



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 1448 OF 2017

LIZZY AKINYI OYUGICLAIMANT

-VERSUS-

JAM HOTELS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 25.6.2017 alleging that she was unfairly dismissed from employment by the respondent in May 2017. She therefore prayed for the following reliefs:

- (a) A declaration that the summary dismissal of the Claimant was unlawful, unprocedural and unjustified.
- (b) Damages for wrongful termination the equivalent of 12 month's salary @Kshs.18,000 per month totaling Kshs.216,000.
- (c) Three months' salary in lieu of notice @Kshs.18,000 per month totaling Kshs.54,000.
- (d) Salary for April and May @Kshs.18,000 totaling Kshs.36,000.
- (e) Accrued 42 leave days.
- (f) Service Charge payment for 2 years.
- (g) House Allowance from 30th April 2015 to 10th May 2017
- (h) General damages for causing the Claimant embarrassment and emotional distress
- (i) Certificate of Service
- (j) Interest on (b) to (g) at court rates from the 10th May 2017 until payment in full and;
- (k) Costs of the suit
- (l) Any other remedy that this Honourable Court may deem fit to grant.

2. The respondent filed defence on 28 May 2018 denying that alleged unfair termination and averred that it is the claimant who deserted her employment after being served with a show cause letter to evade disciplinary action. She therefore denied the reliefs sought and prayed for the suit to be dismissed with costs.

3. The issues arising from the suit are:

- (a) Whether the claimant deserted her employment or she was unfairly terminated.
- (b) Whether the reliefs sought should be granted.

4. The suit was heard on 9.10.2018 and 5.12.2018 when the claimant testified as Cw1 and the respondent's Manager Mr. Francis Kinuthia testified as Rw1. Thereafter both parties filed written submission.

Claimant's Case

5. Cw1 testified that she was employed by the respondent in February 2015 as a Waitress earning Kshs.9,000 from 30.4.2015. She became a Supervisor earning Kshs.18,000 basic pay. That she was never paid house allowance and no written contract was never issued with any written contract. Her duties included serving customers directly and attending their complaints.

6. On 25.4.2017, she was given compassionate leave to attend her brother's burial and resume on 1.5.2017. That on 30.4.2017 she was involved in a road traffic accident at Ntulele while on her way back to work and she sustain serious bodily injuries. That she was treated at Narok and referred to Nairobi Hospital specialized treatment because she was pregnant and bleeding.

7. Cw1 further testified that on 1.5.2017, she called the General Manager Mr. Peter Gahoto and informed him about the accident and her inability to walk and she allowed to rest but advised her to also report the matter to Rw1. That she reported the matter to Rw1 over the phone on the same day and he was told to rest.

8. Cw1 further testified that she reported back to work on 10.5.2017 but Rw1 told her that there was no space and advise her to stay away until she was called back. She waited for 4 days and reported back but again she was told there was no space for her. That she then demanded for her dues but Rw1 told her that he would consult the respondent's Directors about the same.

9. Cw1 further testified that on 20.5.2017 she returned to the hotel and Rw1 offered her Kshs.18,000 being one month salary in lieu of notice but she declined and went away. That thereafter she served a demanded letter through her lawyer and then filed this suit. She denied ever being served with any show cause letter on 10.4.2017.

10. Cw1 contended that her salary for April and May 2017 was never paid. That also service charge was never paid to her during her service at the hotel as required in the hotel Industry. That she also never went for her annual leave from 2015 to 2017. She contended that the termination of her services was unfair and discriminatory because when had not received any warning either written or verbal and termination exposed her to financial suffering after her serious accident during her pregnancy. She therefore prayed for the reliefs sought in the suit.

11. In cross examination, Cw1 admitted that she did not know her statutory minimum wage and house allowance. For a supervisors. She contended that service charge in the hotel industry was payable to supervisors but not managers. She further contended that Rw1 replaced her with his relative. She also contended that she took her treatment documents to employer after the accident but contended that a sick sheet from the doctor was not necessary because she had secured sick leave from the employer. She maintained that she was never served with the show cause letter dated 10.4.2017 and contended that she was on duty from 10.4.2017 to 24.4.2017 when she secured a compassionated leave from 25.4.2017 to 20.4.2017. She denied ever going on her annual leave and contended that in 2016, she applied for leave but she was told that there was busy schedule.

Defence Case

12. Rw1 admitted that the claimant was employed by the respondent for 3 years but contended that, during the said time she was given verbal warnings by the respondent. That on 9.4.2017, he received a report from the Head Supervisor that the claimant had over charged a guest by Kshs.200 and on 10.4.2017 he served her with a show cause letter to respond within 7 days. That after receiving the show cause letter, the claimant disappeared and never returned even to collect her salary for the 10 days worked in April 2017. He denied the alleged dismissal of the claimant and contended that she is still waited to face disciplinary hearing before a committee.

13. Rw1 denied being aware that the claimant was involved in any accident and contended that he was never served with any sick sheet in respect of the said accident. He denied that the claimant was denied her salary for the days worked in April 2017. He further denied that he replaced her his relatives and contended that he has no relative in the hotel. He further denied that the claimant went to the hotel in May 2017, she never went back there. He contended that she disappeared to evade disciplinary action and denied that she served demand letter before brining this suit. He therefore prayed for the suit to be dismissed with costs.

14. In cross examination, Rw1 contended that he joined the respondent from 1.1.2015 as supervisor and later rose to become a Manager. He contended that the claimant was issued with appointment letter but admitted that he did not have a copy. He further contended that the claimant was issued with itemized payslips but also admitted that he had no copies of exhibit. That the respondent remitted claimant's contributions to the NSSF.

15. Rw1 further contended that after receiving a report from the Head Supervisor, he called the guest to hear his story. That the guest wrote down his compliant but failed to sign. However, Rw1 did not produce the report in Court.

16. On further cross examination, he admitted that the guest checked out on 10.4.2017 before seeing him and as such he only spoke to him over the phone. He however admitted that he did not keep record of the phone number for the guest and could not remember the number. He further admitted that the guest paid through receipts but he failed to produce copies of the receipts that were issued to the guest. He further admitted that there was a price list of the items sold at the hotel but failed to produce the same to prove that the guest was overcharged.

17. On further cross examination, Rw1 stated that whenever our employee absented himself or herself, he was followed up by phone call but he admitted that the claimant was not followed up by phone. He contended that the reason for not calling the claimant after she disappeared was because she had already been served with a show cause letter. He admitted that the claimant never acknowledged receipt of the show cause letter by signing but elected to disappear. He further admitted that after failing to show cause the claimant was supposed to be invited

to a disciplinary hearing but that never happened. He maintained that the claimant was still being awaited to face disciplinary hearing. He however admitted that the claimant's position of supervisor was filled and she was at liberty to go for her unpaid salary.

Analysis and determination

18. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent as a supervisor earning Kshs.18,000 per month. There is no dispute that the said employment relationship ended in or about April 2017. I therefore proceed to answer the issues framed for determination herein above.

Desertion or unfair termination

19. Rw1 contended that on 9.4.2017 he received report from the Head Supervisor that a guest had complained that he was overcharged by Kshs.200 and he on 10.4.2017 he called the guest to give his side of the story. That the guest wrote down his report and thereafter he served the claimant with the show cause letter dated 10.4.2017 but she disappeared.

20. The claimant denied that alleged overcharging of the guest and further that he was not served with the alleged show cause letter. She also denied ever disappearing from work as alleged by Rw1 and contended that she was on duty between 10.4.2017 and 24.4.2017. That she was given a compassion leave from 25.4.2017 to attend the burial of his brother and report back on 1.5.2017. That while on her way back to work on 30.4.2017 she was involved in a serious accident that threatened her pregnancy and she sought sick leave from the respondent's General Manager Mr. Gatoto and Rw1 and availed treatment documents to the employer on 10.5.2017 when she reported back. That upon reporting back she was told that her position had been given to another person a fact that was confirmed by Rw1 in his evidence.

21. After careful consideration of the evidence and submissions, I find that the respondent has not proved on a balance of probability that the claimant deserted work from 10.4.2017 after being served with show cause letter to evade disciplinary action. To begin with, Rw1 did not prove that a guest was overcharged by the claimant on 9.4.2017 and thereafter served the claimant with the show cause letter dated to 10.4.2017. He never proved that he received the report on the alleged overcharging because he never called the Head Supervisor as a witness procedurally, I hold that the termination was unfair and unlawful within the meaning of section 45 of the Employment Act.

Reliefs

28. In view of the foregoing holding, I make declaration that termination of the claimant's employment herein was unfair and unjustified. Flowing from the foregoing, I award the claimant Kshs.18,000 being one month salary plus Kshs.108,000 being 6 months' salary compensation for the unfair termination under section 49(1) of the Employment Act. In granting the said compensation, I have considered her 3 years of service without warning and the fact that she did not contribute to the termination through misconduct.

29. I further award the claimant Kshs.24,000 being salary for April and the 10 days for May 2017. However, the claim for 42 leave days, service charge for 2 years and House Allowance are dismissed for lack of particulars. The claimant did not plead any figures to the said items and she is bound by her pleading.

30. Likewise, the claim for General damages is dismissed for lack of any legal basis.

31. Finally, the claim for certificate of service is granted because she is entitled to the same under section 51 of the Employment Act.

Conclusion and Disposition

32. I have found that the claimant did not desert her employment but she was unfairly dismissed. I have further found that she is entitled to some of the prayers sought. Consequently I enter judgment for the claimant as follows:

- (a) Notice.....Kshs. 18,000
- (b) Compensation.....Kshs.108,000
- (c) Unpaid salary..... Kshs. 24,000

Kshs. 150,000

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The said award is subject to statutory deductions but the claimant will have costs and interest at Court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 3rd day of May, 2019

ONESMUS N. MAKAU

JUDGE