



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 226 OF 2017

JULLIET JOY ATIENO.....CLAIMANT

-VERSUS-

ORIENT CUISINE.....RESPONDENT

JUDGMENT

1. The claimant brought this suit on 23.2.2015 alleging that her employment was unfairly terminated by the respondent on 4.11.2014 for alleged theft. She therefore, prayed for the following reliefs:

- a) A declaration that the termination of employment by the respondent was unfair, wrongful and unlawful;
- b) One month salary in lieu of notice = Kshs. 28,750.00
- c) Overtime pay; 13 hours per day at Kshs. 104 per hour for 144 days (144x13x104)=Kshs. 194,688.00;
- d) Severance pay for the period of employment on a pro rata basis 15 days for each year worked Kshs. 25,000 /2 = Kshs. 12,500 claimant worked for half year so Kshs. 6,250.00;
- e) Housing Allowance at 15% of pay Ksh. 3,750 per month for 6 months (3,750x6) = Kshs.22,500.00;
- f) Compensation for leave days accrued and not taken on a pro rata basis 21 days /2 x Kshs. 833 =Kshs. 8,750.00;
- g) Compensation for wrongful termination 28,750 x 12 months = Kshs. 345,000/-
- h) Interest on the b) to g) above;
- i) Costs of the suit; and
- j) Any other relief this Honorable Court may deem fit to award under the circumstances.

2. The respondent filed defence on 12.3.2018 admitting that she dismissed the claimant for gross misconduct. She further averred that the dismissal was done during probation period and as such the claimants is not entitled to the reliefs sought.

3. The suit was heard on 23.1.2020 when the clamant tendered her evidence but the respondent did not attend court to prosecute her defence. After the hearing, only the claimant filed written submissions.

Claimant's case

4. The claimant testified as CW1. She stated that she was employed by the respondent on 9.5.2014 but she was not given any written contract. She noted that the Director of the respondent endorsed on a certificate of service from a former employer, that the claimant was employed by the respondent from 9.5.2015 as a Manager for a salary of Kshs. 25,000/- per month. She was placed on probation for 3 months until 8.9.2014 when her appointment was confirmed.

5. She further stated that on 4.11.2014 she was dismissed on allegation of theft without being accorded any hearing and as such the dismissal was unfair. She therefore prayed for compensation as prayed in her claim.

6. She further contended that she was working Sunday to Sunday without rest. She further stated that her working hours were from 5 a.m. to 3 a.m. the following day but she was not paid overtime and no payslips were given to her. She therefore prayed for the terminal benefits as set out in the claim.

Issues for determination

7. After careful consideration of the pleading, evidence and submissions, I find no dispute in the fact that the claimant was employed by the respondent on 9.5.2014 to 4.11.2014 when she was dismissed. The issues for determination are;

- (a) Whether the dismissal occurred during probation period.
- (b) Whether the dismissal was unfair
- (c) Whether the claimant is entitled to the relief sought.

Probation period

8. The claimant's undisputed evidence is that she was employed by the respondent on 9.5.2014 and dismissed on 4.11.2014. The first three (3) months of her service constituted probation period. From 9.5.2014, three months lapsed on 9.8.2014. It follows therefore that the dismissal did not occur during the probation period but after.

Unfair termination

9. Under section 45 (2) of the Employment Act, termination of an employee's contract of service is unfair if the employer fails to prove that, it was grounded on valid and fair reasons and that a fair procedure was followed. In this case, the respondent filed defence but failed to tender any evidence during the hearing. Consequently, I return that the respondent has failed to discharge her burden of proving a valid and fair reason to justify the dismissal of the claimant and further that she followed a fair procedure.

Reliefs

10. In view of the foregoing finding that the respondent has failed to prove a valid and fair reason for dismissing the claimant, and that fair procedure was followed, I make declaration that the dismissal of the claimant from employment was unfair and unlawful. Consequently, under section 49 of the Employment Act, the claimant is entitled to salary in lieu of notice plus compensation for unfair termination. Considering the fact that the claimant served for a very short period of less than an year in a managerial position, I award her three (3) months salary compensation. The claim for over time of 13 hours worked per day has not been rebutted by evidence. I therefore, allow it as prayed.

11. The claim for house allowance was also not rebutted by evidence. The claimant was earning Kshs. 25,000 basic salary per month and she prayed for House allowance at 15% of the said basic pay. That is a conventional rate which has been accepted by this court and the Court of Appeal. I therefore allow the claim for house allowance as prayed.

12. The claim for severance pay must fail because the separation was not through redundancy under section 40 of the Employment Act.

13. The claim for leave is granted on pro rate basis. The claimant worked for six (6) months, which equals 10.5 leave days hence Kshs. $25,000 \times 10.5/26 = 10096.15$. However the claimant prayed for Kshs. 8,750/- only.

14. In conclusion, I enter judgment for the claimant in the following terms:

Notice.....	Kshs. 28,750.00
Compensation	Kshs. 86,250.00
Overtime	Kshs. 194,688.00
Leave	Kshs. 8,750.00
TOTAL	Kshs. 318,438.00

The sum awarded is subject to statutory deductions but the claimant will have costs plus interest at court rate from the date hereon.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE