



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 860 OF 2016

T M MCLAIMANT

VERSUS

C C E C C [K] LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's contract of employment by the respondent on 20/5/2016. The claimant further prays for general damages for unlawful exposure to sexual harassment and invasion of her human dignity and privacy by the respondent.

2. The respondent has denied ever terminating the claimant's employment contract on 20/5/2016 and avers that it is the claimant who deserted the employment on 22/5/2016. Additionally, the respondent has denied ever exposing the claimant to any sexual harassment but admits that the claimant was physically assaulted by a fellow employee Mr. Zai Diangfeng as a result of which the assailant was charged in court vide criminal case No. 1182 of 2016 and was punished according to the law. The respondent therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 7/12/2016 when the claimant testified as CW1 which the respondent called her HR manager Ms P K as RW1. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 testified that she was employed from 1/2/2016 as storekeeper under an oral agreement earning ksh.13192 per month. The first salary was paid in cash and without payslip because the claimant was not yet registered for NSSF contributions. However from 1/3/2016, she registered with the NSSF and as such her salary was paid through the bank and she was given a payslip. She contended that the said pay was less than the statutory minimum pay for her position as store keeper which ought to have been ksh.16872.

5. On 20/5/2016, her supervisor Mr. Zai Diangfeng went to the store and found her alone. He asked her for an Allen key but she told him that it was with another supervisor, Mr. Heming. Mr. Zai was not pleased with the answer and he beat her breast, called her a thief and removed her from the store. She reported the assault to other managers and she went to hospital and also reported the matter to the police. On same day she was given a 2 days sick leave to report back on 23/5/2016.

6. While still on the sick off, Mr. H called her by phone and told her not to report back because the company had employed another person to replace her. However, CW1 went to see the HR Manager on 23/5/2016 who confirmed that no other person had been employed to take up her job.

7. CW1 further stated that Mr. Zai was arrested on 6/6/2016 and thereafter charged in court where he admitted the offence. According to her, she had to endure persistent sexual harassment from Mr. Zai during her time of service. She explained that Mr. Zai kept requesting for her sex in exchange of ksh3000 in addition salary increment. She contended that the respondent had no sexual harassment policy and there was no special forum to report the vice. She therefore reported to her boss Mr. H who condoned the vice by advising her to give in to Mr. Zai's advances in order to get paid money.

8. On cross examination CW1 stated that she was trained in storekeeping. She further stated that she reported to the police a case of sexual harassment and assault by Mr. Zai. She admitted that the respondent never prevented the arrest and punishment of Mr. Zai but she contended that her boss had offered ksh.1000 to her as inducement to drop the case. She clarified that on 23/5/2016 the HR Manager confirmed that no new person had taken her job but told her to go home and wait until she was called back. She confirmed that if she is reinstated she will be happy but on condition that this suit must be determined. She maintained that she was dismissed on 20/5/2016.

DEFENCE CASE

9. RW1 stated that the claimant was employed by the respondent from 1/3/2016 as a labourer earning ksh.13192 per month. From April 2016, she was promoted to assistant store keeper and her salary was increased to ksh.14850 plus house allowance of 20% of the basic pay. The new salary was however paid in arrears of ksh.7644 in June 2016 through her bank account.

10. RW1 explained that on 20/5/2016 CW1 was assaulted by Mr. Zai and she was given 2 days sick off to report back on 23/5/2016 but she deserted work. On 22/5/2016 RW1 was called by the OCS Changamwe police station to notify her that CW1 had reported a case of assault while at work. She went to the station on 1/6/2016 and thereafter Mr. Zai was arrested and charged for assaulting the claimant which charges he admitted and he was condemned to pay a fine. Thereafter he was dismissed from work and he went back to China.

11. RW1 contended that the respondent has a sexual harassment policy in her HR manual but further contended that CW1 never reported any sexual harassment. She guessed that the foreman ought to have explained to her to her rights. She denied that CW1 was terminated by the respondent.

12. On cross examination, RW1 confirmed that CW1 worked continuously without any break or rest days. She further confirmed that the company never talked to employees about sexual harassment because there were no reported cases. She confirmed that CW1 had reported a case of sexual harassment to the police the day he reported the assault by Mr. Zai. Thereafter, the company reviewed her policy on sexual harassment. She admitted that after treatment, CW1 brought the sick sheet and she filled for her a sick leave. She admitted that after the sick leave CW1 came back to the office. She further admitted that CW1 was neither given a written contract nor a copy of the HR manual. Finally she admitted that the respondent employs more than 20 employees.

ANALYSIS AND DETERMINATION

13. There is no dispute that the claimant was employed by the respondent at all material times to this case. The issues for determination are:

- a. Whether the claimant was unfairly terminated or she deserted her employment.
- b. Whether the claimant is entitled to the reliefs sought in the suit.

Unfair termination vs desertion

14. The claimant contended that she was terminated on 20/5/2016 but RW1 maintained that on the said day she only gave the claimant a sick off in line with the doctor's recommendation. She added that the claimant never deserted work from 23/5/2016 up till now. RW1 contended that although the claimant went to the office on 23/5/2016 after the sick off, she was not reporting back to work. However the claimant contended that she reported back to work on 23/5/2016 and the HR manager told her to go back home until she was called back. CW1 also stated that on 22/5/2016, Mr. H called her to tell her not to report back because another person had been employed to replace her.

15. After careful consideration of the evidence and the submission presented to the court, I find on a balance of probability that the claimant did not desert employment but she was terminated by the respondent. The claimant was assaulted and lawfully went for 2 days sick off. A day before she reported back on 23/5/2016 as scheduled, her boss Mr. J H called her through her phone to notify her not to report back to work because another person had been employed to replace her. That when she reported back to work on 23/5/2016, the HR Manager confirmed that no other person had taken over her job but advised her to go home and wait until she was called back. She was never called back even after serving a demand letter through her lawyer. Mr. H has not testified herein to deny that he called the claimant on 22/5/2016 and told her not to report to work. I therefore find on a balance of probability that the claimant was dismissed by the said Mr. Heming.

16. The issue that flows from the foregoing is whether the termination of the claimant's contract of employment was unfair. According to the claimant the termination was unfair because it was done without a prior notice and for no valid reason. She further averred that she was terminated without being given any prior hearing. The respondent did not deny the foregoing allegation that the claimant was terminated without prior notice, for no valid reason and before giving her any fair hearing.

17. Under Section 45(2) of the Employment Act, termination of employment by the employer is unfair if the employer fails to prove that the termination was grounded on valid and fair reason and that it was done after following a fair hearing. Having observed hereinabove that the respondent never put any effort towards proving the reason and procedural fairness, I find and hold that the termination of the claimant's employment contract was unfair within the meaning of Section 45 of the Act.

Reliefs

18. Under Section 49 of the Act, I award the claimant ksh.16872 being one month salary in lieu of notice plus ksh.67488 being four months salary as compensation for the unfair termination. In awarding the said compensation, I have considered the fact that the claimant had worked for the respondent for fairly short time.

19. The claim for underpayment of salary is also awarded. The claimant proved that she was employed from 1/3/2016 as Store Keeper. RW1 alleged verbally that the claimant was a general labourer in March 2016 and only became Assistant Store Keeper after promotion in April 2016. No employment records were produced to disapprove the said verbal allegation by the claimant. Under Section 10(7) of the Act, a presumption is made in favour of the claimant that the claimant was a Store Keeper all the days of employment by the respondent. I therefore find and hold that she was entitled to the minimum salary of a storekeeper as per the statutory wage order being Ksh.16872 per month exclusive of house allowance. According to the payslip, she was earning a basic salary of ksh.10993 which was underpaid by ksh.5879 equaling to ksh.17637. The claimant prayed for ksh.11041. The respondent allegedly paid her ksh.7644 in June 2016. I therefore award the claimant ksh. 17637-7644 =9,993 as the net arrears of her salary underpayment for 3 months.

20. The claim for damages for exposure to sexual harassment is however dismissed for being an afterthought. The first time the claimant made the allegation was at the police station after a physical assault. The fact that the blow landed on the claimant's breast did not *per se* render the offence sexual harassment.

21. Although the investigation diary produced as exhibit states that a Chinese had been asking for an

affair with her beat her breast with a first, the claimant's statement at the police station on 6/6/2016 never accused the Chinese (Mr. Zai) of any sexual harassment prior to the date of the assault. The claim for exposure to sexual harassment is therefore not well founded and it is dismissed.

22. I have however noted from the evidence that the respondent has not formulated and published a clear policy to deal with the vice that is sexual harassment within her workforce. Had the claimant proved that she was subjected to sexual harassment, the respondent could have paid dearly for exposing her to the vice.

23. The claim for certificate of service is however granted because that is her right under Section 51 of the Act.

DISPOSITON

24. For the reasons that the claimant's employment contract was unfairly terminated, I enter judgment for her in the sum of ksh.94353 plus costs and interest. She will also have certificate of service.

Dated, signed and delivered this 9th June 2017

O. N. Makau

Judge