



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 352 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

MAXIMILA BUSHURU.....CLAIMANT

-Versus-

ANVI EMPORIUM LIMITED.....RESPONDENT

JUDGMENT

The claim herein is filed by **Maximila Bushuru**, the Claimant who alleges that she was unfairly dismissed from employment by the Respondent who also failed to pay her terminal benefits. In the Memorandum of Claim filed on 15th December 2014 she seeks the following reliefs:

- (a) The Respondent to pay my terminal dues as the memorandum of claim.
- (b) The Respondent to issue the certificate of service.
- (c) Any other Legal claim that may deem fit.
- (d) Cost of suit.

The Respondent filed a Reply to the Memorandum of Claim on 28th January 2015 admitting employing the Claimant as a shop attendant and not junior clerk as alleged in the Claim. The Respondent further avers that the Claimant's salary was Kshs. 11,000/- and not Kshs. 7,500/- as alleged in the Claim. The Respondent denies paying the Claimant a salary below the statutory minimum wage. The Respondent further denies unfairly terminating the employment of the Claimant and avers that she deserted duty without permission or notice in June 2014, or that it paid the claimant for only 2 months' salary during maternity leave instead of 3 months.

The Respondent further avers that this matter was conciliated by the County Labour Officer following which it paid the Claimant a sum of Kshs. 20,000/- which the Claimant accepted in full and final settlement of her claim against the Respondent. The Respondent prays that the claim be dismissed with costs.

The case was heard on 31st October 2016. The Claimant testified on her behalf while the Respondent called one witness, VINOD PAL, the proprietor of the Respondent. The Claimant thereafter filed written submissions but the Respondent did not.

Claimant's Case

It is the Claimant's case that she was employed by the Respondent from February 2011 to July 2014. She was working at the Respondent's spare parts shop in Jua Kali area of Kisumu City where she was doing sales of motor vehicle spares and keeping records. Her other duties were cleaning and doing general messengerial duties.

The Claimant testified that she applied for annual leave in July 2014 and was allowed to go by the Director Vinod Pal but was not given any document. She therefore did not know how many days leave she had been given. She was away for one month and when she reported back she was told by the manager to go and see the director at the Head Office in Standard Chartered bank Building at Anvil Bookshop in town. The Director informed her that her immediate boss had issues with her. That the boss was complaining about her reporting to work late. She was told to go home and that she would be called after 2 days but was not called. Her calls to the office were not answered. She went back after 1 week to ask for her terminal dues and was told she will not be paid and can go wherever she wants.

The Claimant testified that she went to an advocate who sent a demand letter to the respondent but there was no response. She thereafter went to Labour Office where she met a labour officer. After explaining her problem the labour officer advised her to withdraw instructions from the advocate so that the Labour could handle her case. After withdrawing the case the labour officer gave her a letter which she delivered to the Director. In October 2014 she was summoned to the Labour Office and was given Kshs. 20,000/- which she received under protest as it was less than what she was claiming. When she pointed this out to the Labour officer she was dismissed. She then decided to file this suit. The Claimant testified that she is claiming leave, underpayments, salary for July 2014 and certificate of service.

Under cross examination the Claimant stated that she dealt with customers. She received money from customers, printed receipts, received change from her boss and gave it to the customer, and did invoicing. She stated that she is a holder of a certificate in purchasing and supplies from Kenya Institute of management. She stated that she was paid salary in cash and signed for it in the muster roll.

Respondent's Case

Mr. Vinod Pal for the Respondent testified that he runs a bookshop, spares parts shop and a hardware, that the Claimant was employed in the spare parts shop as a shop attendant with 3 other employees. Her duties were attending to customers, cleaning and general duties. He testified that she was not a junior clerk as there was no clerk in the shop. Her salary was paid in cash and her starting salary from July 2011 was Kshs. 8000/- up to January 2012. In February 2012 the salary was increased to Kshs. 8800/-. From January 2013 the Claimant's salary was increased to Kshs. 10,000/- which she earned up to June 2014.

Mr. Pal testified that in June 2014 the Claimant went on leave and did not report back to work. He testified that after 3 to 4 months he was called by the Labour Office. The Labour Officer heard his case and directed him to pay Kshs. 20,000/- in full and final settlement. He paid the money at the Labour Office and was later issued with a certificate of Final Settlement signed by the Claimant.

Mr. Pal testified that when the Claimant went for maternity leave she demanded payment of 2 months' salary which she was paid. He testified that all employees take annual leave every year and the claimant is not owed leave as she took leave for all the years she worked for the Respondent. Mr. Pal denied underpaying the Claimant.

Determination

I have carefully considered the pleadings and evidence on record as well as the written submissions filed on behalf of the Claimant. The issues arising for determination are whether the Claimant was unfairly terminated by the Respondent and if she is entitled to the prayers as claimed.

Unfair Termination

What constitutes unfair termination is provided for under section 45(2) of the Employment Act(the Act)

as follows:-

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Burden of proof is provided for under section 47(5) as follows:-

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or

wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

In this case the claimant alleges that she went on annual leave and when she reported back she was not allowed to resume duty. The Respondent on the other hand avers that the Claimant went on leave but failed to report back on duty.

In her testimony the Claimant did not state the date when she went on leave or when she reported back to work. She did not state the dates she alleges to have gone to see the director at Anvil Emporium or the dates she went to her lawyer. The Respondent having denied that her employment was terminated it was for her to prove on a balance of probabilities that she did not desert duty as alleged by Mr. Pal who states that he was summoned to the Labour Office several months after the Claimant failed to report back to work from annual leave.

What is on record is a demand letter from her lawyer dated 23rd September 2014. The Claimant did not explain what transpired between June when she went on leave and September when her lawyer issued the demand letter. This corroborates the Respondent's case that the Claimant went on leave in June but failed to report back, and that the Director was called by the Labour Office several months later. It would appear that even the labour officer did not believe her story about unfair termination and only asked the Respondent to pay her one months' salary in lieu of notice and annual leave of 21 days. The Claimant states she received the money under protest but has nothing to show for it.

As provided under section 47(5) it is the burden of the Claimant to prove unfair termination and in this case she has not persuaded me that she was unfairly terminated or terminated at all. I therefore find that the Claimant has not proved unfair termination of her employment.

Remedies

The Claimant prayed for service gratuity, pending leave days, underpayments, unpaid maternity leave and compensation/loss of earnings. Before I consider the prayers I must first determine the salary that the claimant is entitled to as all the prayers are pegged on the same.

The Claimant pleaded and also testified that she was employed as a junior clerk. She described her duties as doing sales and keeping records of motor vehicle spares, cleaning and doing messengersial duties, and doing general work. Under cross examination the claimant stated that she dealt with customers when they went to the shop. She received money from customers, printed receipts and did invoicing. Mr. Pal for the Respondent maintained that the Claimant was a shop assistant.

Under the REGULATION OF WAGES (WHOLESALE AND RETAIL DISTRIBUTIVE TRADES) ORDER

"general clerk" means an employee wholly or mainly engaged in performing miscellaneous clerical tasks, including mail sorting, preparation of outgoing correspondence, typing, filing, postage account recording, preparation of invoices, keeping stock records, sales or purchase day-books or petty cash book, and writing out of receipts and the issue of stationery and other similar transactions;

"junior clerk" means an employee wholly or mainly engaged in performing clerical tasks, including the sorting of incoming mail, preparation of outgoing documents and correspondence, filing, assisting in the checking and preparation of invoices and who may be required to perform duties such as simple typing, operation of any copying or duplicating machine, relief duties on a telephone switchboard, cutting addressograph plates and addressing envelopes by machine: and

"shop assistant" means any person wholly or mainly employed for the purpose of transacting business with customers in that department of an undertaking to which customers have access but who is not in charge of such department;

From the Claimant's own description of her duties she was not a junior clerk but a sales assistant. Her statutory basic minimum salary as at June 2014 was therefore Kshs. 13,201/-.

(i) Service Gratuity

Service gratuity or service pay as it is referred to in the Employment Act is payable under section 35(5) as read with 35(6). The Claimant having been a member of NSSF is not entitled to the same and the prayer is dismissed.

(ii) Pending Leave Days

The Claimant seeks payment of annual leave but does not state for which year or how many days. Mr. Pal for the Respondent testified that all employees took leave every year although no leave records were produced as required by law. Since the Claimant did not specify which year's leave she is claiming or how many days and since no questions were put to Mr. Pal by the Claimant's counsel to controvert his averments that the Claimant took her leave every year, I find that the Claimant has not proved her claim for annual leave and dismiss the same.

(iii) Underpayments

The Claimant seeks underpayments from February 2011 to July 2014. In her testimony the claimant stated that she was employed on 1st February 2011. The Respondent did not controvert this although Mr. Pal referred to the Claimant's salary from July 2011.

In January 2011 the statutory basic minimum wage for shop assistant was Kshs. 9101 and from May, 2011 it was Kshs.10239. From May 2012 it was Kshs. 11580.30. From May 2013 to June 2014 the Claimant's statutory minimum wage was Kshs. 13,201/-. The minimum wages are exclusive of 15% house allowance.

According to the evidence of Mr. Pal, the Muster Roll and payslips filed by the Respondent the Claimant was paid as follows:-

July 2011 to January 2012	8,000
February 2012 to December 2012	8,800
January 2013 to June 2014	10,000

The Claimant was thus underpaid as follows-

February 2011 to April 2011 (10466.15-8000)x3	= 7398.45
May 2011 to January 2012 (11774.85-8000)x9	=33973.65
February 2012 to April 2012 (11774.85-8800)x3	= 8924.55
May 2012 to December 2012(13317.35-8800)x8	=36138.70
January 2013 to April 2013(13317.35-10000)x4	=13269.40
May 2013 to June 2014(13,201-10000)x14	=44814.00

TOTAL UNDERPAYMENTS =144518.75

To arrive at gross underpayments I have added 15% to the Statutory minimum wages to include house allowance.

I therefore award the Claimant underpayments in the sum of Kshs. **144,518.75**

(iv) Unpaid Maternity Leave

The Claimant testified that she took maternity leave in November 2011 and was paid for 2 months instead of 3 months. Mr. Pal confirmed this in his evidence. This Claim is however time barred as the Claim was filed on 15th December 2014, and the claim is outside the statutory limitation period of 3 years as provided in section 90 of the Employment Act. The Claim is therefore dismissed.

(v) Compensation/Loss of Earnings

The Claimant seeks compensation for loss of employment. As I have already held above, there was no proof of unfair dismissal. The claimant is therefore not entitled to compensation and the claim is dismissed.

Conclusion

I enter judgment for the Claimant against the Respondent in the sum of Kshs. 144518.55. The payments already received by the Claimant in the sum of Kshs. 20,000/- shall not affect the Judgment herein as it was in respect of notice and leave which have not been awarded in this claim.

Since the Claimant did not prove the main claim of unfair termination of employment, there shall be no order for costs.

Dated and signed and delivered this 8th day of June, 2017

MAUREEN ONYANGO

JUDGE