



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 523 OF 2016

CHRISTINE KAARI NATHAN.....CLAIMANT

VERSUS

PRESBYTERIAN FOUNDATION t/a Milele Beach Complex.....RESPONDENT

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 employment contract by the respondent in February 2016. The respondent filed no defence and her counsel who had entered appearance for her withdrew from the suit after the close of the hearing citing lack of instructions.

CLAIMANT'S CASE

2. The claimant testified as CW1 and called Mr. Michael Mutunga Kiio as CW2. CW1 stated that she was employed by the respondent trading as Milele Beach Hotel on 3/12/2013 under one year contract which was renewed for another one year effective 2/12/2014. Her salary was ksh.24727 per month.

3. Towards the end of 2015, the respondent changed her business name to trade as Milele Beach Complex and a new management took over the hotel but the claimant continued to work under the same terms as before until January 2016 when she went on leave. Before long she was called back to the office to assist in the investigation of some money which was allegedly stolen from the accounts office. Later she was served with letter dated 4/2/2016 suspending her from work for 14 days to pave way for fraud investigations.

4. After the 14 days given for her suspension, she reported back to work but she was told that her employment had been terminated. She described the termination as being unfair because it was done without prior notice and without giving the claimant a fair hearing in which she could defend herself.

5. CW2 is also a former employee of the respondent. He was employed by the respondent from 2013 to 31/5/2016 when his contract lapsed. He explained that while still in employment the respondent changed name to Milele Beach Complex. He confirmed that the claimant was his workmate.

6. In January 2016, there was allegation of money stolen from the hotel and the claimant was called to carry out investigations. Thereafter she was suspended with 5 other employees for 14 days after which they were terminated but no one was arrested and charged in court in connection with stolen money.

ANALYSIS AND DETERMINATION

7. There is no dispute that the claimant was employed by the respondent in her hotel called Milele beach hotel. There is also no dispute that the respondent changed the trade name to Milele Beach complex. The issues for determination are:

- a. Whether the termination of the claimant's employment contract was unfair.
- b. Whether reliefs sought should be granted.

Unfair termination

8. Under Section 45(2) of the Employment Act, termination of an employee's employment contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the claimant testified that she was terminated without prior notice and/or fair hearing to enable her defend herself. On the other hand the respondent never filed any defence and never gave any evidence during the hearing as such the claimant's evidence has not been contested. Consequently, I find and hold that the claimant's contract was unfairly terminated by the respondent.

9. Although there is no express agreement between the parties extending or renewing the contract after it lapsed on 1/12/2015. There is no further dispute that the claimant continued to work for the new management under the same terms she was working for the previous management. The claimant produced an undated letter by Abed Lai and addressed to the CEO Presbyterian Foundation which stated as follows:

"Re: Delayed/Nonpaid January 2016 salary by Milele Beach Complex

I bring to your attention, I (Abed Lai) and the staff below have not been paid their salaries for January 2016 upto now. Christine Nathan, Lucy Maina, Teresia Kungu, Julius Masha and Eve Luvuno.

I kindly write to you requesting your indulgence in the matter since the church never issued any letters to the staff to say they've handed them over to new management. When the presbeta trading as Milele Beach complex came in, they promised to take on board every staff with the previous terms as it was with the foundation".

10. On the basis of the promise stated in the letter quoted above that led the claimant to continue serving the respondent until January 2016 when she was given leave of 28 days according to the leave application form approved by General Manager on 2/1/2016. It is also on the same basis that the respondent took disciplinary action on the claimant including suspending her from employment on 4/2/2016 in connection with an alleged fraud and thereafter terminated her services.

11. Flowing from the foregoing conduct of the parties herein, I make a finding that the contract of employment was renewed by the parties after it lapsed on 1/12/2015. The renewal was on the same terms as the expired contract in terms of length of the term of engagement and the parties' rights including annual leave for the claimant. It is this renewed contract that was unfairly terminated by the respondent and I so hold.

Reliefs

12. Under Section 49 of the Employment Act, I award the claimant ksh.24727 being one month salary in lieu of notice plus ksh.74181 being 3 months salary as compensation for unfair termination. The reason for the little compensation is that the claimant had worked for the respondent for a fairly short period of time.

13. The claim for leave is dismissed because she took leave of 28 days from 4/1/2016 to 1/2/2016. Any other leave claimed is lacking in material particular and evidence. Even if there was previous leave not taken, the claimant has not demonstrated that she had obtained written consent from the employer to accumulate it as required by clause II of the contract letter.

DISPOSITION

14. For the reason that the claimant's contract was unfairly terminated, I enter judgment for her in the sum of ksh.98908 plus costs and interest.

Dated, signed and delivered this 28th July 2017

O.N. Makau

Judge