



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 1 OF 2019

GRACE MUTHONI MBOGOH.....CLAIMANT

VERSUS

AMBOSELI COURT LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the alleged failure to pay her final dues, pending leave dues, fuel reimbursement, discrimination for demanding and enforcing employment rights, compensation at AA rates for the use of personal car for official duties, her certificate of service and costs. The Claimant averred that she begun working sometime in March 2012 as a Finance and Administration officer based at Ruaraka office and in 2013 she was elevated to Finance and Administration Manager. She averred that she was requested to stand in as head Accountant in August 2013 at the sister company in Nyeri after the occupant resigned. The Claimant averred that she was pursuing her masters degree course work at the University of Nairobi and had to incur travel costs over the weekend to ensure she was at the same pace with her college colleagues. She averred that her hard work and zeal saw her elevated to Financial Controller in 2016. The Claimant averred that she became the group overall in charge and would travel attending meetings with auditors and hence had a fuel reimbursement because out of town movement with her car. She averred that she chose to resign on 1st April 2018 and her resignation was accepted verbally. The Claimant averred that during the resignation period she performed her duties as usual and did end month reports including the payroll which she used prepare and share with the Defendant's head of human resource and operations director. The Claimant submitted the head of Human Resources refused to share a breakdown of the Plaintiff's leave days and gave incorrect block leave days consumed. The Claimant averred that the Respondent frustrated her request to get her paid terminal dues and other benefits which had accrued over six years. She sought the April 2018 net salary plus pending 28.25 leave days net pay – Kshs. 353,743.74; April 2018 fuel reimbursement – Kshs. 15,000/-; April pension to ICEA Lion Life Insurance – Kshs. 38,350/-; employer pension contribution percentage on the pending 28.25 leave days – Kshs. 17,227/-; interest at court rates for delayed payment of dues, suffering; general and punitive damages for frustrating the plaintiff to access her terminal dues; costs and interest of the suit; certificate of service and any other relief the court may deem just and equitable.

2. The Respondent filed a defence in which it averred that the fuel allowance was an allowance subject to tax and the Claimant put to strict proof to the contrary. The Respondent averred that the Claimant tendered a resignation on 1st April 2018 with notice effective the same date addressed to the head of Human Resources but the letter was not copied to her supervisor the Operations Director as pleaded. The Respondent averred that ever since despite being called by the Respondent to collect her final dues together with her certificate of service she has refused to do so. The Respondent denied that there was verbal acceptance of her resignation or that she continued to work diligently upon issuance of the notice. The Respondent denied that the head of Human Resources had refused to share a breakdown of the Claimant's leave days and that they gave the correct figure of leave days and other particulars in the reply dated 30th July 2018 in response to the demand letter of 20th July 2018. The Respondent averred that from its records the Claimant had exhausted all her leave days and that the pension dues are payable alongside her final dues which she has refused to accept. The Respondent averred that the Claimant had not given any figures of the sums she expected to be paid in the hope she would reap rewards from court. The Respondent averred that the Claimant is entitled to 1 month salary – Kshs. 265,000/- subject to tax and no other sum as there are no fuel reimbursement arrears or leave days due. The Respondent urged the dismissal of the Claimant's suit with costs.

3. The Claimant testified and reiterated her pleadings. She stated that she was employed as a finance and administration officer and over time was elevated to the position of finance and administration officer. She testified that she was based in Nairobi and later in the sister company a vacancy arose and she was requested to stand in for the accountant. She stated that at the time she was studying at the University of Nairobi (UoN) and had to commute to work on her thesis. She stated that she was still handling her duties in Nairobi and would prepare the payroll and liaise with human resources and the operations director. She testified that she would use her vehicle and that they would reimburse her travel. She stated the terms were negotiated net of tax. She said this was outside the salary paid as it was for extra duty. She stated that her salary rose as she progressed. She testified that in May 2016 she was elevated to Group Financial Controller and that it was then she used her vehicle for official work. She used her car for office errands and that the wear and tear was more than the fuel reimbursement of Kshs. 15,000/-. She testified that she gave notice of her resignation on 1st April 2018 and she later handed the letter to HR but sent a soft copy first. She stated that she was told the copy had been received and she was wished well by the HR and she continued with her duties. She said she diligently worked till her last day and did detailed handover notes to the operations director who would take up her

position. She stated that they communicated that they were waiting for the accountant in order to do the letter and calculate her dues. She testified that she wrote follow-up emails and the Respondent did not make payment. She thus sought the sums claimed in her claim being the April salary, leave for 28.25 days pending and pension. She stated that she was called in July 2018 and advised that the cheque was ready and she sought calculation to compare if the computation was correct. She stated that she declined to take the payment as the sum paid was not the correct sum. She testified that she had no tax arrears and therefore there was no sum due on taxes. She was cross-examined and stated that she resigned voluntarily to pursue greener pastures. She stated that she did not take the cheque for Kshs. 181,000/- and she sought tabulation relating to the sum. She testified that the sum did not include the fuel reimbursement. She said she did not request for any money for overtime. She stated there was no formal agreement on the fuel reimbursement. She testified that there was a lot of wear and tear hence the request to apply AA rates. She stated that the records for leave were at the office for the leave days she had signed for. She testified that she did not keep the records and that the company should bring the records. She stated she did not know where the tax money is. She said she was not trying to extort the Respondent and that their position was malicious. She stated that no one issued her with a certificate of service. In re-exam she stated that she communicated on email and the fuel reimbursement was agreed between her and the operations director to be paid each month. She stated that for the month of April it was not paid. She stated that she did not agree to the calculations on leave days. She testified that the Respondent's documents did not tally as there were discrepancies on leave days. She said that she had a tax compliance certificate showing there was no tax obligation. The Respondent's witness having sat through the Claimant's testimony was not allowed to testify.

4. The parties were to file submissions and the Claimant submitted that the Respondent did not issue her with a certificate of service contrary to Section 51 of the Employment Act. She submitted that she was not paid her salary for April and the allowances as well as the pay for leave days not taken. She sought April pension and the general and punitive damages for the frustration and mental anguish by withholding her pay. The Claimant submitted that she was entitled to costs in terms of Section 12(4) of the Employment Act and the Advocates (Remuneration) Order 2014. She submitted that as the Respondent did not avail testimony the decision of Odunga J. in **Linus Nganga Kiongo & 3 Others v Town Clerk of Kikuyu [2012] eKLR** applied. She submitted that the Respondent has failed to pay her terminal dues after she resigned from her employment.

5. The Respondent submitted that it was not disputed that the Claimant had resigned from her employment. The Respondent submitted that after the resignation all that remained was the computation of her dues and that the unresolved issues arose over the claim for fuel allowance and the alleged unpaid leave days. The Respondent submitted that in response to the demand letter from the Claimant's lawyer, the issue of fuel allowance was addressed as was the leave dues. The Respondent submitted that the Claimant had not been deducting tax for the fuel allowance and that no leave dues were payable as the Claimant had exhausted her leave dues. The Respondent submitted that the pension dues were forwarded as per the ICEA Insurance calculation which was admitted. The Respondent submitted that there were unpaid taxes which were to be deducted from the Claimant's April salary as they were parting ways with the Claimant. The Respondent submitted that he who comes to equity must come with clean hands and that the Claimant should not be allowed to benefit from her undertax and then blame the Respondent for her own acts of commission and omission. The Respondent submitted that the claim for general and punitive damages should fail as it does not accrue from breach of employment contract either from common law or from employment law as echoed in the case of **Jerome J. Dufrong v Douglas Ratemo & 2 Others [2019] eKLR**. The Respondent submitted that the Claimant should be compelled to pay costs for the unnecessary suit. The Respondent submitted that the certificate of service was ready and was submitted to the Claimant's lawyer who declined to receive. The Respondent submitted that having demonstrated the dues the Claimant was to receive, the court should order her to receive the same together with the certificate of service and have the matter marked as settled.

6. The Claimant resigned and therefore the only issue is the payment of terminal dues as there is no claim for unlawful dismissal. The Claimant seeks the salary for April 2018 as well as the leave days due and her pension. She also claims general and punitive damages for the suffering and frustration the Respondent subjected her to in regard to her terminal dues non-payment. The Respondent admits she is entitled to some payment but denies she is entitled to any dues for leave as she had exhausted her leave days, the Respondent also asserts that the payment for April has to cater for taxes that were unpaid. The Respondent filed documents on her leave days and it is clear there were leave balances. For instance in 2018 only 2 leave days had been taken, in 2012, 2013 and 2014 the days taken were 18, 15 and 10 while in 2015 27 days were taken. I find that the Claimant is entitled to leave days which are 28.25 days. She was also not paid her salary for April 2018. There is no denial she was entitled to the pay. The Respondent attempted to introduce a tax element in the fuel reimbursement. This was an attempt to deny the Claimant her dues. The sum was never subjected to tax during her employment and the Respondent cannot retrospectively reduce the sum on fuel reimbursement. As such the Claimant would be entitled to the sums claimed being Kshs. 353,743.74 being the April salary together with the leave dues for the 28.25 leave days not taken. She is also entitled to Kshs. 15,000/- fuel reimbursement and the ICEA pension dues for April 2018. As regards the punitive and general damages, despite the Respondent being recalcitrant in payment, the only punishment they will suffer is paying interest at court rates on the sums due from April 2018 till payment in full as well as meet the costs of the suit. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. Kshs. 353,743.74 being the April salary together with the leave dues for the 28.25 leave days not taken;
- ii. Kshs. 15,000/- fuel reimbursement;
- iii. ICEA pension dues for April 2018;
- iv. Interest at court rates on the sums due in i) and ii) above from April 2018 till payment in full;
- v. Costs of the suit;
- vi. A certificate of service in terms of Section 51 of the Employment Act.

7. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to

scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2020

Nzioki wa Makau

JUDGE