



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 942 OF 2015

Consolidated with

CAUSE NO. 943 OF 2015

1. FESTUS MWASHUMA LOMBO

2. DAVID MOMANYI MOKUA.....CLAIMANT

VS

REVITAL HEALTH CARE (EPZ) LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimants brought separate suits on 21.12.2015 claiming accrued terminal dues plus compensation for unfair termination of the employment by the respondent on 1.9.2015. The suits were however consolidated on 21.7.2016 by the consent of all the parties herein. The fist by the claimants case is that there was no justifiable reason for their termination and the procedure followed was unfair and unlawful.

2. The respondent admits that the claimants were her employees up to 1.9.2015 when she exercised her freedom of contract by terminating their services and paid them salary in lieu of notice. She therefore denied the claim for damages for the alleged unfair termination of the claimants contract.

3. The hearing of the suit was dispersed with and the parties agreed to rely on their respective pleadings, witness statements and documentary evidence filed. They also filed written submissions to sum up their respective cases.

Analysis and Determination

4. After considering all the material presented to the court, I find no dispute in the fact that: the claimants were employed as Supervisors by the respondent; their services were interrupted by warnings and salary reduction for alleged poor or negligent performance; they were served with termination letters; and later terminal dues were paid to them. The issues for determination are:

(a) Whether the termination of the claimants services was unfair

(b) Whether the reliefs sought should be granted.

Unfair Termination

5. Under section 45(2) of the Employment Act termination of employment of an employees services is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case the respondent has not made any effort to discharge the said burden of proving the fairness of the reason for termination and the procedure followed in terminating the claimants employment contract on 1.9.2015. All what she has done is to contend that she exercised her right under the contract of terminating the same at any time upon notice or payment of salary in lieu of notice.

6. The claimants have however contended that the termination was unfair for lack of any justifiable reason and being done without according them a hearing. According to them the respondent had previously taken similarly arbitrary decisions against them by reducing their lawful salary without their consent. They have maintained that they never did anything wrong or performed poorly.

7. The termination letters dated 1.9.2015 to both claimants are identical in contents and stated:

“REF: TERMINATION LETTER

This is to inform you that due to your poor performance at work, several written and verbal warnings, we are forced beyond our limit to inform you that the Company no longer requires your services as from 1st September 2015. Although we regret the situation the act is compulsory.

Your years of service were highly appreciated by the management.

Please come pick your dues on 10th September 2015. The Personnel department will provide you with details on severance package, final paycheck and clearance information date.

We wish you all the best in your future endeavours.

Regards.

AnkunVora

General Manager

cc

Personnel Manager”

Emphasis nine

8. After careful consideration of the said termination letters, I am of the view that the termination of the claimants services was for a particular reason, namely poor performance. Under section 43, 45 (2) (a) and (b) and 47 (5) of the Employment Act, the employer has the burden of proving and justifying the reason for terminating his employees employment contract.

9. In this case no effort whatsoever was made by the respondent to prove that the claimant had performed poorly in their duties. She did not demonstrate by evidence that there were agreed targets between her and the claimants and that they were provided with all the necessary support but still performed below the agreed targets after doing periodic appraisals. Without any such evidence, I find and hold that the respondent has failed to prove on a balance of probability that the claimants had performed poorly in their duties. Consequently, she has failed to prove that the termination was founded on a valid and fair reason. In addition to the foregoing default, I do not hesitate to find and hold that the procedure followed to

terminate the services of the claimants on ground of poor performance was not fair. Under section 41 of the Employment Act, the employer is required in mandatory terms that, before terminating the services of his employee or ground of misconduct, poor performance or physical incapacity, he shall first explain to the employee in a language he understands and in the presence of a fellow employee or Shop floor union representative, the reason for which the termination is contemplated, and then invite the employee and his chosen companion to air their defence for consideration before the termination is decided.

10. In this case the said mandatory procedure was not followed. The claimants left work at the end of their shift and the following day they were served with the termination letter accusing them of poor performance without any prior hearing as required under section 41 supra. This second default by the respondent sealed the basis for finding and it is done, that the termination of the claimants employment contract was unfair.

Reliefs

11. Under section 49(1) of the Employment Act I award to each claimants one month salary in lieu of notice plus ten months salary for unfair termination of their services. In awarding the Ten months compensation I have considered the fact that the claimants had worked for a fairly long period and the fact that no offence was proved against them that contributed to their termination. The tabulation for terminal dues are not in harmony with the payslip for August 2015 and as such the respondent has not proved that she paid salary in lieu of notice to the claimants.

12. The claim for unpaid leave is dismissed for lack of both legal and contractual basis. What value is in unpaid leave to a dismissed employee?

13. The claim for House allowance is also dismissed because the payslips produced by both the claimants and the respondent reflect payment of House allowance. Likewise the claim for gratuity is dismissed for lack of any legal or contractual basis. Section 35(5) of the Employment Act disqualifies employees who are members of NSSF and for whose benefit, the employer has remitted NSSF dues, like in this case, from claiming service gratuity unless under the contract of employment. In this case the claimants have not proved that their contract of employment provided for gratuity on termination.

14. I however allow the claim for refund of salary deducted from their salary without their express consent. The said deduction will be paid to the claimants on the other hand, Mr. Emmanuel Matole, the Respondents HR Manager and the only witness for the defence herein, stated that the gross salary for the first and second claimants as salary arrears for month of October 2014-July 2015 equalling to 10 months.

Summary of the Awards

15. The first claimant pleaded that his salary was kshs.35,663 while the second claimant pleaded a monthly salary of kshs.17,875 at the time of termination was kshs 28,793 and 50,264 respectively. The said gross pay included overtime pay and is not a fixed amount. I will therefore apply the salaries pleaded by the claimants and supported by their payslip for August 2015 in assessing their respective awards because parties are bound by their pleadings.

16. Festus M. Lombo

Notice.....35,643

Compensation.....356,430

Salary arrears..... 15,000

407,073

17. David M. Mokuia

Notice.....17,875

Compensation.....178,750

Salary arrears.....15,000

211,625

18. The claimants will also have Certificate of Service as prayed because it is their right under section 51 of the Employment Act.

19. In line of the awards made above in respect of salary deductions from the claimants salary without their consent, I make declaration that the said deductions was unfair and illegal as prayed.

Disposition

20. For the reasons stated above, I enter Judgment in favour of the claimants in the aggregate sum of **kshs.618,698** plus costs and interest. They will also each be issued with Certificate of Service.

Signed, dated and delivered at Mombasa this 20th day of January 2017.

O.N. MAKAU

JUDGE