



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 124 OF 2013

(Before Hon. Justice Mathews N. Nduma)

JANE LILIAN AMBETSACLAIMANT

VERSUS

LAVINGTON SECURITYRESPONDENT

J U D G M E N T

1. The grievant Jane Lilian Ambetsa, was employed by Lavington Security Limited on 1st April, 2007 as an office assistant in Kakamega County at a consolidated monthly salary of Kshs.7,500. The grievant was after two years deployed to the position of office secretary on same salary working from 6am to 6pm.

2. After one year, the grievant was demoted to the position of security guard on same salary.

3. On 31st May, 2012 the grievant developed severe toothache. She sought permission to go for extraction of the tooth but it was not granted. The pain was so severe and so she went to be extracted the tooth. It took a few minutes and she came back to work. When she returned, the supervisor told her to remove her uniform and go home. After two days, the grievant realized she had been dismissed and reported the matter to the union. The Claimant seeks compensation for the unfair dismissal and payment of terminal benefits set out in the statement of claim as follows:-

- a) One month salary in lieu of notice.
- b) Underpayment of wages.
- c) Overtime for extra hours worked between 2007 to 2012.
- d) Payment for public holidays.
- e) Payment in lieu of leave days not taken for 5 years.
- f) Failure to remit NSSF for 36 months.
- g) Payment of service gratuity for 5 years.

4. The Claimant testified under oath and told the court that she did overtime without payment, was not granted annual leave except an off when sick. She also said she did not receive minimum wage and relies on the wage orders referred to in the statement of claim. She also testified that she was not paid gratuity for the five (5) years service. Claimant stated she was registered with NSSF and it was paid for. Under cross examination the Claimant testified that Respondent had a schedule and employees signed in and out upon leaving. That the record is with the employer. She said on 31st May, 2012 she had no permission to leave work place since it was refused. There was no guard to replace her when she went to hospital since the tooth was aching badly.

5. The Respondent did not call any witness and therefore evidence by the Claimant was not rebutted at all. The Respondent had however filed a memorandum of response and filed written submissions largely stating that the Claimant did not satisfy the dictates of sections 107 and 108 of the Evidence Act by proving her case on a balance of probabilities in respect of the terminal benefits claimed and that the Claimant was lawfully dismissed for absenting herself from work.

Determination

6. The issues for determination are as follows:-

- a) Whether the Claimant was summarily dismissed for a valid reason and in terms of a fair procedure.
- b) Whether the Claimant has proved sufficiently the various terminal benefits claimed.

Issue a

7. The Claimant testified that on 31st May, 2012 she had a serious toothache while at work. She sought permission to go to hospital to have the tooth extracted but the supervisor declined to give her off. The Claimant could not bear the pain and so she rushed to the nearest hospital for extraction and returned after a short while. Upon return she found the supervisor waiting for her. He told her to remove her uniform and was sent home.

8. This evidence was not controverted. It is the court's considered finding that the Claimant was justified to rush to hospital and the supervisor acted in an inhumane manner by denying her permission to rush to hospital to have the tooth extracted. No disciplinary hearing was held to give opportunity to the Claimant to explain her case to the employer.

9. The summary dismissal of the Claimant was for an invalid reason and it was effected without following a fair procedure. The Respondent violated sections 41, 43 and 45 of the Employment Act, 2007.

10. The court finds that the summary dismissal was wrongful and unfair. The Claimant is entitled to compensation in terms of section 49(1) © as read with sub-section (4) of the Act.

11. The Claimant had served the Respondent for a period of five (5) years. She was dismissed without decorum or notice. She was not paid terminal benefits upon dismissal. She suffered loss and damage. The Claimant was dismissed for daring to attend hospital for removal of a painful tooth. She did not contribute to the dismissal in the court's view. Judgment is entered in favour of the Claimant for compensation equivalent to six (6) months' salary in the sum of Kshs.(7,500 x 6) 45,000.

Annual Leave

12. The Claimant testified that she was not granted annual leave for five years worked. This evidence was not rebutted. An employee is entitled to minimum 21 days leave per year. The court awards the Claimant three (3) years leave in the sum of Kshs.22,500. The rest of the claim is time barred.

Gratuity

13. The Claimant worked as a security guard. In terms of the Regulation of Wages (Security Services) 1998 the Claimant is entitled to 18 days salary for each completed year of service. The Claimant had served five years. The court awards him Kshs.22,500.

Overtime

14. The Claimant testified that she worked from 6am to 6pm between the years 2007 to 2012 and was not paid overtime. This evidence was also not rebutted. The Claimant claims Kshs.159,008 as per the computation attached to the statement of claim. The court awards the Claimant accordingly. The claim has been proved on a balance of probabilities.

House Allowance

15. The Claimant received a consolidated pay of Kshs.7,500. That was her testimony. The claim for house allowance has not been proved and is dismissed.

Underpayment.

16. The claim for underpayment has been proved as per Legal Notice No. 64. The Claimant is awarded Kshs.3,498 in respect thereof for the period May 2011 to May 2012.

Leave Transport

17. The Claimant did not go on leave and is not entitled to the Claimed Leave Transport. The claim is also dismissed.

NSSF Refund

18. This claim has not been proved and is dismissed.

Public Holidays

19. The claim for payment of double salary for days worked during holidays in the sum of Kshs.6,696 has been proved and is granted.

20. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows –

a) Compensation (6 months) Kshs.45,000.

b) Annual Leave for 3 years Kshs.22,500.

c) Gratuity, Kshs.22,500.

d) Overtime Kshs.159,008

e) Under payments Kshs.3,498

f) Public Holidays Kshs.6,096.

Total award Kshs.258,602.

g) The award is payable with interest at court rates from date of filing suit with respect of terminal benefits and from date of judgment with respect to compensation (a) above till payment in full.

h) Respondent to pay costs of the suit.

Dated, Delivered and Signed in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Francis adegwa for Claimant

Mr. Onsongo for Respondent

Chrispo – Court Clerk