



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KISUMU

CAUSE NO. 279 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

SUSAN ATIENO NGOKO.....CLAIMANT

-Versus-

RAM HOSPITAL LIMITEDRESPONDENT

JUDGEMENT

The Claim herein is filed by Susan Atieno Ngoko who seeks the following remedies against the Respondent Ram Hospital Limited -

1. That the claimant claim against the respondent is for a declaration that the Respondent and its agents conduct were illegal, constituted unfair labour practices and violated the Claimant's rights.
2. A Declaration that the claimant is entitled to an award as computed under **Para18-22** of the statement of claim herein, amounting to **Kshs.298,660.35/-**.
3. Costs of the proceedings herein be borne by the Respondent.
4. Interests on (1) and (2) above at the Court rates.
5. Any or further relief as this Honourable Court may deem fit and just.

The Respondent filed a Statement of Defence denying the allegations in the Statement of Claim.

At the hearing of the case both the Claimant and Respondent presented witnesses. The Claimant testified on her behalf while the Respondent called KEFA ONDIEKI DOLA, a mortuary attendant at Ram Hospital who testified on its behalf.

The Claimant testified that she was employed by the Respondent as a mortuary attendant on 15th August 2006. On 24th June 2013 she received a body which she prepared and then billed the sons of the deceased. She then sent the relatives of the deceased to the accountant for billing of the charges for the ward so that they could pay before being issued with a burial permit. She sent her colleague Kepha Ondieki (RW1) to take the relatives to cash office to pay.

The Claimant testified that on 21st October, 2013 Kepha received the body of Okero Alphasad while he was working on night shift. She testified that she was doing day shift while Kepha was doing night shift.

While she was at work the children of Alphasad asked her to get them a pathologist to do a post mortem. She got a pathologist who did the post mortem. She assisted as a helper during the post mortem. The pathologist was from the government hospital as the Respondent did not have one of its own. The relatives of Alphasad negotiated the fees for the post mortem with the pathologist and it was agreed that the relatives would collect the post mortem report from the Claimant and leave her with the pathologists fees. The pathologist was also to leave the receipt with the Claimant.

The Claimant testified that on 22nd October, 2013 before the relatives came to collect the post mortem report she was called to the administrator's office and asked to write a report on how the post mortem was done. At the time she was called no post mortem fees had been paid. The post mortem table fees and mortuary fees had also not been paid.

The claimant testified that after she prepared the report the administrator Enoch Abogo told her to go home as the matter was under investigation. When she reported for work the following day she found that the locks for the mortuary door and gate had been changed and she was required to stay inside the mortuary with both the door and gate locked. She testified that she expressed her concerns about being locked inside the mortuary but the administrator responded that though he understood her concerns he was only complying with a directive from the directors. The Claimant testified that she raised the concerns with the director who told her that it was his decision.

She testified that on 24th September while she was seeing a doctor after work she was called and accused of stealing money. She later went to the hospital and met Dr. Tailor with the relatives of the late Gisore John Omwando. The Claimant testified that she worked until 22nd October 2013 when she was told to go home. She asked when she should report back to work and was told she will be called. At the end of the month she was not paid her salary. When she went back after two months she was told that her case had been concluded and she was offered a cheque of Shs.8,000 dated 9th January, 2014. Her salary at the time was shs.7,000 per month and she did not understand what the cheque was for.

The Claimant testified that she reported the matter to the Labour office. The Labour Officer called the Director Dr. Tailor severally and also wrote several letters to the Respondent but there was no response nor did the respondent attend any meetings called by the Labour Officer.

The Claimant testified that she seeks payment of Shs.217,452.45 as tabulated by the Labour Officer.

For the Respondent KEFA ONDIEKI PW1 testified that he worked with the Claimant as mortuary attendant, that the Claimant was given Shs.28,500 by the family of John Gisore Omwando for preservation of the body and for post mortem but she failed to pay the money to the hospital. When the relatives came to view the body they complained that they had been overcharged for preservation yet the body was in bad state. RW1 testified that the Claimant was not on duty when the relatives came and when he checked with cash office there was no record of payment as alleged by the relatives. The cashier reported the matter to the Administrator who in turn reported to the Director Dr. Tailor. The Claimant was directed to pay what was due to the hospital and refund the balance to the relatives. RW1 was later asked to record a statement by Dr. Tailor.

Determination

I have considered the pleadings, *viva voce* evidence and the written submissions filed by the parties. The issue in dispute is whether the Claimant was unfairly terminated and if she is entitled to the payment of Shs.298,660.35 as claimed.

Unfair Termination

The Claimant testified that she was sent home on 22nd October, 2013 after writing a statement about money alleged to have been given to her for preservation and post mortem by relatives of a deceased patient. Thereafter she was issued with a cheque of Shs.8,000 and informed that her case had been finalised.

RW1 on his part testified that the Claimant was sent home not to report back to work until she pays back the money she received from the relatives of the deceased patient. However in the witness statement of ENOCK MOCHAMA ABOBO, the Respondent's Hospital Administrator which was filed together with the defence, but who was not called to testify, he states -

- *After deliberations of management it was determined that the claimant should be sent on compulsory leave to pave way for further investigations as the allegations touched on her integrity and that of the respondent.*
- *The client informed the respondent's management that he was ready to testify on his allegations before any forum if invited.*
- *Management considered the serious nature of the assertions made against the claimant by reason of which her services were ultimately summarily terminated.*

Paragraph 15 and 17 of the Defence further confirms that the Claimant's employment was terminated. The said paragraphs state as follows -

15. The respondent asserts that the claimant having been forewarned and having undertaken not to engage in acts of soliciting payments from the respondent's clients was dismissed from the respondent's employment after she solicited for payments from the family of the late Gisore Omwando.

17. The respondent asserts that in view of the claimant summary dismissal which was lawful in the circumstances she is not entitled to any payment in the nature of damages for unlawful termination of her employment either as claimed in paragraph 21 of the Statement of Claim or otherwise.

Section 41 and 43 of the Employment Act provide for the procedure for termination of employment as follows -

41. Notification and hearing before termination on grounds of misconduct

(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.

(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.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

In the present case there is no evidence that apart from the explanation that the Claimant was required to make orally and in writing relating to the preservation of the bodies of John Gisore Omwando and

Alfaxard Okero she was ever formally informed of the reasons for termination or given an opportunity to defend herself in the manner prescribed in section 41 and 43 of the Act. She was never issued with a letter of dismissal or termination. In both her statement of claim and in her testimony in court, it is evident that the claimant was not aware that she had been dismissed, having only been told to go home and wait until she was called back to work.

The Respondent having failed to comply with the law in respect to both procedure and validity of reason for termination, I find that the Claimant's employment was unfairly terminated.

Remedies

The Labour Officer tabulated the terminal dues for the Claimant as follows -

1. Underpayments of Wages

(a) 1st May, 2013 to 27th October 2013 (legal notice no.197/2013. Actual wage paid - Kshs.8,000/-.

Actual Wage paid - Kshs.8,000/-

Legal Wage Kshs. - Kshs.10,378/-

Difference Kshs.3,378 x 6 months - Kshs.20,268/-.

(b) 1st May, 2012 to 30th April, 2013 (legal notice no.71/2012.

Actual Wage paid - Kshs.6,000/-

(c) 1st May, 2011 to 30th April, 2012 (legal notice no.64/2011).

Actual wage paid - Kshs.6,000/-.

Legal Wage - Kshs.9,103/-

Difference - Kshs.2,048.85 x 2 =24,586.20

Total Underpayment -Kshs.82,090.20.

2. One month's salary in lieu of notice =Kshs.9,024.15

3. Unpaid annual leave for 2 years =Kshs.18,048.30

4. 12 months compensation for unfair termination

@9,024.15 per month =Kshs.108,289.80.

GRAND TOTAL = Kshs..217,452.45

The Respondent did not attend the Labour Office to controvert the same. The Respondent has further totally ignored the tabulation in its defence and the evidence adduced in court. It did not confirm or deny if any of the items in the letter from the labour officer is not due to the claimant. I have confirmed from the relevant general wages orders that the Claimant was indeed underpaid as tabulated by the Labour Officer.

On the claim for annual leave the Respondent has not denied that the Claimant was never given annual leave for the 2 years which she has claimed or indeed for the entire period she worked for the

Respondent.

As I have already found above, the Claimant was unfairly terminated and is entitled to compensation under section 49 of the Employment Act.

In view of the foregoing I confirm and award the claimant the sum of Shs.217, 452.45 as tabulated by the Labour Officer.

The Claimant made a further claim of shs.99,256 being salary from October 2013 to September 2014. She is not entitled to the same as the court has found that her employment was terminated in October 2013. The Claim is thus dismissed.

The Respondent shall pay the claimant's costs for this suit together with interest at court rates from date of judgement.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE