



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NO. 368 OF 2014

MARY VIHENDA HOSEA.....CLAIMANT

-VERSUS-

PAPER CONVERTERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit on 11th March 2014 seeking the following reliefs;

- a) The Respondent adjust the Claimant's salary to match her fellow workmates to be earning basic pay Kshs.15,761 and Housing Kshs.3,900 , totalling to Kshs.19,661.46.
- b) The Respondent pays the Claimant the arrears of salaries adjustment from the time the Claimant was asked to stay away from the Company to the date the Claimant was reinstated.
- c) The Respondent to pay the Claimant twelve months compensation for wrongfully withheld dues.
- d) Cost of the suit.
- e) Any other benefits the Honourable Court may deem fit.

2. In response, the Respondent filed a Notice of Preliminary Objection on 11th February 2015 contenting that the claim was *res judicata* since the issues herein had been dealt with in Cause 378 of 2010. However, the Preliminary Objection was dismissed on 3rd June 2015 on the ground that the issues in the two suits were different. Thereafter the respondent never filed defence and the suit proceeded by formal proof on 17.4.2018 when the claimant testified as Cw1. Thereafter both parties filed written submissions which I have carefully considered alongside the pleadings and the evidence tendered.

Claimant's case.

3. The Claimant testified that she is employed by the Respondent having started as a casual worker in 1988 and thereafter her terms of employment were converted to permanent. That in May 2006 she was injured while on duty and filed suit for compensation and she was paid Kshs.135000. That after the said injury, the employer suspended her from work and she filed Case 378 of 2010 before the Industrial court and on 28.3.2012 the suspension was lifted and she was paid all her salary arrears inclusive of her increments as negotiated between the Federation of Kenya Employers and her trade union, KUPRIPUPA.

4. The claimant further stated that from April 2014, the respondent started deducting Kshs.6,000 from her salary every month alleging that she was recovering the money she paid as salary arrears for the period of suspension. She named the respondent's HR manager as the one who told about the said deduction and the purpose. That while her colleagues in the same job group of general labourers, Virginia Njeri Nguchu and Katia Lihando Kalungu were earning Kshs.15761 basic salary plus Kshs.3,900 housing allowance she was being paid Kshs.10,868 basic salary plus Kshs.3,900 housing allowance.

5. She contended that as at February 2014 the total salary deducted from her was Kshs.167,751.20 and prayed for the same plus arrears for the period thereafter till the said hearing date. She further prayed for compensation for the said unlawful deductions equalling to 12 months' salary plus costs of the suit and interest.

6. On cross examination, the claimant admitted that the pay slips she produced did not show that the salary was being deducted as alleged. She, however, contended that the salary she was receiving was less than her rightful entitlement because her colleagues who were in the same job group and doing the same job had payslips showing a higher pay than hers. She maintained that under the Collective Agreement (CBA) she was supposed to earn the same pay as her said colleagues. She however did not produce the CBA as an exhibit but she contended that her payslip indicated that she was being deducted union dues.

Claimant's submissions

7. The Claimant submitted that she was discriminated by the respondent by being paid a lesser salary than her colleagues for equal work done and contended that her rights to fair labour practices, and freedom from discrimination under Article 41 and 27 of the Constitution and Section 5 (2) of the Employment Act were violated. She relied on the case of **VMK v CUEA [2013] eKLR** in support her of case that she is entitled to reliefs sought by the suit.

Respondent's submissions

8. The Respondent submitted that prayer (b) of the Claim seeks the same reliefs that were granted under item (c) in the said Industrial case No. 378 of 2010 and urged that this suit is **res judicata**. In support of the contention the Respondent relied on the case of **Julia Odhiambo Ogina v Andrew Horace O Omondi [2014] eKLR**.

9. The Respondent submitted that the Claimant has not demonstrated why she must be paid the same as her workmates. She contended that the claimant has not produced evidence in the form a CBA, written contract of service or payslips for her said colleagues to prove that they were in the same job group, same job description or cadre with her but she was discriminated by being paid a lesser pay. The Respondent submitted that Section 107 of the Evidence Act requires that the existence of facts must be proved. She therefore maintained that the claimant was paid all her salary arrears and as such, nothing more was outstanding.

Analysis and determination

10. There is no dispute that the claimant is still employed by the respondent. The issues for determination herein are:

- a) Whether the suit herein is *res judicata*.
- b) Whether the reliefs sought she be granted.

Whether the suit herein is *Res judicata*.

11. The issue of *res judicata* was dealt with by Wasilwa J on 3rd June 2015 when she made a finding of fact that the suit was not **res judicata** save for of the relief sought under prayer (b) herein which was granted by Rika J in his judgment dated 28.3.2011. Indeed, the claimant admitted in her evidence in chief that after the said judgment she was paid the said salary arrears but there after the employer started deducting her salary to recover the said payment. I will therefore not interfere with the said finding but instead I proceed to determine the outstanding issue of other reliefs on the merits.

Whether the claimant is entitled to any reliefs.

12. The Claimant seeks for the adjustment of her salary to correspond to that of her colleagues and to be paid the difference between her salary and that of her colleagues in arrear from February 2014 to date. The question that has begs for answer is where does the burden of proof of the claimant's actual salary lie? The claimant alleged that under the CBA which governs her contract of service she is in the same job group with the said two colleagues and their basic pay is as at January 2014 was Kshs.15,761 and the house allowance was Kshs.3,900. He produced payslips for the said two colleagues, presumably with their consent, to prove that they indeed were earning the foregoing salary while she was earning basic pay of Kshs.10,868 plus house allowance of Kshs.3,900 per month.

13. Flowing from the foregoing allegations, it is clear that there is written contract of service between the parties herein in the form of a CBA whose custodians are the employer and the Claimant's trade union. It was therefore not impossible for the claimant to secure a copy from her union and produce it as an exhibit to prove her allegations about her job group and the rightful salary. I do not think that the provisions of section 10 (7) of the Employment Act applies to the circumstances of this case.

14. The said section provides that, where there is no written contract, the employer bears the burden of proving or disproving any term of the contract of service that is orally alleged by the employee in legal proceedings. Consequently, I return that the claimant has not proved on a balance of probability that her salary was supposed to be equal to that of her two colleague whose payslips she produced and that her salary was being deducted by Kshs.6,000 per month to recover the money used to pay her salary arrears for the period she was suspended.

That means his claim for salary adjustment and salary arrears must fail.

15. The claim for 12 months compensation for the alleged wrongful withholding of dues is not well founded and it must also fail for lack of merits since the Claimant's services have not been terminated. Such relief is only available under Section 49 (1) (c) of the Employment Act in cases where the employee is unfairly or wrongfully terminated or dismissed. The said section provides that:

“49(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

c) The equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

16. Consequently, in the absence of a unfair termination of contract of service, the Claimant is not entitle to 12 months salary compensation.

Likewise the Claimant is not entitled to damages for discrimination, as the same was neither pleaded nor proved.

Conclusion and disposition

17. I have found that the suit herein is not *res judicata* in as far as it seeks for salary adjustment and salary arrears for the period not covered by the judgment in Cause No. 378 of 2010 which was delivered on 28.3.2011. I have further found that the claimant has failed to prove on a balance of probability that she is entitled to the salary arrears and compensatory damages for the withheld dues. Consequently, I dismiss the suit with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 7th day of December, 2018

ONESMUS N. MAKAU

JUDGE