



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 139 OF 2017

(Before Hon. Justice Mathews N. Nduma)

VIVIAN ATIENO NYARANGA.....CLAIMANT

VERSUS

JOVENTURE HOTEL.....RESPONDENT

JUDGMENT

1. The claimant filed suit on 5th April 2017 praying for compensation for unfair termination of employment and payment of terminal benefits including:

(a) House allowance for 22 months.

(b) Interest and costs.

2. The facts of the case are common cause that the claimant was employed by the respondent on 1st April 2015 as a waitress at a monthly salary of Kshs. 12,149.

3. The employment of the claimant was on a six (6) months fixed contract renewable and was terminable by either party giving one month notice or payment of one month salary in lieu of notice.

4. Upon expiry of the first contract, the same was renewed and the claimant received a further contract dated 1st February 2016 for a further fixed term of six (6) months on similar terms.

5. The claimant served continuously until expiry on or about the 1st August 2016 but the claimant was not given a further written contract. However the claimant testified that he continued to work for the respondent on the same terms and conditions of service until he was served with a letter of termination of service dated 2nd February 2017.

6. The letter of termination referred to the employment contract dated 1st February 2016 and stated that the letter provided under clause (c) for termination of employment upon giving the other party one month notice or payment of one month salary in lieu of notice.

7. The respondent stated in the letter that the respondent had opted to terminate the contract accordingly and would pay the claimant terminal benefits including:

(a) One month salary in lieu of notice.

(b) Service pay

(c) Leave pay for days not taken and

(d) Provide the claimant with certificate of service.

8. It is not in dispute that the claimant was paid terminal benefits in the sum of Kshs. 35,275.85 on 16th March 2017 following the termination of his employment.

9. The claimant testified that the termination was unfair in that he was not given a valid reason for the termination nor was he given

opportunity to explain why his employment should not be terminated.

10. The respondent filed statement of defence on 11th September 2019 in which it denied the allegations of unfair termination of employment stating that the employment was simply terminated on effluxion of time and was not renewed.

11. That the claimant was paid a consolidated salary at all material times and was not entitled to a further payment of house allowance. That the respondent paid the claimant all terminal benefits due to him and the suit lacks merit and should be dismissed with costs.

12. The respondent was represented at the trial by Odhiambo D. Advocate who opted to close the respondent's case after clause of claimant's case without calling any witness. The respondent did not offer any evidence therefore to counter the testimony by the claimant under oath.

13. The court has considered the oral and documentary evidence by the claimant and has found that the claimant served the respondent under two written fixed term contracts of six (6) months each. That upon expiry of the second fixed term contract, the claimant continued to serve the respondent for a further six months on similar terms without any fixed written contract.

14. The employment of the claimant was then terminated upon expiry of the last six (6) months period and he was paid terminal benefits stated herein.

15. There is no evidence that the claimant had any issues of misconduct while she worked. There is no evidence that the claimant was dissatisfied with the salary she was paid during the 22 month period she served the respondent. The claimant did not therefore provide any evidence that she was entitled to a further payment of house allowance for the 22 months served. That claim lack merit and is dismissed.

16. However upon expiry of the second fixed term, contract and the respondent did not provide the claimant with a further fixed term contract, the terms and conditions of service of the claimant were anchored on the provisions of the Employment Act 2007.

17. The claimant therefore became an employee protected under the provisions of the Employment Act and the minimum terms and conditions of service provided in the Act, including mandatory provisions guiding termination of employment applied to the claimant.

18. The respondent therefore could not terminate the employment of the clamant without giving her a valid reason in terms of *section 43(1) and (2) of the Act* and the respondent was bound to give the claimant a notice to show cause and opportunity to be heard in terms of *section 41 of the Act*.

19. It is clear that the claimant was not accused of any misconduct, however no reason was given for the termination of her employment nor was she given opportunity to explain why her employment should not be terminated.

20. The claimant has proved on a balance of probabilities as mandated under *section 47(5) of the Employment Act 2007* that the termination of her employment was wrongful as it was not for a valid reason and she was not given opportunity to be heard.

21. The court finds that the termination of the employment of the claimant was wrongful and unfair and it violated *section 45 of the Employment Act, 2007*.

22. The claimant is therefore entitled to compensation in terms of *section 49(1) (c) and (4) of the Act*.

23. In this respect the claimant had served continuously and diligently for 22 months. The claimant did not contribute to the termination of her employment. The claimant lost career prospects and means of earning a livelihood for no cause shown. The claimant was paid all terminal benefits including notice pay, gratuity and in lieu of leave days not taken. These factors mitigate the case of the claimant. The claimant was also given certificate of service to help her get new employment.

24. Considering all circumstances of the case including similar cases considered by this court, the court awards the claimant the equivalent of two (2) months salary in compensation for the wrongful termination of her employment in the sum of Kshs. 24,298.

25. In the final analysis judgment is entered in favour of the claimant against the respondent in the sum of Kshs. 24,298. The award is to be paid with interest at court rates from date of judgment till payment in full.

26. The respondent to pay the costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 15th day of October , 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. P.D Onyango for Claimant.

Mr. Odhiambo D. for respondent

Chrispo- Court clerk