



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 259 OF 2015**

**ANNIE KIRAGU.....CLAIMANT**

**VERSUS**

**SOMAK TRAVEL LTD .....DEFENDANT**

**JUDGMENT**

1. The Claimant was employed by the Respondent on 16.7.1996 as Customer Relations Officer cum Sales Agent and worked until 16.4.2014 when her services were terminated on account of redundancy after which she was paid Kshs.487,422.47 as terminal dues. It is the Claimant's case that the terminal dues amounted to an underpayment because the salary applied in the calculation was less than her rightful salary. She has therefore brought this suit claiming Kshs.4,302,449.65 made up salary arrears due to underpayment, severance pay, outstanding leave and leave travelling allowance.

2. The Respondent has admitted discharging the claimant but averred that the redundancy was genuine because since 2008, the business had steadily declined due to political and non- political reasons that led to cancellation of charter flights to the Kenya Coast. It is the defence case that the redundancy was justifiable in order for her business to remain afloat. She however denied that the terminal dues to the Claimant was underpaid and contended that the Kshs.481,422.47 was the net of statutory deductions.

3. The main issue for determination framed by the Claimants and adopted by the Respondent revolve around the Claimants position in the employment and her rightful salary. The answer to the foregoing will then to resolve the question whether or not the terminal dues to the Claimant were underpaid and whether they are entitled to the reliefs sought.

4. The parties agreed to dispense with hearing and instead adopted the pleadings, written statement by the witnesses and the documentary evidence on record and filed written submissions to dispose of the suit.

**Claimants' case.**

5. The Claimant stated in her written testimony that she was employed by the Respondent on 16.7.1996 as a Customer Relations Officer cum Sales Agent. She joined the Kenya Gaming & Safari Workers Union in 2008 but she was forced by the employer to withdraw the same year. In 2009 she rejoined the union and continued to pay her union dues directly. In 2010 and 2011 the union bargained for salary increment but only her colleagues whose union dues were by check off system benefited from the increment. She agitated for her salary increment but it was denied.

6. In 2012 she signed check off forms authorizing union dues deductions from her salary but the employer

declined to do so even after the Claimant was elected Shopsteward. Instead, in February the employer served redundancy notice to the union. In the same month, while attending a meeting to negotiate a new CBA, the Claimant discovered that she was being paid lesser salary than her entitlement of Kshs.80,000 per month under the CBA among other benefits. When she reacted bitterly to the discovery, the employer offered to transfer her to Nairobi where the staff were getting the rightful pay and other benefits but she refused. Thereafter she was declared redundant on 16.4.2014 and paid terminal dues based on a lower salary than she was entitled under the collective Agreement (CBA). She urged the court to re assess her terminal dues based on the Kshs.80,000 salary as per the CBA.

### **Defence Case**

7. The Respondent's General Manager Zemira Lucia Ephania Fernandes filed written testimony stating that the Claimant was employed by the respondent as Tour Representative for clients from British Airways Holidays in 1997 for a Kshs.8,000 salary per month. Thereafter the salary was increased upto Kshs.33,062 and her area of operation remained the South Coast of Kenya. From 2008, the said major client cancelled charter flights to the Kenyan coast following travel Advisories due to political violence and insecurity in the region. As a result, the Claimant among staff were laid off to enable the business remain afloat.

8. She contended that after termination, the Claimant was paid all her terminal dues including salary in lieu of notice Kshs.34,885.42; severance pay Kshs.553,515.33; salary arrears (July 2010- June 2011) Kshs.25,875.33; salary arrears (July 2011- June 2012) Kshs.27,815.62; salary arrears (July 2013-April 2014) Kshs.16,612.10; leave travelling allowance (2011-2014) Kshs.4,500 and salary for 15 days in April 2014 Kshs.16,530 all totaling to Kshs.679,733.47 less Kshs.198,311 statutory deductions leaving a net of Kshs.481,422.47 which was paid to the Claimant. She denied that the said dues amounted to an underpayment and maintained that the claimant was at all material times employed as a Tour Representative earning a higher salary than the Kshs.20,000 prescribed under the CBA.

### **Analysis and Determination**

9. I have carefully considered the material presented to the Court and I now proceed to determine the issues framed by the parties, namely:

- a) Whether the Claimants was employed in the position of Tour Representative or Customer Relations officer;
- b) Depending on (a) above, What was the Claimant's rightful salary; and
- c) Whether the Claimants are entitled to the reliefs sought.

### **Employment Position.**

10. There is no dispute that, initially the Claimant was appointed to serve in the position of Tour Representative vide letter dated 1.7.1997. However, the Claimant contents that in the Hospitality Industry, Tour Representative and Client Relations officer are one category. That allegation has not been denied by the defence and I find merits in that allegation considering the job description outlined by the appointment letter. In fact, the certificate of Service issued by the defence witness herein dated 20.4.2014 states that the Claimant was employed as Customer relations officer cum sales representative from July 1996 to 16.4.2014. In addition the correspondences between the Claimant and the respondent dated 14.6.1997 and 25.6.1997 produced by the defence as exhibits, indicate that the claimant was the respondent's Tour Leader in South Coast and also doing sales duties. I therefore find that the Claimant has proved on a balance of probability that she was employed by the respondent in the position of Customer relations officer cum sales representative.

### **Claimant's Rightful Salary**

11. The Claimant has alleged that she was a member of the Kenya Gaming & Safari Workers Union and as such her salary was negotiated under the CBA between the union and the employer. She produced as exhibit the CBA for July 2012 which was to last for 2 years but remain in force until another CBA was registered. Under the said CBA, the salary for Fare man, Transport controller, Client Relations Officer, Safari Consultant, Air Part representative and Sales Agent was Kshs.80,000. As observed herein above, the Claimant's job description under the appointment letter put her squarely on top of this category of positions whose salary was Kshs.80,000 under CBA.

It stated thus,

***"As a Tour Representative for clients of British Airways Holidays, you will be responsible for meeting their clients on arrival, briefing them, sorting out their problems and selling Safaris and Excursions to them. You will also undertake any other duties given to you by your Departmental Head."***

### **Reliefs sought**

12. In view of the foregoing finding that the Claimant was entitled to a salary of Kshs.80,000 per month from July 2010 until another CBA was registered, it is obvious that her terminal dues were underpaid because they were calculated on the basis of a lower salary of Kshs.34,885.42. I therefore proceed to reassess the same using the salary of Kshs.80,000 prescribed under the CBA for the period running 1.7.2010 to 16.4.2014 when she was terminated. The CBA that came into effect after her termination is not applicable because by then her employment relationship with the respondent had ended.

13. The Claimant is awarded Kshs.80,000 as one month salary in lieu of notice. She will also get salary arrears resulting from salary underpayment from July 2010 to April 2014 being  $Kshs. (80,000 - 33062) \times 45.5 \text{ months} = Kshs.2,135,679$ . She will further get severance pay at the rate of 28 days pay per completed year of service as provided by the CBA being  $Kshs.80,000 \times 28/26 \times 14 = Kshs.1,206,153.85$ . She will also get 10 days leave being  $Kshs 80000 \times 10/26 = Kshs.30,769.25$ . The claim for leave travelling allowance of Kshs.4,500 is granted as prayed because it is not opposed and it is lower than the Kshs.3,000 per year provided under the CBA. Finally, the claim for general wage order is declined because it has been compensated by the assessed underpayment herein above.

### **Disposition**

14. For the reasons stated above, I enter Judgment for Claimant in the sum of Kshs.3,457,102.20 plus costs and interest from the date of filing suit. The said award will be paid subject to the Kshs.481,422.47 paid after the lay off in addition to statutory deductions.

**Dated and signed at Nairobi this 18th day of January, 2018**

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 22nd day of February, 2018**

**LINNET NDOLO**

**JUDGE**