poor business performance at the hospital. The management has tried its best for the past couple of months to save the situation but its proven difficult.

As one of the affected staff, you are hereby notified of the decision to retrench you from May onwards. We regret this unfortunate situation and wish you well.

(Signed)

Dr Mohamud Adan Mohamed

CEO, Alfarooq Hospital Management"

12. Reading from this letter, it is evident that the Claimant's employment with the Respondent came to an end on account of redundancy.

13. Section 2 of the Employment Act, 2007 defines redundancy as:

"the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

14. While the law recognises redundancy as a legitimate mode of termination of employment, it also sets stringent conditions as a safeguard against abuse. These conditions are found in Section 40 of the Employment Act and may be categorised under three heads namely; redundancy and termination notices, objective selection criteria and prior payment of statutory dues.

15. As held by this Court in ***Cleophas Omuga v Habo Group of Companies [2019] eKLR*** the conditions under Section 40 of the Employment Act are mandatory and any termination that circumvents any of them is *ipso facto* unfair under Section 45 of the Act.

16. The Respondent did not lead any evidence to show compliance with the foregoing conditions and the Court therefore finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and she is entitled to compensation.

Remedies

17. I consequently award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service accentuated by the Respondent's failure to observe the law in executing the redundancy.

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

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).

19. The Claimant states that she was not issued with any pay slips and her letter of employment did not contain any specific figure for house allowance. With this in mind and also taking cognisance of the rather low salary paid to the Claimant, I allow the claim for house allowance at 15% of the basic salary and adopt the resultant figure of Kshs. 15,353 as the Claimant's monthly salary for purposes of this claim.

20. Similarly, the Respondent did not provide any leave records to prove that the Claimant was allowed to go on leave. The claim thereon is therefore allowed.

21. The claim for public holidays was not proved and is dismissed.

22. In the end, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 92,118
b) House allowance for 30 months @ Kshs. 2,003.....	60,090
c) Leave pay for 2 years (15,353/30x21x2).....	21,494
d) Prorata leave for 6 months (15,353/30x1.75x6).....	<u>5,373</u>
Total.....	179,075

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

24. The Claimant is also entitled to a certificate of service plus costs of the case.

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF FEBRUARY 2020

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JUDGE

Appearance:

Mr. Muganda for the Claimant

No appearance for the Respondent