



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 1268 OF 2014

DORCAS MWIHAKI WANJOHI.....CLAIMANT

-VERSUS-

ANN MURUTHI

T/A ST MICHAEL'S COMPUTER INSTITUTE.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a Head Tutor earning Kshs.22,000 per month from 12.10.2011 and worked until 15.12.2013 when she served one month termination notice. She thereafter brought this suit claiming the following termination benefits:-

- (a) Salary arrears.....Kshs.151,000
- (b) Leave for 2 years.....Kshs. 44,000
- (c) Certificate of service
- (d) Costs plus interest

2. The respondent admitted that she, together with her Business partner, employed the claimant as a Head Tutor vide a letter of Appointment dated 12.10.2011 until 15.12.2013 when she resigned citing breach of contract. She further averred that as at the time of the resignation, the claimant had agreed to a deal that the respondent's partnership be registered as a company where she would be a shareholder and a director but the claimant delayed the said registration. She therefore prayed for the suit to be dismissed with cost.

3. The parties sought and obtained direction to dispense with oral testimony and instead dispense of the suit by written submissions on the basis of the pleadings, written witness statements and documentary evidence filed. The issue for determination is whether the claimant is entitled to the reliefs sought.

Claimant's case

4. The claimant stated that she was employed by the respondent as a Head Tutor earning Kshs.22,000 per month. That she worked from 12.10.2011 to 15.12.2013 when she served one month termination notice. That after the termination the respondent failed to pay her salary arrears and other benefits. That she further failed to issue her with certificate of service.

5. She further stated that in an attempt to deny her accumulated salary and dues the respondent asked her to form company together with her but she declined after realising that the intention of the respondent was to deny her due salary. That she lodged a complaint against the respondent at the Labour Office but it was not resolved, hence this suit. She therefore prayed for reliefs sought in her claim including salary arrears for the month of February 2013 to December 2013 plus leave for 2 years.

Defence evidence

6. The respondent admitted that she co-founded St Michaels Computer Institute with her Business Partner in March 2011 and employed the claimant as a Head Tutor on 12.10.2011. That the claimant worked until 15.12.2013 when she resigned. That as at the time of the resignation,

she (respondent) had ceased from active engaged in the affairs of the Business and on 14.4.2014, she formally resigned from the partnership by filing the requisite form BN/4.

7. The respondent further stated that as early as 23.11.2012 the claimant had acknowledged the fact that the business was going through financial difficulties and suggested ways of dealing with the situation. That before the resignation, she had consulted with the claimant and she agreed to convert the business to a limited liability company and offered her 10% shares plus Directorship. That the claimant instructed a lawyer who did some work towards registration of the company but process was never completed.

8. The Respondent admitted that after resignation, the claimant lodged complaint at the Labour Office Murang'a claiming Kshs.195,000 but failed to convince the Labour officer about her claim. That thereafter the claimant resorted to unorthodox process of using unlicensed debt collectors to intimidate her to pay the said money. She contended that the suit is only meant to embarrass her and prayed for the same to be dismissed with costs.

Analysis and determination

9. The claimant has prayed for salary arrears accrued leave plus certificate of service. After careful consideration of the pleadings, evidence submissions presented to the court, I did not see any express denial by the respondent that as at the time of the claimant's resignation she had salary arrears of Kshs.151,000 for February to December 2013 plus accrued leave for 2 years. She never adduced any documentary evidence to prove that the claimant had been paid all her salary. She also never produced any leave records to prove that the claimant had utilized all her annual leave. Finally, she never produced any evidence to prove that the claimant was issued with a certificate of service after her resignation.

10. In view of the foregoing gaps in the respondent's evidence, I return that the claimant has proved her case on a preponderance of evidence. I therefore award her the claim for the unpaid salary of Kshs.151,000 which fell into arrears from February to December 2013. Such arrears arose due to the financial problems which was acknowledged by the claimant in writing on 23.11.2013. The said arrears are detailed in the copy of the payment scheduled for the period November 2011 to October 2013, which was not disputed by the respondent.

11. I further award the claimant cash for 2 years leave. The appointment letter never provided for the number of leave days per year and as such guided by section 28 of the Employment Act, I award her 21 days leave per year equaling to 42 leave days. **Hence $42/26 \times 22,000 = \text{Kshs.}35,538.50$.**

12. Finally, the claimant is entitled to certificate of service under section 51 of Employment Act because she worked for over 4 weeks continuous service. Although the respondent alleged that she had a partner, she never named him or her or sought for a joinder of the partner as a party. In addition, the time she alleges to have resigned from the partnership the cause of action herein had already accrued against her.

Conclusion

13. I have found that the claimant is entitled to the reliefs sought and I now enter judgement for her against the respondent in the following terms:-

(a) Kshs.186,538.50

(b) Certificate of Service

(c) Costs and interest at court rate from the date of filing suit. The award of damages shall be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of April, 2019

ONESMUS N. MAKAU

JUDGE