



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 177 OF 2018

(Before Hon. Justice Mathews N. Nduma)

LMO.....CLAIMANT/RESPONDENT

VERSUS

A LIMITED.....RESPONDENT/APPLICANT

JUDGMENT

1. The matter proceeded ex parte in default of appearance by the respondent. The suit is thus undefended. Application to set aside the ex parte proceedings by the respondent was dismissed on 10th March 2020 and matter reserved for judgment.
2. The suit was filed on 30th April 2018. The claimant prays for the following reliefs:
 - a. A declaration that the summary dismissal of the grievant from employment is unlawful, unfair, wrongful, null and void.
 - b. The grievant be reinstated to their employment without loss of benefits.
 - c. In the alternative, the grievant be paid their terminal dues of Kshs. 8,372,993.50 for the 1st Grievant and Kshs. 11,145,622 for the 2nd Grievant.
 - d. General damages for violation of the Grievant's right to freedom of association and unfair labour practices.
 - e. Costs of this cause.
 - f. Interest of the cause at court rates
 - g. Any other reliefs the honourable court may deem fit to grant.
3. The claimant testified under oath and adopted her witness statement dated 29th April 2018 as part of the evidence in Chief. The claimant testified that she was employed by the respondent on 10th May 2016 on a three years contract as a sales lady. The claimant earned Kshs. 25,991 salary per month. The claimant earned also an average of Kshs. 40,000 sales commission per month. The claimant sold food items.
4. On 13th March 2018, the claimant received a notice to show cause. The claimant was accused of not following company rules and regulations; reporting late and leaving early without authority on 10th and 12th March 2018. The claimant responded to the letter on 17th March 2018 denying the allegations. The claimant stated that on 10th and 12th she arrived a bit late due to heavy rains in the morning. The claimant denied flouting any company rules and regulations and saying that work conditions were not good.
5. The respondent did not call the claimant to a disciplinary hearing. On 22nd March 2018, the claimant was suspended from work and placed on half pay. The half pay was not paid. The claimant went home and was not recalled to date.
6. The claimant testified that Mr. Shem Abuga, a manager was demanding to have sex with her but she declined because she was a married person. Claimant stated that this was the only reason why her employment was terminated.

7. The claimant reported the matter to Labour Office. The Labour office wrote to the respondent but they did not respond. The Advocates for the claimant wrote a demand letter which was not responded to hence the suit.

8. The claimant stated that she was paid salary up to February 2018. She was not paid for 13 days worked in March 2018. The claimant stated that she was yet to complete 13 months of her fixed contract. She prays for notice pay and compensation for the unlawful dismissal. AM owned the company but Shem was her supervisor

Determination

9. In terms of *Section 47(5) of the Employment Act, 2007*, the claimant has the onus of demonstrating on a preponderance of evidence that the termination of her employment or dismissal was wrongful. The onus then shifts to the respondent to show that the employer had a valid reason to terminate the employment or dismiss the claimant and that the employer followed a fair procedure in effecting the dismissal or termination.

10. In the present case, the claimant has shown that she had served the respondent diligently and productively for a period of over three years. That her immediate supervisor started making sexual advances to her which she turned down because she was a married woman. That the allegations made against her were framed up by the supervisor for this reason. That the claimant explained clearly in the response to the show cause letter that she had done no wrong.

11. The respondent did not respond to the claimant at all. Indeed, the claimant was never recalled back from work from the date of suspension. The claimant was not paid salary for days worked in March 2018 in the sum of Kshs. 11,262.81. The claimant was not given notice nor was she paid in lieu of notice. She claims one month salary in lieu of notice in the sum of Kshs. 25,991 and lost commission for the months in the sum of Kshs. 40,000.

12. The claimant has proved on a balance of probabilities that the dismissal was wrongful and unfair. The respondent failed to demonstrate that it had a valid reason to dismiss the claimant. The respondent also failed to prove that it followed a fair procedure in dismissing the claimant.

13. The court finds that the respondent violated *Sections 36, 41, 43 and 45 of the Employment Act, 2007*. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*, accordingly.

14. In this respect, the claimant was sexually harassed by her supervisor and not protected by the respondent. The claimant did not contribute to the job loss. The claimant lost good career prospects and her daily bread and butter unlawfully. The claimant was not paid terminal benefits nor was she given notice of dismissal. The claimant was not compensated for the job loss. The claimant had 13 more months to serve on a fixed term contract. The claimant lost opportunity to earn sales commission to her loss and detriment. The claimant did not receive certificate of service to help her move on with her life. The court finds this a suitable case to award the claimant the equivalent of Six (6) months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. (25,991x6) Kshs. 155,946.

15. With regard to the unpaid terminal benefits, the court finds that the respondent ought to have paid the claimant one month salary in lieu of notice in the sum of Kshs. 25,991 which the court awards the claimant.

16. The court also awards the claimant Kshs. 11,262.81 being unpaid salary for 13 days worked in March 2018. The claimant has not proved that she had accrued unpaid commission by the time she left employment. Having compensated the claimant for the unlawful dismissal, the court cannot pay her salary for the unserved 13 months period. The claim is dismissed therefore.

17. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- a. Kshs. 155,946 in compensation.
- b. Kshs. 25,991 in lieu of one month notice.
- c. Kshs. 11,262.81 for 13 worked days in March 2018.

Total award Kshs. 193,199.81.

- d. Interest at court rates from date of judgment in respect of (a) above and from date of filing suit in respect of (b) and (c) above.
- e. Costs of the suit to follow the event.

Judgment Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Sawe for claimant.

Mr. Nyabega for Respondent.

Chrispo – Court Clerk