



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 36 OF 2014

LOICE UCHI GAMBOCLAIMANT

VERSUS

PEKELE VILLAGE RESORT1ST RESPONDENT

DECHE KASHERO T/A PEKELE INVESTMENTS.....2ND RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment by the respondent on 12/11/2013. The respondent denied liability for the alleged unfair termination and avers that it is the claimant who deserted her employment without any prior notice. The main issues for determination is whether the claimant deserted her employment without notice or she was unfairly terminated by the respondent. The court will also determine the question as to whether the claimant is entitled to the reliefs sought.

CLAIMANT'S CASE

2. The claimant testified as CW1. She stated that she was employed by the respondent as Cleaner on 2/2/2007 under a verbal contract. She was however given an appointment letter dated 3/1/2008. She started with a salary of ksh4000 per month but it was later increased to ksh.5750 per month. Her working hours ran from 7.00am to 2.00pm. She never went for any annual leave until 2012 when she went for 4 month in June, July, August and December. The said leave was made possible after her colleague lodged a complaint at the labour office.

3. CW1 further testified that on 28/10/2013 she sought and obtained permission from the respondent's manager Mr. Mohammed to go to the hospital. After treatment, she reported back the same day and gave the said manager a doctor's note recommending for a sick off for 2 weeks. She gave the doctor's note to the manager in the presence of Mr. Charles Mwajila and Lilian Folonzi. The manager, however declined to grant her the sick off stating that there were many guests in the hotel and as such she should wait until the number of guest diminished then go for the sick leave.

4. When CW1 went home that night, her condition worsened and she called her colleague Lilian Folonzi and sent her to notify the manager that she could not attend work. After 2 days, the manager sent Lilian to check her condition and found her still sick. On 11/11/2013 she reported back to work after recovery

and resumed duty.

5. On 12/11/2013 however, she together with the other colleagues at work were told to go home because there was no work. When CW1 demanded for a termination letter, she was denied and the manager told her that she was dismissed for absencing herself from work for 2 weeks. According to her that the termination was unfair because the alleged misconduct was untrue and she never was accorded any hearing before the termination.

6. On cross examination, CW1 confirmed that she was terminated with her 2 other colleagues who were later reinstated. She also confirmed that the respondent hotel is located at Kilifi and outside municipality. She further confirmed that the manager told her to write a letter explaining her 2 weeks absence and she did so on 13/11/2013. Finally she denied ever going for leave in January and February 2013 but admitted that she went for leave in September, November and December 2012.

DEFENCE CASE

7. Mr. Deche Kashero testified for the defence as RW1. He admitted that he employed the claimant as a cleaner in his guest house at Kilifi called Pekele Investments. He stated that the claimant went for her annual leave in June 2012 – September 2012 and again from January –February 2013 with full pay. RW1 explained that in November 2013, the claimant disappeared for 2 weeks and his effort to trace her was in vain because she was neither in her house nor her parents home.

8. According to her RW1, she reappeared on 12/11/2013 and worked for one hour and disappeared again. Although she was reached over the phone, she refused to report back to work and instead wrote the letter dated 13/11/2011 alleging that she had TB and inquiring why she was dismissed. She also demanded for his dues. RW1 denied ever dismissing the claimant. He concluded by stating that after the claimant filed complaint at the labour office, she never attended the 3 meetings convened to hear her case. He maintained that it is the claimant who deserted her employment.

9. On cross examination RW1 admitted that he never met the claimant on 12/11/2013 and all that he testified herein is what he was told. He contended that the claimant deserted work before a disciplinary hearing was done. He admitted that from 2008-2012, the claimant never went for his leave. Finally he maintained that the salary paid was inclusive of house allowance as shown in the masterroll.

ANALYSIS AND DETERMINATION

10. After careful consideration of the evidence and the submissions filed by two parties, I see no dispute in the fact that the claimant was employed by the respondent from 2/2/2007 and worked until 13/11/2013 when her services ended. The issues for determination herein are:

- a. Whether the claimant deserted his employment from 29/10/2013 or she was unfairly terminated by the respondent.
- b. Whether the claimant is entitled to the reliefs sought.

Desertion vs unfair termination

11. There is no dispute that on 28/10/2013, the claimant went to hospital with the permission of the respondent's manager and brought a doctor's note recommending for 2 weeks sick off but she was denied the sick off. There is also no dispute that from 29/10/2013 to 11/11/2013 the claimant was absent from work. Under Section 44(4) (a) of the Employment Act, the respondent, as the employer herein was entitled to summarily dismiss the claimant from employment unless she proved that the absence was with leave or due to other lawful cause.

12. In this case the claimant alleges that she was sick and her doctor had recommended for her 2 weeks sick off. That the respondent's manager declined to grant the said sick off and when she went home her

condition worsened and she did not attend work. That she called her colleague Ms. Folonzi and send her to notify the manager of her worsening condition. That after 2 days the manager sent Ms. Folonzi to check on her condition. That she reported back on 11/11/2013 and worked the whole day but on 12/11/2013 she and her colleagues were terminated.

13. RW1 has however contended that the claimant disappeared from work on 28/10/2013 without any leave and his effort to trace her from her house and her parents' home was fruitless. That she reappeared on 12/11/2013 and worked for one hour and disappeared again. That when she was reached over the phone she refused to return to work and instead wrote a letter dated 13/11/2013 demanding for the reasons for her termination and payment of her terminal dues.

14. After careful consideration of the evidence before me, I find that the claimant never deserted work but she was dismissed. The reason for the termination was that she had absented herself from work for 2 weeks. The manager Mr. Mohammed who dismissed the claimant was not called as witness to deny the alleged dismissal. Under the natural cause of things, a reasonable employee cannot desert work and demand the reason for dismissal by the employer. The claimant must have been terminated before writing the said letter. The question that flows from the foregoing conclusion is therefore whether the termination of the claimant's services was unfair.

15. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

Reason for termination

16. In this case the reason for the dismissal of the claimant was her absence from work for 2 weeks. Under Section 44(4) (a) of the Act, absence from work without leave or other lawful cause is a misconduct that entitles an employer to summarily dismiss his employee. The employee herein has admitted that she absented herself for 2 weeks from 29/10/13 to 10/11/2013.

17. The respondent contends that the absence was without leave and the claimant admits the same. She however contends that she was sick and she notified the manager through her colleague Ms.Folonzi. She has however not called Ms. Folonzi as a witness to confirm that allegation. She also did not call any doctor to prove that she was indeed too sick to attend work for 2 weeks. She also never called any neighbour or family member to confirm that she as indeed sick and at home during the 2 weeks. Consequently, I find and hold that she has not discharged her burden of proving that she absented herself from work for 2 weeks with leave or for other lawful cause. Specifically, she has not rebutted the respondent's contention that she disappeared from work for 2 weeks and she could not be traced either at her house or her parents' home.

Procedure followed

18. Under Section 41 of the Act, before employer terminates the services of his employee on ground of misconduct, poor performance or physical incapacity, he must first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reason for the intended termination and thereafter accord the employee and his chosen companion a chance to air their defence for consideration before the termination is decided.

19. In this case the claimant contended that she was informed of her dismissal by her colleagues who were terminated with her and when she went to see the manager, he told her that she was dismissed for absenting herself from work for 2 weeks. She then went home and wrote the letter dated 13/11/2013 explaining her absence. In my view the mandatory procedure provided under Section 41 aforesaid was not followed. It is clear from the evidence on record that the dismissal of the claimant was decided by the manager without first hearing the claimant in the manner provided under Section 41 of the Act. He also never paid her any dues or issued her with certificate of service as required under Section 45(5) (c) of the Act. Consequently, I find and hold that the respondent has failed to prove that she followed a fair

procedure before dismissing the claimant from service and as such the dismissal became unfair within the meaning of Section 45 of the Act.

Reliefs

20. Under section 49 of the Act, I award the claimant ksh.11500 being 2 months salary in lieu of notice plus ksh.34500 being 6 months salary in lieu of notice. The reason for awarding 2 months' notice is because that is the notice period provided for employees who have served under the Hotel Industry for 5 years under Rule 20(1) (b) of the Regulation of Wages (Hotel and Catering Traders) Order. On the other hand the reason for awarding 6 months compensation is because the claimant has served the respondent for a long time.

21. The claim for leave for 7 years is dismissed because the claimant admitted that she took leave in the month of June – September 2012. In addition the respondent has proved by record that she took another leave from November 2012 to February 2013. That total to eight months leave inclusive of Sundays and public holidays which is more than the annual leave earned between 2/2/2007 and 13/11/2011.

22. The claim for unpaid house allowance is also dismissed for lack of particulars and evidence. The claimant has not demonstrated by pleadings, evidence and submissions how she arrived at the sum of ksh.72450. There is no dispute that she was paid different amount of salary at different times of her employment.

DISPOSITION

23. For the reason that the termination of the claimant's services was unfair, I enter judgment for her in the sum of ksh.46000 plus costs and interest from the date of hearing.

Dated, signed and delivered this 23rd June 2017

O. N Makau

Judge