



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MALINDI
CAUSE NUMBER 18 OF 2018

[Previously Mombasa Cause Number 947 of 2015]

BETWEEN

MELISA AKINYI AYOYI.....CLAIMANT

VERSUS

CLAUDIO BENAGLIA t/a ROYAL TULIARESORT.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Melisa Akinyi Ayoyi, the Claimant in Person

Gicharu Kimani & Associates, Advocates for the Respondent

JUDGMENT

Pleadings and file history

1. The Claimant filed her Statement of Claim on 21st December 2015. The Claim was transferred to the E&LRC Malindi, through an order of the Court made on 13th March 2018, and given the current registration number.

2. The Claimant states she was employed by the Respondent as a Cook on 16th July 2013, at a salary of Kshs. 15,000 monthly. She did not have a letter of employment. She worked from 7.30 a.m. to 9.30 p.m. She worked 14 hours a day. She never took annual leave and rest days. She worked during public holidays. The Respondent deposited Kshs. 25,000 at the Labour Office Malindi. He advised the Claimant on 23rd October 2015, to collect that amount from the Labour Office as her terminal benefits, and sign a fresh contract. If she was not ready to do so, she was asked to leave employment altogether. She refused to collect the amount as it did not represent the totality of her terminal dues. She asks the Court to grant her Judgment against the Respondent in the following terms:-

- a) Declaration that termination was unfair and unlawful.
- b) Declaration that termination violated Section 41 and 45 of the Employment Act.
- c) 1 month salary in lieu of notice at Kshs. 15,000.
- d) Public holidays worked for 2 years, at Kshs. 25,385.
- e) Accrued annual leave for 2 years at Kshs. 24,231.

f) Off days for 2 years at Kshs. 55,385.

g) Overtime pay over a period of 2 years at	Kshs. 261,346.
Total...Kshs.	381,387.

h) Any other suitable remedy.

i) Costs.

3. The Respondent filed his Statement of Response on 25th February 2016. His position is that he employed the Claimant from 16th July 2013 as a Cook, on casual basis. Her rate was Kshs.500 daily. She was paid a rate above the minimum wage. Around October 2015, the Respondent approached the Labour Office Malindi for assistance in drawing a contract on permanent terms, and enhanced salary of Kshs. 15,000, for the Claimant. The Claimant refused and/or ignored to sign the new contract. The Respondent was compelled to terminate Claimant's contract through a letter dated 23rd October 2015. The Respondent deposited Kshs. 25,000 at the Labour Office as Claimant's terminal benefits. The Claimant refused to collect her terminal benefits. Instead, the Respondent was slammed with a demand letter for the sum of Kshs. 381,347 from the Claimant's Trade Union, KUDHEIHA. The Respondent prays the Court to reject the Claim, and Parties are referred to the Labour Office Malindi.

4. On 29th February 2016, the Court stayed its proceedings pending conciliation at the Labour Office. On 26th July 2016 there was no settlement recorded and hearing was scheduled for 30th November 2016. The Claimant eventually gave evidence, and rested her case, on 30th November 2016.

5. The Labour Officer Malindi gave evidence on 16th February 2017. The Court, upon hearing the Labour Officer was on the view that Parties had not exhausted conciliation. Proceedings were stayed a second time, and Parties referred to the Labour Office for conciliation. Parties reported to the Court on 21st November 2017 that conciliation had failed.

6. Claudia Benaglia gave evidence and rested his case on 19th July 2018.

Claimant's evidence

7. Akinyi told the Court she was employed by the Respondent on terms and conditions outlined in her Pleadings. She confirmed the contents of her Pleadings on circumstances leading to termination of employment. She stated on cross-examination that she was given a contract by the Respondent to sign. She declined to sign because her salary had been lowered to Kshs. 12,000 monthly. She does not know how to read, but was told her salary had been lowered to Kshs. 12,000. She signed attendance register. She used to be paid Kshs. 500 per day. She worked on public holidays. She signed salary vouchers and muster roll.

Respondent's evidence

8. Claudia testified he was Director of Royal Tulia. The Claimant was Respondent's Cook. The Respondent paid her all the agreed salary as shown in the exhibited salary vouchers. After 2015, the Respondent consulted the Labour Office. A new agreement was drawn. The Claimant refused to sign. The Respondent terminated her contract because she declined to sign. The Respondent had terminal benefits computed and deposited at the Labour Office. He deposited Kshs. 25,000 and was issued certificate of payment. In November 2015, Claudia's company closed. He wrote to the Registrar of Companies asking for striking out of his company from the register. Deregistration was done as shown in Respondent's exhibits 6 [a] to [d]. As of today, there is no Royal Tulia. Cross-examined, the Respondent told the Court he wanted the Claimant to go on working for him individually. She refused to sign the new contract. She was aware of details of money deposited with the Labour Office. Benaglia did not invite the Claimant to negotiate terminal benefits as he had already negotiated with the Labour Office. He restated on redirection that he offered to re-employ the Claimant individually.

The Court Finds:-

9. The Claimant was employed by the Respondent as a Cook. She has not sued a Company called Royal Tulia Limited; the Claim is against the individual Claudia Benaglia who traded as Royal Tulia. She describes the Respondent, at paragraph 2 of the Statement of Claim, as an Italian male adult of sound mind. The Respondent similarly describes himself at paragraph 1 of his Statement of Response as a male adult of sound mind. The evidence by the Respondent about a company which has been de-registered, and the suggestion that such a company employed the Claimant, is completely out of place.

10. Similarly, it is not possible that Claudia offered to employ the Claimant individually or privately as stated in his evidence. There was no other Employer as far as the Court can read from the record. Claudia Benaglia employed the Claimant from the beginning. Whether he employed her at his Villa or his private residence, he and he alone remained her Employer.

11. Disagreement between the Parties occurred in the month of October 2015. The Respondent stated he offered, on the advice of the Labour Office, to place the Claimant under a written contract, on permanent terms and pay her a monthly salary of Kshs. 15,000. She previously earned Kshs. 500 daily.

12. The Claimant states the Respondent's new offer involved slashing of her salary to Kshs. 12,000. Benaglia states he was enhancing her salary to Kshs. 15,000. The draft agreement was to cover the period 1st October 2015 to 30th September 2016.

13. A salary voucher for 31st August 2015 exhibited by the Respondent confirms that the Claimant earned a monthly salary of Kshs. 15,000 as of that date. It confirms also the evidence of the Claimant that the new agreement offered her less salary than previously earned, though

not at Kshs. 12,000 as stated by the Claimant. The draft agreement offered her Kshs. 13,000.

14. This was the cause of the disagreement. Claudia wished the Claimant to sign the new contract. The Claimant declined. Claudia deposited terminal dues computed at Kshs. 25,000 at the Labour Office, and advised the Claimant to collect her dues. If she did not sign the new contract, he would terminate her contract. She did not collect the dues and did not sign the contract. The Respondent therefore terminated her contract.

15. The Respondent had an obligation, under Section 10 of the Employment Act 2007, to consult the Claimant, before revising her contract. The Respondent testified he did not negotiate with the Claimant, because he had discussed details of the new contract with the Labour Office. Such discussion did not take away the obligation of the Respondent, to consult the Claimant directly. She testified she did not even read the draft agreement. She did not have the details explained to her. She was not told why her old contract was being revised, and why she would have to take an inferior pay. Details of terminal benefits offered and deposited at the Labour Office were not given. Claudia wrote to the Claimant on 23rd October 2015, advising “ you accept, otherwise you preclude yourself, and you cannot continue to work at Royal Tulia... Royal Tulia is a place for helping...not a profit making activity, therefore monetary policy of administration has to be controlled.” The Respondent appeared to have used the Labour Office, in an attempt to compel the Claimant to enter into a new agreement, whose full details, the Claimant was not familiar with, and which offered diminished monthly salary. It is not surprising that conciliation failed at the Labour Office. The Court referred the dispute to the Labour Office twice. Twice, conciliation failed. The Respondent’s sole objective was to have what he refers to as ‘control of monetary policy.’ The Employment Act does not allow for unilateral change in contracts of employment, to enable Employers achieve their financial objectives. The Employee must be notified, and consulted, about such change. The mantra in employment and labour relations is never ‘take it or leave it.’ There is always an obligation to consult on change, in terms and conditions of employment, more so when the proposed change, results in an inferior salary to the Employee.

16. To have additional justification of termination, the Respondent advanced the unlikely scenario, where a corporate entity, not the Respondent, employed the Claimant. The Court was told that this entity closed down business, and was deregistered at its own initiative. As of now, the Court was told, there is no Royal Tulia. Claudia offered to reemploy the Claimant individually. This evidence as suggested elsewhere is untenable.

17. There was no valid reason shown by the Respondent to justify termination. The Claimant’s contract was terminated, because she declined to take an un-negotiated pay-cut. She refused to sign the draft placed before her by Claudia. Termination was not based on valid reason as required under Section 43 of the Employment Act 2007.

18. It is declared that termination was unfair and unlawful.

19. The Claimant is granted 1 month salary in lieu of notice at Kshs. 15,000.

20. Having found termination was unfair, it is open to the Court to consider grant of appropriate remedy under Section 49 read together with Section 50 of the Employment Act. The Claimant acts in person, and did not expressly ask for remedy for unfair termination, either by way of compensation, reinstatement or reengagement. It is open to the Court to consider what remedy to avail to her, under her prayer for any other remedy, the Court finds just and fit. **The Claimant is granted equivalent of 7 months’ salary in compensation for unfair termination at Kshs. 105,000.**

21. She has not established through evidence, her prayers on public holidays’ pay, accrued annual leave and overtime. These prayers are rejected.

22. Costs to the Claimant.

IN SUM, IT IS ORDERED:-

[a] It is declared termination was unfair.

[b] The Respondent shall pay to the Claimant notice pay at Kshs. 15,000 and equivalent of 7 months’ salary in compensation for unfair termination at Kshs. 105,000- total Kshs. 120,000.

[c] Costs to the Claimant.

Dated and delivered at Malindi this 30th day of November 2018.

James Rika

Judge