



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO. 1622 OF 2015

CHRISTINE MUMBI TATUACLAIMANT

VERSUS

BRIONY LIMITED RESPONDENT

JUDGEMENT

1. The Claimant, Christine Mumbi Tatua filed Memorandum of Claim on 17th September, 2015 and served the Respondent who entered appearance but no defence was filed. On the hearing date, 26th October, 2016 the respondent's advocate applied to cease acting for the Respondent as they had no instructions in the matter. Application dated 10th October 2016 was filed by advocates for the respondent, the Respondent firm was served on 7th November, 2016 and on the due hearing date on 15th November, 2016 the respondents were absent and the application was allowed.

2. On the basis that the respondents were served with haring notice, the court proceeded and heard the Claimant on formal proof.

3. On 4th October, 2016 judgement was entered for the Claimant on the liquidated claim of Kshs.270, 000.00.

Claim

4. By agreement dated 1st April, 2015 the Claimant was employed by the Respondent as Operations Manager at a monthly salary of Kshs.90, 000.00. The Claimant was on probation for 3 months from 1st April, 2015 to 30th June, 2015. During the probation period either party could terminate the contract of employment by giving one (1) month notice.

5. The Claimant commenced work until 30th June, 2015 when she resigned owing to breach of contract by the respondent. Her salary was never paid as agreed and the resignation was as a result of the wilful breach of the contract by the respondent. The Claimant was not reasonably able to attend work due to non-payment of her salaries for 3 months – April, May and June, 2015.

6. The Claimant is seeking payment of the due salaries at Kshs.270, 000.00 and damages of breach of contract of employment.

7. In evidence, the Claimant testified that upon employment by the Respondent she diligently attended to her duties as the Operations Manager but for 3 months she was not paid her due salaries. She was forced to resign as she was unable to meet her need and had to use her savings and borrow monies so as to be

able to travel at work. She suffered emotionally and was forced to vacate her rented premises and her sister's house as she could not pay rent or meet her basic need. She greatly suffered so as to meet her work demand due to the breach of her employment contract. The Respondent should be held liable for the breach and pay damages.

Submissions

8. The Claimant filed written submissions that based on the breaches of her employment contract, under section 12 of the Employment and Labour Relations Court Act, the court can award damages. That under section 49 of the Employment Act the court has jurisdiction to award various remedies for breach of contract of employment by compensation. The Claimant has relied on the case of **Max Masoud Roshankar & Another versus Sky Aero Limited [2015] eKLR** where the court awarded damages for inhuman and degrading treatment of an employee. The court also awarded compensation in the same case.

Determination

9. The liquidated claim of Kshs.270, 000.00 is hereby confirmed.

10. On the claim for damages, the claim is that the Claimant was forced to resign from her employment with the Respondent due to non-payment of her due salaries and thus effectively breached the employment contract.

11. In employment, payment of the due wage, salary or payment due is the satisfaction for the same. When an employee takes up employment and attends as directed, the duty on the employer is to affect the due salary in satisfaction of the same. Thus where there is evidence of work performance and there is the equivalent of payment of the due wage, salary or payment agreed upon, the employer effectively is in breach of the employment contract. For the employee to continue at work, and where there is no payment of the due wage or salary, such is to subject the employee to inhuman conditions as with the salary, an employee is able to meet basic needs to support self and live in dignity. Where such salary is not paid for a period outside the agreed duration of a month, the employee starts to get stressed on how to meet the basics needs, such results in distress and eventually the employee is reduced to a beggar.

12. Such are condition specifically addressed under our constitution at article 28 and 30 which prohibit any person from treating another with indignity. In employment relations article 41 of the constitution also apply as when an employer subjects an employee to non-payment of due salary, proceed to deny the employee such pay for long period of more than a month as agreed upon, such is an unfair labour practice. Such is specifically prohibited under the constitution.

13. Section 18 of the Employment Act also delves on the issue as to when the due wage or salary is payable thus;

18. When wages or salaries due

(1) Where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled—

(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or

(b) In the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.

(2) Subject to subsection (1), wages or salaries shall be deemed to be due—

(a) In the case of a casual employee, at the end of the day;

(b) In the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period; .

(c) In the case of an employee employed for a period exceeding one month, at the end of each month or part thereof; .

(d) in the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date is the earlier, and on the completion of the journey,

13. The parties herein were on an employment contract. Such was premised on a relationship thus regulated and salaries due in terms of section 18 above, were thus at the end of each 30 days. Where not paid, the employer and Respondent herein was in breach of the employment Contract. The resignation of the Claimant that followed was thus pre-empted by the breach apparent on the part of the respondent.

14. Breach of an employment contract is an unfair labour practice and contrary to section 45 of the Employment Act. The resignation of the Claimant from her employment was thus necessitated by the unfair labour practice of the employer. Had the due salaries due been paid, the Claimant should have retained her employment and continued to serve.

15. On the basis that the Respondent has opted not to defend the claim, despite being served and entering appearance there was no material challenge of the claim, the Claimant is hereby granted the orders sought and I make a finding that there was breach of contract and the Claimant is entitled to damages.

Remedies.

16. As held by this court in **JANE I KHALECHI v OXFORD UNIVERSITY PRESS E.A. LTD [2013] eKLR**

*... Damages are punitive in nature and generally intended to teach the defendant that tort does not pay. They are awarded in addition to compensatory damages. However damages may not be awarded in actions for breach of contracts as was held in **Kenny-v-Preen [1962] 3 All ER 814, CA.***

17. In this case, the unfair labour practice apparent, I find there are sufficient remedies availed under section 49 of the Employment Act to compensate the Claimant for the loss and damage suffered due to the termination of employment. Section 49(1) provides;

[Where the court makes a finding that] summary dismissal or termination of a contract of an employee is unjustified, the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

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

18. An award of damages in this case will appropriately compensate the claimant. The Claimant served for 3 months but within this time she suffered grave unfairness and subjected to inhuman treatment as due salaries not paid. Compensation at 10 months gross pay is an appropriate remedy. The Claimant is awarded Kshs.900, 000.00.

Judgement is hereby entered for the Claimant against the Respondent to the liquidated claim of Kshs.270, 000.00 and compensation at 900,000.00 together with costs. The liquidated claim shall be paid with interest.

Judgement read in open court at Nairobi this 2nd February, 2017.

M. MBARU

JUDGE

In the presence of:

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