



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 341 OF 2018**

**ZMM.....CLAIMANT**

**VERSUS**

**MAMBA NV LUNAR PARK.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by **ZMM** against her former employer, Mamba NV Lunar Park.
2. The claim is documented by a Memorandum of Claim dated 17<sup>th</sup> May 2018 and amended on 26<sup>th</sup> July 2018. The Respondent's defence is by way of a Response dated 13<sup>th</sup> July 2018 and amended on 13<sup>th</sup> August 2018.
3. The matter proceeded to full trial with the Claimant testifying on her own behalf and the Respondent calling its Director, Lianne Wangui and Manager, Peter Macharia.

**The Claimant's Case**

4. The Claimant pleads that she was employed by the Respondent as a Ride Machine Operator sometime in the year 2013. At employment, she earned a monthly salary of Kshs. 15,000.
5. The Claimant claims that during the first quarter of 2017, the Respondent's Manager, Peter Macharia sexually harassed her on various dates by making sexual advances which the Claimant rebuffed.
6. The Claimant states that the nature and particulars of sexual harassment included the following:
  - a) The Respondent's Manager, Peter Macharia wanted the Claimant to have sex with him, in exchange for preferential treatment at work;
  - b) The Respondent's Manager used verbal language towards the Claimant which was sexual in nature and in particular that in the event they engaged in sexual intercourse, she takes extra caution not to get pregnant as the Respondent's Manager was already married and did not want children born out of wedlock and did not want his wife to know.
7. The Claimant states that her rights under Section 5(3) of the Employment Act were violated.
8. The Claimant further states that after she refused the Manager's advances, he began an inappropriate relationship with the Claimant's colleague, one Miss C. Thereafter, C would sometimes report to work late and abscond from performing her duties, leaving the Claimant with more work beyond her scope of duties.
9. The Claimant avers that in April 2017, she reported both the Manager and C to one of the Respondent's directors, a Mr. K. The Claimant also informed K that Peter Macharia had on several occasions, in the first quarter of 2017, made sexual advances towards her while at work.
10. The Claimant claims that she was thereafter subjected to victimization by the Respondent's Manager who on one occasion uttered the following words in Kiswahili '*wacha C aende lakini wewe utaona*'.
11. On 31<sup>st</sup> December 2017, as was the procedure, the Claimant carried out a riding test on a child of tender years, to establish whether the child was comfortable riding the machine.

12. The Claimant states that the child was not comfortable with the ride and payment for the ride was therefore not made.
13. The Claimant avers that at around midnight on the eve of 1<sup>st</sup> January 2018, as she was signing off, she was informed by the Manager not to report to work the following morning because he had obtained a report about her. The Claimant states that the contents of the report were not revealed to her.
14. The Claimant lays a claim for unlawful and unfair termination of employment on the ground that she was not given an opportunity to respond to any allegations against her.
15. The Claimant reported a dispute at the Ministry of East African Community, Labour and Social Protection and three letters dated 22<sup>nd</sup> January 2018, 16<sup>th</sup> February 2018 and 21<sup>st</sup> February 2018 were written to the Respondent by the Department of Labour, to settle the Claimant's terminal dues, a demand the Respondent failed to honour.
16. The Claimant now seeks the following from the Respondent:
- a) One month's salary in lieu of notice.....Kshs. 15,000
  - b) Service pay for 4 years.....30,000
  - c) Annual leave for 4 years.....42,000
  - d) Public holidays worked and not paid.....40,000
  - e) 12 months' salary in compensation.....180,000
  - f) Damages for sexual harassment.....1,200,000
  - g) Certificate of service
  - h) Costs plus interest

**The Respondent's Case**

17. In its Response as amended on 13<sup>th</sup> August 2018, the Respondent states that the Claimant was employed as a casual labourer.
18. The Respondent further states that at peak times at the Park, especially during public holidays, the Claimant was assigned to assist parents and their children to get on the rides. The Respondent denies that the Claimant was earning a monthly salary of Kshs. 15,000.
19. The Respondent also denies receiving any complaint of sexual harassment from the Claimant.
20. The Respondent states that on 1<sup>st</sup> January 2018, the Claimant was assigned a Kiddy Vide Rider Machine known as Crown. The Claimant is said to have taken advantage of the huge clientele at the Park and decided to sell the tickets she had and keep the money for herself.
21. The Respondent avers that one of the workers alerted one of the directors, Lianne Wangui, who monitored the Claimant from a CCTV camera. The Respondent states that Wangui caught the Claimant red handed, collecting money from a customer, whose child was already on the ride.
22. The Respondent alleges that a review of the CCTV camera revealed that for most of the day, the Claimant was collecting money from customers, which she did not hand over to the management.
23. Upon being questioned by the Director and the Manager, the Claimant is said to have apologised and further gave information to the effect that other employees were involved in the vice.
24. The Claimant was suspended for 14 days and instructed to come back with a written apology.
25. The Respondent states that during her suspension, the Claimant engaged in a war of words with two other workers, Macharia and C on personal issues that had nothing to do with the Company.
26. The Respondent avers that it was for this misconduct on the part of the Claimant that the Company's directors decided to summarily dismiss the Claimant and further ordered her to pay all the money she had collected from customers without the authority of the Respondent.
27. The Respondent maintains that the Claimant was summarily dismissed lawfully and in accordance with Section 44(4) of the Employment Act, 2007.
28. The Respondent denies the Claimant's entire claim and counterclaims the sum of Kshs. 55,000 being the estimated amount she took from

customers on 1<sup>st</sup> August 2018.

### **Findings and Determination**

29. There are five (5) issues for determination in this case:

- a) The nature and status of the Claimant's employment;
- b) Whether the Claimant's dismissal was lawful and fair;
- c) Whether the Claimant has proved a case of sexual harassment;
- d) Whether the Claimant is entitled to the remedies sought;
- e) Whether the Respondent has established a proper counterclaim against the Claimant.

### **Nature and Status of Claimant's Employment**

30. The Respondent states that the Claimant was a casual employee engaged on need basis. On her part, the Claimant claims to have been employed from the year 2013 to 1<sup>st</sup> January 2018.

31. Section 2 of the Employment Act defines a casual employee as:

***“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”***

32. Sections 10 and 74 of the Employment Act obligate employers to keep and maintain employment records for all their employees. If indeed, the Claimant was a casual employee, the Respondent ought to have produced these records in the form of muster roll, attendance register or payment vouchers to prove its assertion.

33. Having failed to do so, the Respondent failed to convince the Court that the Claimant was a casual employee.

### **The Dismissal**

34. From the evidence on record, the Claimant's employment was terminated on allegations of collecting money from the Respondent's customers and keeping it for herself.

35. These allegations, if proved, would amount to gross misconduct as defined in Section 44(4)(g) of the Employment Act.

36. The only way the Respondent could have proved the said allegations was to take the Claimant through a disciplinary process as required by Section 41 of the Act. There was however no evidence of any attempt on the part of the Respondent in this regard.

37. What is more, the Respondent's witnesses Lianne Wangui and Peter Macharia did not provide any documentary evidence to support the claim that the machine operated by the Claimant posted a shortfall.

38. The allegations made against the Claimant were consequently not proved and the Respondent failed to establish a valid reason for dismissing the Claimant as provided under Section 43 of the Act.

39. That said, I find and hold that the Claimant's dismissal was substantively and procedurally unfair and she is entitled to compensation.

### **Sexual Harassment?**

40. The Claimant made allegations of sexual harassment against the Respondent's Manager, Peter Macharia. She claims to have reported the harassment to one K, whom she described as a brother to one of the Respondent's directors.

41. Allegations of sexual harassment at the work place are serious as they impact not only the alleged target and aggressor but have potential to toxify the entire work environment. They must therefore not be made or taken lightly.

42. From the Claimant's own testimony, she did not only accuse Peter Macharia of sexually harassing her; she also complained that the said Macharia had an inappropriate relationship with the Claimant's former colleague, one C.

43. The Claimant herself could not recall the date(s) she had been harassed nor did she narrate the actual words or actions spoken or taken towards her by the alleged aggressor.

44. It seems to me that there could have been relational issues among the Claimant, her colleague C and their Manager but the evidential

threshold for sexual harassment was not met.

45. The Court therefore rejects the Claimant’s claims of sexual harassment.

**The Respondent’s Counterclaim**

46. In its counterclaim, the Respondent claims the sum of Kshs. 50,000 from the Claimant, being cash collection shortfall from the machine operated by the Claimant on the material date.

47. The Respondent did not however provide any document to show how the claimed figure was arrived at.

48. The Respondent’s counterclaim therefore fails and is dismissed.

**Remedies**

49. Pursuant to the finding that the Claimant’s dismissal was substantively and procedurally unfair, I award her six (6) months’ salary in compensation. In making this award, I have taken into account the Claimant’s cumulative length of service and the Respondent’s failure to observe the law in executing the termination.

50. Having determined that the Claimant’s dismissal was wrongful and unfair, she is entitled to notice pay.

51. The Respondent maintains that because the Claimant was a casual employee she is not entitled to service pay or leave pay. The Court having arrived at a contrary finding on this issue, the claims for service pay and leave pay succeed and are allowed.

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

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

- a) 6 months’ salary in compensation.....Kshs. 90,000
  - b) 1 month’s salary in lieu of notice.....15,000
  - c) Service pay for 4 years (15,000/30\*15\*4).....30,000
  - d) Leave pay for 4 years (15,000/30\*21\*4).....42,000
- Total.....177,000**

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

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

56. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Awino for the Claimant

Miss Waitere for the Respondent