Mokaya v St. Leornard's Maternity Nursing Home Limited (Cause 53 of 2017) [2018] KEELRC 929 (KLR) (9 October 2018) (Judgment)

Lydiah Mongina Mokaya v St. Leornard's Maternity Nursing Home Limited [2018] eKLR

Neutral citation: [2018] KEELRC 929 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE 53 OF 2017

DKN MARETE, J

OCTOBER 9, 2018

BETWEEN

LYDIAH MONGINA MOKAYA ..... CLAIMANT

AND

ST. LEORNARD'S MATERNITY NURSING HOME LIMITED ... RESPONDENT

JUDGMENT

1. This matter was originated by way of Memorandum of claim dated 28th August, 2017. It does not disclose an issue in dispute on its face.

   The respondent in a Statement of Defence dated 30th January, 2018 denies the claim and prays that the same be dismissed with costs.

   The claimant's case is that she was employed by the responded as a Clinical Officer and posted to Nyansiongo where the responded had a summit clinic. She was not issued with a contract of employment.

2, The claimant's further case is that she took up residency in a double room provided by the respondent where she resided on full time duty from Sunday to Sunday. She was on call at all times, including night when patients would come in for consultation. This is expressed as follows;

   5. The Claimant was not allowed to leave the respondents premises even on Sunday as the Managing Director, Dr. Nyauma did not want the clinic unattended.

   6. The claimant could not take her day off and her husband had to travel to visit the claimant at Nyansiongo.

3. The claimant's other case is that issues of sexual harassment arose between herself and the respondent's manager, a Mr. Tweni. This arose when he would come in to deliver drugs at night and directly asked her for sexual favours which conduct riled her visiting husband.

Her further case is that in November, 2014, she was transferred to Chepilat by Mr. Tweni. This involved daily commutation to and from her residence at Nyansiongo. She would travel to and fro a distance of twenty kilometers which occasioned sufferdom due to her pregnancy. She was also not provided with fare to and from Nyansiongo which was kshs.80 a day. She puts it thus;

> 16. At the same time, the Claimant noted that her colleague who worked at a different place in Chepilat, Daniel Mulongo, would be provided with accommodation as well as full transport allowance. The Claimant considered this as a way of frustrating her form of discrimination as both of them were employees of the Company.

4. The claimant's other case is that in December, 2014, the respondent, by a letter dated 1st December, 2014 asked her employees to re-apply for their jobs with applications reaching by 5th February, 2014. She did but her application was rejected. She was the only unsuccessful candidate in these applications and links the same to the sour relations occasioned by her sexual harassment escapades with the respondent's manager, Mr. Tweni.

The claimant further amplifies and supports her case of gross wrong doing against herself as thus;

21. The Claimant's services were unfairly terminated and contrary to the laws governing labour practices in Kenya.

22. The Respondent's Manager while in a work environment sexually harassed the Claimant by behaving in an unwelcomed manner as well as expressing sexually colored remarks after the Claimant towards the Claimant. The Respondent's actions are contrary to Articles 27(5) and 28 of the Constitution of Kenya and Section 6 of the Employment Act.

23. Moreover, The Respondent's Manager seems to have a vendetta against the Claimant for refusing his advances. The Respondent unfairly terminated the invaluable services of the Respondent without an indication. The Respondent responded by relieving the Claimant from her duties and thereby violating the provisions of Section 8 of the Occupational Safety and Health Act No.15 of 2007.

24. The actions of the Respondents are unfair and in contravention of the principles of fair labour practices that provide for fair remuneration for work done. The Claimant was denied a chance at fair termination of employment as outlined under Section 41, 43 and 45 of the Employment Act.

25. The Respondent failed to issue to the Claimant a Certificate of Service to show the period that the Claimant had worked for the Respondent. This is contrary to Section 51 of the Labour Relations Act, as the Claimant's chances of getting another job have been impeded.

She prays as follows;

a) This Honorable court do order the Respondent provide the claimant with a certificate of service for the period worked from December 2012 to December 2014.

b) This Honorable Court do order the Respondent to pay the Claimant Pay in lieu of Annual Leave of Kshs.40,000.

c) This Honorable Court orders the Respondent to refund the NSSF dues not remitted Kshs.14,400.

d) The Claimant prays that the Court does ward the claimant Kshs.240,000 as 12 months' compensation for unfair termination of services.

e) The Claimant further prays that this Honorable court do award general damages for sexual harassment and discrimination to the claimant.

f) This Honourable Court do order the Respondents to bear the costs for this suit as provided under Sec 12 (4) of the Employment and Labour Relations Act.

g) This Honourable Court do make further orders as it shall deem fit as provided for under Section 12 (3) (vii) of the Employment and Labour Relations Act.

5. The respondent's case is that the claimant approached Dr. Nyauma for employment and this was offered at Summit Medicare Limited with a posting to Nyansiongo within Nyamira County.

Her further case is that at no one time was the claimant employed by the respondent and therefore the claim is non-suited. This is because the respondent worked at Summit Medicare Limited and not the respondent which is a new clinic. She in toto denies the claim as presented.

6. The respondent's further case is that when the management found that there was laxity in the claimant's performance at Nyansiongo, she was swapped (transferred?) to Cheplat to enhance service delivery. The claim on sexual harassment is also totally denied.

It is her penultimate case that due to the claimant's unsuccessful attempt at re-employment, her services were terminated and she was paid her salary to the last day worked.

7. The matter came to court various until the 26th June, 2018 when it was heard inter partes. Here, CW1 Lillian Mongina Mokaya testified in reiteration of her case. Similarly, DW1 Patrick Olemu Tweni and DW2 Mulongo Daniel Sitati all dully affirmed also testified in reiteration of the defence case. These testimonies bore all similarities with the parties respective cases.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?

2. Is the claimant entitled to the relief sought?

3. Who bears the costs of this claim?

8. The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. At the hearing of this cause, the claimant testified in reiteration of her case as presented. This testimony also tallies with her witness statement dated 28th August, 2017 which she wished adopted as her evidence before this court and in support of the claim.

The respondent brought in two witnesses, Patrick Tweni and Daniel Mulango both of whom testified in support and reiteration of the defence. They also adopted their respective witness statements dated 26th June, 2017 and 25th instant. These in all ways replicated their testimonies.

9. The claimant in her written submissions dated 13th July, 2018 and in support of her case sought to rely on the authority of Naim Bilal v Judicial Service Commission [2017]eKLR Justice Mbaru cited the case of David Barasa versus British Peace Support Team & Another [eKLR] that;

> A secondment in its nature is where a principal employer with the consent of the employee concerned, second the employee to another department/agency or as the executing authority determines, accepting the employee in the same service for a particular service or for a period of time. Such an employee remains subject to the terms and conditions of any contract entered into with his consent including that of the principal employer as well as the rules and regulations of the employer where he is so place. [emphasis added].

10. Further, the claimant sought to rely on the authority of Section 6(1) of the Employment Act provides that:

> " An employee is sexually harassed if the employer of that employee or a co-worker-
>
> a) Directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express-
>
> i) Promise of preferential treatment in employment;
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> ii) Threat of detrimental treatment in employment;
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> iii) Threat about the present or future employment status of employee;
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> b) Uses language whether written or spoke of a sexual nature.

11. In support of a case for discrimination in employment, the claimant sought to rely on section 5 (2), (3) and (4) of the Employment Act, 2007. This is further expressed in the following averments;

28. The claimant suffered at the hand of the Respondent's manager as she was pregnant at the time of her transfer and eventual termination from service. When the Claimant asked that the manager stops harassing her, he instead transferred her from her station in Nyansiongo to Chepilat where she was not paid a transport allowance as her colleague was as was testified by the Respondent's witness.

29. The claimant did not need to reapply for her job as she was already a long term serving employee for 2 years without any disciplinary issues and should have gone back to her employer i.e St. Leonard's Maternity Hospital for redeployment. A party that was not known to the Claimant purported to terminate the services of the Claimant.

30. It is the view of this Honourable court that an employee who is re-deployed and employed by a different party should be made aware by its employee.

31. No reasons were given by the Respondent on its decision to terminate her services despite being a long serving employee of the respondent. The Respondent should have issued the claimant with such a letter.

32. Secction 5 (2) of the Employment Act provides that "an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy of practice."

33. Section 5(3) of the Employment Act further expounds on this and provides that

> "No employer shall discriminate, against an employee or prospective employee or harass an employee or prospective employee.

a) On grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status, mental status or HIV status

b) In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment"

> Section 5(4) an employer shall pay his employees equal remuneration for work of equal value"
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> With regard to discharging the burden of proof, section 5 (6) of the Employment Act provides that "in any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory omission is not based on any of the grounds specified in this section.
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> It is our submission that the Respondent has not discharged it burden in proving that there was no discrimination against the Claimant and as shown to the court there was a disparity in pay for employees. In the case of VMK v CUEA [2013] eKLR Justice Mathews Nderi, awarded the claimant Kshs.5,000,00 discrimination at the workplace.
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> 34. On 1ST December, 2014, the Respondent asked the Claimant to reapply for her job and was asked to submit her response by 5/12/2014 together with the other employees who were working with the respondent.

12. The claimant in the penultimate submits a case of contravention of section 41 (1) and (2) of the Employment Act, 2007 in that she was not afforded an opportunity to be heard before termination of employment. There was no substantive and procedural justice in the termination of her employment. This provides as follows;

> 41(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
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> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

13. The respondent in his written submissions reiterates her defence that the claim is non-suited. She also rubbished the claimant's case as that of unproven allegations which do not amount to evidence in support of the claim.

> 24. But what is the evidential value of averments made by parties. Madan J. A. (as he then) made it abundantly clear in CMC Aviation Ltd v Cruisar Ltd [1987] KLR 103 when he stated;
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> " The pleadings contain the averments of the three parties concerned. Until they are proved or disapproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of 'evidenced' in Section 3 of The Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disapproved. Averments are matters of the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven.
>
> The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents"

14. In all, the claimant's case overwhelms that of the respondent on a balance of probability and preponderance of evidence.

    It is the onus of the employer to keep records of employment. Whereas the claimant's case is pegged on the fact that the contract of employment was unwritten, the respondent does not address this or offer any evidence to the contrary. This is the hallmark of section 10 of the Employment Act, 2007.

15. The respondent merely denies the claimant's case of unlawful termination of employment and sexual harassment. On the issue of termination, she submits a case of lack of qualification at the subsequent interviews which case sounds hollow.

    Any right thinking and reasonable person would construe the termination of employment of the claimant as based on mischief and malice. The geneology of events culminating in this termination of employment tells it all. Recruitment, sexual harassment claims, transfer, re-application for employment and failure to recapture her employment. This is suspect. It is all telling.

16. Cases and instances of sexual harassment are extremely personalized and difficult to proof. More often than not, these would not be documented but comprise of overt and covert overtures by the offending party. It is therefore expected that when this arises, action should be taken towards reporting or raising the same with the powers that be, the employer or his agents. Sometimes the prevailing environment may not be facilitative of this. It would therefore be unreasonable to employ the standard burden of proof on this kind of matters. This is like in the present case.

    The claimant's case overwhelms that of the respondent. It is the more probable of the two cases. Undeniably the parties filed and produced witness statements which were adopted by this court on their instigation at the hearing. It is not therefore realistic for the respondent to posit that the claimant has not proven her case on evidence. I therefore find a case of wrongful, unfair and unlawful termination of employment of the claimant by the respondent. I also find a case of sexual harassment and discrimination at the workplace vented out by the respondent onto the claimant.

17. The 2nd issue for determination is whether the claimant is entitled to the relief sought? She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim and award relief as follows;

i. One (1) months pay lieu of notice.....Kshs. 20,000.00

ii. Two (2) months salary as compensation for untaken leave for two years.....Kshs.40,000.00

iii. Twelve (12) months salary as compensation for unlawful termination of employment....Kshs.240,000.00

iv. Kshs.600,000.00 being general damages for both sexual harassment.

v. Kshs.100,000.00 being general damages for discrimination at the work place.

Total of Claim.....Kshs.1,000,000.00

vi. The costs of this claim shall be borne by the respondent.

DELIVERED, DATED AND SIGNED THIS 9TH DAY OF OCTOBER, 2018.

D.K.NJAGI MARETE

JUDGE

Appearances

Mr. Wachira instructed by Wachira Wanjiru & Company Advocate for the claimant.

Mr. Migiro instructed by Migiro & Company for the respondent.