



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 611 OF 2015

LEAH WAITHIRA WARARI.....CLAIMANT

-VERSUS-

MANASCO MEDICAL CENTRE.....1ST RESPONDENT

S. W. SHEUDAH.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 16.4.2015 alleging that his employment had been wrongfully and unlawfully terminated by the respondent and prayed for:

(i) The claimant to be paid full compensation of 12 months wage as compensation for loss of employment as provided for under section 49(1) (c) of the Employment Act 2007 $18,000/= \times 12$ months.....Kshs.216,000.00

(ii) 1 month pay in lieu of notice.....Kshs. 18,000.00

(iii) Leave prorata for 1 year 21 days $\times 693$Kshs. 14,553.00

(iv) House Allowance 15% $18,000 \times 15 = 2700 \times 40$ months.....Kshs.108,000.00

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(v) Severance pay 3 years 45 days $\times 693$Kshs.311,400.00

(vi) Salary under payment for 40 months 7384×40Kshs.259,280.00

(vii) Maternity leave balance 45 days.....Kshs. 31,140.00

Total Kshs.714,113.00

(viii) REASON WHEREFORE the claimant pray for judgement against the Respondent jointly and severally for (a) Kshs.714,113 as terminal dues plus interest at 12% per annum for the date of filing suit payment in full.

(ix) Any other award or benefit the Honourable court deems fit to grant in the circumstance of this case.

(x) The respondent to pay cost of this suit.

2. The respondent never filed any defence but his advocate participated in the hearing of the suit by cross examining the claimant and also filed written submissions after the hearing.

Claimant's Case

3. The claimant testified that she was employed by the 1st respondent as a Pharmaceutical Technologist from 2.6.2011 to 15.12.2014 when her services were terminated on account of redundancy. She further testified that the termination was without prior notice of one month as required by the law and she was not paid her terminal dues.

4. She further testified that her salary was underpaid and house allowance withheld by the respondent. She produced the General Wage Order for 2013 to support that claim. She further produced the termination letter and maternity leave application form to prove that she was terminated while on maternity leave.

5. In cross examination, she admitted that she underwent training while still in the employment of the respondent. She contended that she was employed by Dr. Manase Dakalu the Director of the 1st Respondent and she was terminated by the second Respondent who was wife of Dr. Dakalu and Co-Director of the 1st Respondent. She contended also that her salary of Ksh.18,000 was net of NHIF and NSSF deductions. She further contended that she only took 21 days leave in 2013 but she was only seeking 21 days leave for her last year of service. She maintained that she was not served with a redundancy notice and even the termination notice dated December 2014 was served on her in January 2015. As regards the under payment, she admitted that the General Wages Order produced did not provide for Pharmaceutical Technologist.

Claimant's Submissions

6. The claimant submitted that the termination of her employment on account of redundancy was unfair because it did not comply with the mandatory procedure set out under section 40(1) of the Employment Act. She contended that the employer failed to serve her and the area labour office with at least one month notice before the termination and further failed to pay her terminal dues upon redundancy as required by section 40(1) (e) (f) and (g) of the Act.

7. In addition, the claimant submitted that the respondent did not adduce any evidence to prove that the redundancy was valid and justified. She therefore prayed for the reliefs sought in her suit.

Respondent's submissions

8. The respondent admitted that she never fully complied with section 40 of the Act before terminating the claimant's service on account of redundancy but submitted that the claimant suffered no prejudice. She therefore urged the court to award one month salary compensation in the circumstances.

9. She further admitted to serving the claimant with a 15 days termination notice and submitted that the court should award salary in lieu of notice for 15 days.

10. She further submitted that the claim for leave should be dismissed because the claimant never applied for the same and did not prove any circumstances under section 28(4) of the Act that permits for carrying forward leave days.

11. As regards the claim for house allowance, she contended that the Kshs.18,000 was inclusive of house allowance. Likewise, she contended that the claimant did not prove that her salary was underpaid since the wage order produced did not provide for payments for a Pharmaceutical Technologist.

12. The claim for severance pay under section 40(1) (g) was admitted at the rate of **Kshs.18,000/2 x 3 = Kshs.27,000**. She however, denied the claim for remainder of maternity leave days. She contended that the claim amounts to double benefit in view of the claim for salary in lieu of notice.

Analysis and determination

13. There is no dispute that the claimant was employed by the 1st respondent as a Pharmaceutical Technologist until she was dismissed on account of redundancy effective 1.1.2015. The issues for determination are:

(a) Whether the termination was wrongful and unfair.

(b) Whether the reliefs sought should be granted.

Unfair and wrongful termination

14. The claimant contended that the termination was unfair because the respondent never gave any evidence to prove that the redundancy was justified. In addition, the respondent admitted in her written submissions that she never complied with the procedure provided under section 40 of the Employment Act.

15. Under section 45 of the Act, termination of employees services is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Considering the fact that the respondent did not adduce any evidence to justify the reason for redundancy and the fact that she admitted that the mandatory procedure for redundancy under section 40 of the Act was not followed, I return that the claimant's services were unfairly terminated within the meaning of section 45 of the Act.

Reliefs

16. In view of the foregoing finding, I award the claimant one month salary in lieu of notice plus 6 months salary compensation for unfair termination. In awarding the said compensation, I have considered the fact that she did not contribute to the termination through misconduct, and also the short period of service of 3 years.

17. The claim for severance pay is admitted and I award the claimant Kshs.27,000.

18. I also award to her the claim for 21 annual leave days plus 42 maternity leave days not utilized between 1.1.2015 and 12.2.2015.

Hence $63/26 \times 18,000 = 43,615.40$.

19. The claim for House Allowance is declined due to lack of evidence and particulars. Finally, the claim for underpayment is also dismissed for lack of evidence in the form of wage order by the Government.

20. In conclusion, I have found that the termination of the claimant's services was unfair and proceed to enter judgment for her as follows:

Notice	18,000.00
Compensation.....	108,000.00
Severance pay.....	27,000.00
Annual leave and Maternity leave.....	<u>43,615.40</u>
	196,615.40
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The said sum is less statutory deduction by in addition to costs plus interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 25th day of October, 2019

ONESMUS N. MAKAU

JUDGE