



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NUMBER 610 OF 2015

BETWEEN

FLORENCE WAMBUI.....CLAIMANT

VERSUS

MARY IMMACULATE COTTAGE HOSPITAL A.K.A

SISTERS OF MARY IMMACULATE.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Waweru Gatonye & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 14th August 2015. She states she was employed by the Respondent as Supporting Staff, in April 2009. Her contract was terminated by the Respondent for alleged gross misconduct, effective 8th July 2015. She earned a monthly salary of Kshs. 8,500 as of the date of termination. She claims she was not given a hearing and valid reason, or reasons, before termination, contrary to Sections 41, 43 and 45 of the Employment Act 2007. She prays for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 10,954.
- b) Annual leave pay for 2014/2015 at Kshs. 10,954.
- c) Underpayment of salary for May 2013 – April 2015 at Kshs. 30,744; and May 2015 –July 2015 at Kshs. 17,178.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 131,448

Total.... Kshs. 201,278

- e) Declaration that termination was unfair and unlawful.
- f) Costs, Interest and any other order the Court deems fit to grant.

2. The Respondent filed its Statement of Response on 30th September 2015. It is conceded the Claimant was employed by the Respondent. She entered into a fresh contract effective from June 2014 to July 2015. She was dismissed on account of gross misconduct. In particular, she left work without permission on 12th July 2008. She apologized, was warned and pardoned. She misappropriated Respondent's funds on 17th January 2015. She was again warned and pardoned. She engaged in some of nuisance on 30th December 2014, and was warned and

pardoned. She took annual leave on 17th January 2015 without approval of the Respondent. She apologized and was allowed to resume duty. She once again absented herself on 30th May 2015 without leave or lawful cause. The Respondent terminated her contract on account of the outlined acts of gross misconduct. She was given one month notice of termination, which coincided with the end of her contract in July 2015. Termination was fair. The Respondent prays the Claim is dismissed with costs to the Respondent.

3. Parties agreed in Court on 21st September 2017, to have the Claim considered and determined on the strength of the record. They confirmed filing of Submissions at the last mention, on 30th October 2017.

The Court Finds:-

4. The Claimant was employed by the Respondent as Supporting Staff. Initially she was employed in April 2009. Subsequently her contract was changed to a fixed term contract for a period of 1 year, dating from June 2014 to July 2015. Termination took place under the fixed term contract.

5. Was termination unfair? The fixed term contract was coming to an end on 8th July 2015. The Claimant was issued 30 day notice of termination on 8th June 2015. Clause 17 of her contract provided that the contract would be deemed terminated at the end of the contractual period of 1 year, unless intention to renew was given by the Claimant to the Respondent, and accepted 3 months before expiry. Secondly, the contract could be terminated through a written notice of 1 month. Lastly, the Respondent reserved its right to terminate the contract summarily for gross misconduct.

6. There was notice of termination issued upon the Claimant. Allegations about acts of gross misconduct did not result in summary dismissal. Most of the allegations were punished through warning letters. Apologies were tendered and accepted. The Court's view is that the alleged acts of gross misconduct were not relevant to termination of the Claimant's contract.

7. Termination was based on the other 2 permissible grounds, under the contract. The contract period ended on 8th July 2015. The Claimant does not say she expected it would be renewed, and does not claim that refusal to renew, amounted to unfair termination. She did not express any intention to renew. She does not contest the date of expiry. The other permissible ground was termination by notice of 30 days. This notice issued on 8th June 2015. The Claimant left on 8th July 2015. Both grounds were permissible under the contract. Termination was fair. Notice pay and compensation are not payable.

8. Leave Application Form exhibited by the Respondent shows the Claimant utilized her 21 days of annual leave for the period 2014/2015, from 17th January 2015 to 11th February 2015. She wrote a letter of apology for proceeding on leave without the approval of the Respondent. Her prayer for annual leave has no foundation.

9. Her contract described her as Subordinate Staff. Subordinate Staff is not a specific job classification. Under the Regulation of Wages [General] Order, the Claimant would be deemed a General Labourer. Her job description included assisting in the maternity; maintaining cleanliness there; washing of Patient's linen; cleaning the compound; assisting in labour wards during delivery of babies; and generally, performing any work assigned to her by the Management.

10. The Wage Orders exhibited by the Claimant show she was underpaid. She was lastly paid an amount of Kshs. 8,500 monthly, while the rate for General Labourer in Nairobi, Mombasa and Kisumu Cities, was Kshs. 10,954 over the period in question. ***She is granted the prayer for underpayment at Kshs. 47,922.***

11. No order of the costs.

12. ***Interest on underpayment of salary granted at 14% per annum from 8th July 2015, till payment is made in full.***

IN SUM, IT IS ORDERED:-

[a] Termination was lawful.

[b] The Respondent shall pay to the Claimant underpayment of salary at Kshs. 47,922.

[c] No order on the costs.

[d] Interest granted at 14% per annum from 8th July 2015 till payment is made in full.

Dated and delivered at Mombasa this 9th day of February, 2018

James Rika

Judge