



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1873 OF 2014

RUSIAH MISESI.....CLAIMANT

VERSUS

EAGLE HEIGHTS AFRIKA (K).....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 22.10.2014 alleging breach of employment contract and wrongful summary dismissal by the respondent on 4.8.2014. She therefore prayed for terminal dues and compensation totaling to Kshs.1,051,656 against the respondent.
2. The respondent denied the alleged breach of contract of service and wrongful dismissal of the claimant and averred that it is the claimant who absconded duty from 15.7.2014 and took away her personnel file containing payment vouchers and other documents. She therefore denied the claim for terminal dues sought and prayed for the suit to be dismissed with costs.
3. The issues for determination arising from the pleadings are whether the claimant's employment was wrongfully terminated or she deserted, and whether the reliefs sought should be granted. The suit was heard on 30.10.2018 and 10.12.2018 when the claimant testified as Cw1 and the respondent's Executive Director testified on behalf of the respondent as Rw1. Thereafter both parties filed written submissions.

Claimant's Case

4. Cw1 adopted her written statement as her evidence in chief. She stated that she was employed by the respondent in December 2012 as Accountant and Officer manager earning Kshs.15,000. She however contended that she was underpaid because the correct pay for the position she was serving was Kshs.64,404 per month. She used to work from Monday to Saturday from 8.00 a.m. to 7 p.m. but sometimes without any overtime pay.
5. She further testified that she was never deducted NHIF, NSSF and PAYE from her salary and as such, no statutory deductions were remitted for her as required by the law. She also never went for her annual leave or paid cash in lieu.
6. She further testified that in June 2013 she requested for 3 days off to take an exam for a CPA KASNEB exam but to her shock, she was deducted Kshs.2,000 from her salary, she further stated that between 6.12.2014 and 6.1.2014 she fell ill and failed to report to work and despite availing medical records, she was denied the entire salary for December 2013.
7. She further testified that on 8.7.2014, she notified Rw1 that she was to proceed on maternity leave but Rw1 told her that no salary would be paid to her during the said leave. That when she went on the maternity leave she was laid off without notice and told not to report back. She contended that her termination was due to her sympathy for Rw1's husband who was involved in a matrimonial dispute with Rw1 at the time she therefore prayed for the dues set out in her claim.
8. In cross examination, Cw1 admitted that she was employed under 3 months contracts save for the last contract which was for 2 months. She further admitted that the contracts never provided for annual leave. She further admitted that she was not admitted in hospital between December 2013 and January 2014 but maintained that she called the employer and reported that she was sick.
9. Cw1 further stated that she used to attend evening revisions classes from 5.30 p.m to 8 p.m, Mondays to Fridays and that on Saturdays she used to attend church. She admitted that her last contract was to lapse on 18.7.2014 and she applied for maternity leave of 3 months on 14.7.2014. She further admitted that she never applied for extension of the contract of service before applying for the leave but stated that she delivered on 1.8.2014.

10. She further admitted that she was called severally by the police after Rw1 filed complaint but she never went to see them. She contended that in 2004 she was Accounting Technician (ATD/ATC) but she produced nothing to prove that allegation. She further contended that she worked continuously without any break from December 2012 to July 2014 but her salary for December 2013 and July 2014 was never paid.

Defence Case

11. Rw1 testified that the claimant was employed by the respondent as a casual employee and not permanent staff. That in December 2013, the claimant absented herself from work and brought no medical documents from the doctor. That on 15.7.2014, she saw in the claimant's personnel file an application for maternity leave drafted in the handwriting of the Rw's husband. That when she asked the claimant to photocopy the said application letter, the claimant disappeared and never reported back. That on 18.7.2014 the claimant entered the office through the back door and left a typed application for maternity leave on her(Rw1) desk stole her personnel file and took off with her (Rw1) estranged husband. Rw1 then reported the theft to the police but no action was taken.

12. Rw1 denied that claim for overtime and contended that the claimant never worked beyond 5 p.m. She denied the allegation that the claimant was sick in December 2013 and contended that the claimant never reported to her that she was sick and she never sought any sick leave or brought to her any medical documents. She further contended that in June 2013 the claimant absented herself for 3 days permission and when she reported back she told her that she had exams for CPA course.

13. She further contended that the claimant was employed as Receptionist doing Clerical work at an agreed salary of Kshs.15,000 per month under fixed term contracts. She contended that the last contract was lapsing on 18.7.2014 and at that time, she was involved in divorce case with her said husband. She contended that the lawyer representing her husband is the same one representing the claimant herein.

14. In cross examination Rw1 stated that the claimant was the only employee of the respondent between December 2012 and July 2014. That there was no much work and that is why she employed seasonally. She admitted that she continued employing her and never served warning letter after absenting herself without permission. She denied that the claimant gave her the original medical documents and confiscated the same. She however admitted that she deducted 3 days' pay from the claimant's salary for June 2013 because she never sought permission to go for her exams.

15. Rw1 contended that she never knew of the claimant's pregnancy until she saw an application for maternity leave drafted by her (Rw1) husband. She contended that it was inappropriate for her husband to guide the claimant on how to draft the application because he was not her employer.

16. Rw1 admitted that on 23.7.2014, she received a demand letter alleging that she had terminated the claimant's contract, and tabulating her dues. She further admitted that she responded through her lawyer but without disputing the demands. She further admitted that she called the claimant and even send her husband, her gardener, to tell her to go for her salary for July 2014. She however denied that the claimant was entitled to the claim for leave, and salary in lieu of notice. She confirmed that she used to pay the claimant using cash vouchers.

Analysis and Determination

17. There is no dispute that the claimant was employed by the respondent under fixed term contracts the last one lapsing on 18.7.2014. The issues for determination arising from the pleadings, evidence and submissions are:-

- (a) Whether the claimant was unlawfully dismissed from work or she deserted the same or his contract lapsed.
- (b) Whether the reliefs sought should be granted.

(a) Wrongful dismissal or desertion or lapse of contract term

18. The claimant pleaded that she was summarily dismissed on or about 4.8.2014. She however gave no evidence to prove the exact date of the said dismissal and the details of how the dismissal occurred. However going by her evidence during cross examination, the claimant delivered on 1.8.2014 allegedly before she was dismissed.

19. Rw1 stated on the other hand that the claimant deserted work from 15.7.2014 after she send her (claimant) to photocopy a leave application letter drafted for by her (Rw1) husband. That thereafter the claimant delivered a typed application letter through the office back door on 18.7.2014 and took off with her (Rw1) estranged husband.

She maintained that the claimant's fixed term contract lapsed on 18.7.2014 and she never applied for its extension.

20. After careful consideration of the evidence and the submissions filed, I find on a preponderance of evidence that the claimant has not proved that she was summarily dismissed by the respondent. She did not produce any termination letter or other form of evidence to prove that she was dismissed by the respondent on 4.8.2014.

21. I am further not satisfied by the evidence adduced that the claimant deserted employment from 15.7.2014 as alleged by the Rw1. She did not rebut the evidence by the claimant that she delivered her leave application dated 14.7.2014 on 16.7.2014 and when she (Rw1) declined to receive she left it on her office cabinet at the reception.

22. I am however satisfied that the evidence on record has proved on a balance of probability that the claimant's fixed term contract lapsed on 18.7.2014. The last contract of service dated 12.6.2014 and produced by the claimant as an exhibit stated that it was for a period of 2 months effective from 12.5.2014 and would effectively terminate by close of business on 18.7.2014. That is the day when Rw1 alleged that

the claimant disappeared with her (Rw1) estranged husband. Upon application of my mind to the evidence and submissions presented to the court, I return that the claimant was not wrongfully and summarily dismissed by the respondent but her contract of service lapsed automatically after effluxion of time.

(b) Reliefs

23. The claimant prayed for overtime for December 2013 to March 2014. However, in her evidence she stated that the overtime claim was for the period between December 2012 and March 2013. The pleadings were never amended to align it with the evidence. In addition Cw1 admitted in evidence that the time she alleges to have been working overtime she was attending evening classes or church service on Saturdays. Consequently I find that the claim for overtime worked has not been proved.

24. The claimant further prayed for salary for December 2013 and July 2014. She admitted that she was absent from work from 21.12.2013 the Rw1 contended that she did not attend work in the whole month of December 2013. The respondent never produced attendance register to support her claim. I therefore grant the claimant the entire salary for the period ending 21.12.2013.

25. In so doing, I have considered the fact that the claimants salary was being paid before the end of the calendar month for example in the month of November 2013, salary was paid on 22.11.2013. I further award the claimant full salary for July 2014 because his pay period ended on 18.7.2014 according to the contract of service dated 12.6.2014.

26. The claim for salary for 3 months during maternity is dismissed for lack of merits because by that time, her employment contract had lapsed. She was therefore not entitled to salary after the end of her employment.

27. The claim for leave for two years is not merited. I however, I grant her cash for the leave accrued from 2.12.2012 to 18.7.2014 on prorata basis. The period works to 1 year and 7 months. The leave earned under section 28 of the Employment Act was at the rate of 21 days per year or 1.75 days per month, which equals to 33.25 leave days. The said days translates to Kshs.19,182.70 based on the monthly salary of Ksh.15,000.

28. The claim for salary in lieu of notice is dismissed because as already found herein above the claimant was not wrongfully dismissed but her contract lapsed automatically by effluxion of time.

29. The claim for service dues for 2 years is disallowed but I grant service pay for only year which was fully served. The award is assessed at the rate of half month's pay per year of service equaling to Kshs.7,500.

30. The claim for compensation for wrongful and malicious termination is dismissed because the claimant's contract was not wrongfully terminated but it expired automatically.

31. Finally, the claim for retrospective pay to compensate for additional salary for 13 months lacks particulars and evidence to substantiate it. I therefore dismiss it for lack of merits.

Conclusion and Disposition

32. I have found that the claimant was not wrongfully dismissed by the respondent but her employment contract lapsed automatically by effluxion of time. I have further found that the claimant is entitled to some of the reliefs sought. Consequently I enter judgment for her in the following terms:-

- (a) Salary for December 2013Kshs.15,000.00
- (b) Salary for July 2014 Kshs.15,000.00
- (c) Leave.....Kshs.19,182.70
- (d) Service pay..... Kshs. 7,500.00

Kshs.56,682.70

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Considering the circumstances of this case, each party shall bear her own costs but the decreed sum shall attract interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 17th day of May 2019

ONESMUS N. MAKAU

JUDGE