



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 900 OF 2013

FLORA AMBOKO ATISA.....CLAIMANT

VERSUS

MASON SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 14th June 2013 and averred that she was employed on 1st July 2003 as a cleaner/office manager earning Kshs. 5,500/- basic. It was averred that the Claimant was not issued with any contract of employment. She averred that she worked diligently for the Respondent for 9 years and 5 months and was deployed to various places including the Barclays Bank, Housing Finance Bank Limited, Ministry of Home Affairs and Safaricom Headquarters where she worked as a tea girl/office messenger in the hospitality department. She averred that she was unlawfully terminated due to redundancy on 3rd January 2013. It was averred there was no show cause notice issued and that there was failure to pay the Claimant rightful benefits contrary to section 40 and 41 of the Employment Act 2007. She averred that the circumstances leading to her dismissal were not explained and was as a result of the non-renewal of the Safaricom contract. She avers that upon return from scheduled leave she was advised that the contract with Safaricom was not renewed and therefore due to restructuring she was not going to be required. It was averred that the Claimant was requested to return the staff uniform and was notified that she would be called to discuss her dues. She averred that she was never called. She averred that she sought to demand her dues and the Respondent failed to pay her terminal benefits, namely

- a. One month's notice pay Kshs. 5,500/-
- b. Severance pay of 15 days for each year of service Kshs. 27,000/-
- c. House allowance at 15% of 5,500 for 9 years 5 months Kshs. 7,425/-
- d. Damages for unlawful dismissal Kshs. 66,000/-
- e. NSSF remittances withheld unlawfully Kshs. 12,000/-
- f. Salary 5 months leave Kshs. 27,500/-
- g. Overtime for the entire period of employment starting 3rd November 2003 for Mondays to Fridays – Kshs. 110,468/-
- h. Overtime on Saturdays from period starting 3rd July 2003 – November 2012 Kshs. 166,188/-

The Claimant sought a certificate of service as well as costs of the suit as well as interest on the sums claimed.

2. The Respondent responded to the claim on 18th October 2013. It averred that the Claimant was employed as a cleaner cum tea girl at a salary of Kshs. 4,500/- on 24th June 2003. The Respondent averred that the Claimant was at all times deployed at the Safaricom company where the contract with the company as to expire on 31st (sic) November 2012. The Respondent averred that at the time of the termination of the basic contract with Safaricom, the Claimant had accumulated twenty five leave days which she was allowed to take in December 2012 and was to report back on 4th January 2013 but she never reported as expected. The Respondent averred that she never surrendered the Safaricom Access pass. It was averred that the salary payments for the Claimant were made through the Bank and that she worked through shifts and never at any time accrued any overtime. The Respondent denied receipt of any correspondence from the Claimant at all and sought that the suit by the Claimant be dismissed with costs.

3. The Claimant testified on 11th June 2016 and stated that she was employed by the Respondent on 1st July 2003 earning Kshs. 5,500/- per month and that she worked for 9 years 5 months. She testified that she was not given any letter of employment and that at the time she worked she was not paid any house allowance. She stated that the contract between her employer and Safaricom collapsed in November 2012 and that she was asked to proceed on annual leave and resume 3rd January 2013. She testified that she came back as advised and expected to be deployed to other sites but she was notified that she was not deployed and was one of the ones affected by the redundancy. She testified that she went to the Labour Officer who advised her to come to Court. She stated that she did not go for leave in 2004, 2005, 2006, 2007 and 2008. She stated that she was paid salary of Kshs. 9,675/- as salary had risen. She testified that she was not given any show cause and that she was paid in cash at the office in the years 2003 to 2006. She testified that she never received any letter from the employer and that she was employed verbally.

4. In cross-exam, she testified that she was a cleaner and tea girl and that she worked at various sites – Barclays Bank, HFCK, Foreign Affairs and lastly Safaricom sites both retail and HQ. She stated that the salary was Kshs. 5,500/- at the time. She testified that because there is no where she signed that she was an unskilled worker. She stated that she was entitled to 21 days leave and that she was only given leave from 2009-2010. She stated that she was not on shift basis and that it was only at Safaricom house that the shift basis was introduced later. She testified that it was in 2012 that the salary rose to Kshs. 9,675/- as at the time she left. She testified that she did not fail to come back on duty and that it was her supervisor who called her and told her not to return as there was no place for her. She stated she could not refuse to return to work having worked for all the years. She denied receiving the letter of offer or the dismissal letter. It was put to her that she did not return to duty as expected and that the summary dismissal was given disentitling her to any payment, to which she replied in the affirmative.

5. In re-examination she testified that she was called by Vincent and told that there was no place to relocate her to and that she was not called back again. She testified that she was not given any letter of employment at the time of employment.

6. Further hearing was deferred to 14th June 2016 when the Respondent called its witness Mr. Fredrick Mbogo Njiru. He testified that he was the operations officer since 2003. He stated that she started off as a steward then transferred to hospitality department as a tea lady based at Safaricom. He stated that she worked with the Respondent from 2003 till 2013 when she absconded. He testified that she was an average worker and that during the day there were two shifts – one starting at 6.00am and ending at 3.00pm and another from 11.00am and ending at 5.30pm up to 6.00pm. He stated that the Claimant used to work for 8 hours and that the workers were entitled to annual leave. He testified that at the end of the contract she had a balance of 25 days and that she was affected by the end of contract between the Respondent and Safaricom. He stated that she was sent on annual leave pending redeployment and that he had a chance for the Claimant at the same place but the Claimant was unreachable. He testified that her supervisor called and left a message with her late husband who answered her phone advising him that there was a job for her but she never came. He stated that the leave discharge letter was given to all those proceeding on leave and that the Claimant was to report on 4th January 2013 and that the Claimant did not report back to date. He referred to the summary dismissal letter dated 11th February 2013 and the reason for dismissal was given as absconding as the Claimant did not report back to work. He stated that there was no overtime as there were 2 shifts and her supervisor was Vincent Koti. He testified that she was not entitled to any salary and that she deserted duty.

7. In cross-exam by counsel for the Claimant, he testified that she did not sign the letter of contract as there was no place for her to sign. He stated that there were 2 shifts from 6.30am to 3.00pm and from 11.00am to 5.30pm. He stated the employees signed the register before the start of work. He testified that the Claimant was paid for the days worked in December and that they waited for her to return in January but she did not. He was referred to the payment made in January 2013 and stated that it was salary for January 2013. He stated that the Claimant's letter was posted to her last known address and that he thought there can be evidence of posting but that he did not have it. He testified that the dismissal letter was received by Labour Office though he did not have a stamp as proof of receipt. He stated that the Claimant was invited back but she did not come back. He testified that the leave forms were kept at the head office by either himself or Benson.

8. In re-exam by his counsel, he testified that the leave given to the Claimant was up till January 2013 and it was to ensure that all the leave days were paid. He stated that the last address used was the address they had for the Claimant and that the letter was posted but there was no evidence of it since it was posted. He testified that the Claimant was not reflected on the register for January 2013 as she did not come at all. He stated that the Claimant was given a chance to be heard but she was not responding and was not cooperating. That marked the end of oral testimony and parties opted to file written submissions.

9. The Claimant filed her submissions on 21st June 2016. In her submissions it was stated that the Respondent did not satisfactorily explain what the payment of Kshs. 7,126/- was for in January 2013. It was submitted that what could be assumed was that the payment was salary for January 2013. Reference was made to Section 36 of the Employment Act. It was submitted that the Claimant was entitled to severance pay at rate of 15 days for each year worked. The Claimant submitted that she was entitled to leave for the years from 2004 till 2008. She submitted that she was entitled to pay for overtime and Sunday as well as holidays. It was submitted that the Claimant was working overtime as she was not allowed any lunch break. On house allowance it was indicated that the Claimant was entitled to house allowance and that she was never paid this for the time she was in employment. She submitted that under Section 45 of the Employment Act she was entitled to damages for dismissal if the reason for termination was not valid and not in accordance with fair procedure. The Claimant submitted that she was entitled to damages for the unlawful termination and that the claim ought to be allowed with costs.

10. The Respondent filed submissions on 27th June 2016 and stated that the uncontested issues were that the Claimant was employed in June 2003 as a cleaner/office messenger and that she worked in various departments and stations at that at the time of her dismissal working as tea girl/office messenger at Safaricom Headquarters in the hospitality department. It was submitted that on or about the 31st day of November 2012, the contract between the Respondent and Safaricom Limited terminated and the employees stationed at Safaricom Headquarters were asked to go for their annual leave from 1st December 2012 and report back on 4th January 2013 for reassignment and that other employees in her department reported save for the Claimant. It was submitted that the dispute was on facts and the law. It was submitted that the Claimant was paid Kshs. 7,126/- which was leave days taken plus payment of other arrears owed by the Respondent to the Claimant and that it was clear her pay was Kshs. 4,500/- and not 7,126/-. The Respondent submitted that the Claimant was summarily dismissed due to absenteeism. Reliance was placed on the case of **Shankar Saklani v. DHL Global Forwarding (K) Limited (2012) EKLR** and referred to the case of **Linus Barasa Odhiambo v. Wells Fargo Limited** where the court held that summary dismissal is a dismissal which the employer is entitled

to without notice. It was submitted that absenteeism and desertion go hand in hand and the case of **Tirus Kariuki Mungai v. Postal Corporation of Kenya [2016] eKLR** was cited where the court held that absenteeism basically entails absence from work and desertion means the willful and unjustified abandonment of a person's duties and obligations. The Respondent submitted that various attempts were made to reach the Claimant but these did not bear fruit and that the Respondent followed fair and lawful procedure in summarily dismissing the Claimant and that the dismissal was fair and lawful to the extent permitted by law. It was submitted that the Claimant was not entitled to notice as it was summary dismissal and that the prayer for unlawful dismissal lacked merit. The Respondent submitted that the claim for salary arrears and overtime was baseless. It was submitted that damages for unlawful dismissal are only payable on proof of unfair termination and that the dismissal was proved to have been lawful and fair. On certificate of service, it was submitted that it is available for the Claimant to collect though she had not returned the access card and that she had not cleared with the Respondent's HR department. The Respondent submitted that there was a written contract of employment and that the house allowance claim was unfounded and that it should be dismissed alongside the other prayers by the Claimant.

11. The claim before court is one relating to termination. From the undisputed facts, the Claimant was sent on leave in November 2012 as the contract between the Respondent and Safaricom Limited was at an end. The Respondent asserts that there were efforts to call back the Claimant and that the Claimant was dismissed for her absenteeism. The Claimant on her part asserts that she was told there was no place for her and therefore seeks damages for her unlawful dismissal as well as payment for the overtime worked. In her testimony, the Claimant admitted that she used to work in a shift at the Respondent's place of service. The register produced by the Respondent showed different timings the Claimant signed for. The claim for overtime thus was unproved. The Claimant sought payment of house allowance as well as overtime for holidays. The Claimant was entitled to house allowance which is 15% of her basic pay. The pay was Kshs. 4,500/- per the letter of contract given in evidence by the Respondent. Her entitlement would have been 15% of this sum which is Kshs 72,900/-. She was dismissed for absenteeism and the dismissal is stated to have been summary. However, the employment was coming to an end due to the termination of the contract with Safaricom Limited which indicates a state of affairs that the provision of Section 40 of the Employment Act covers. The Respondent should have declared the redundancy in the manner provided for in law and not just send the employees home with a promise to re-engage the employees in January. The Claimant was entitled to be given her severance for the service and this is calculated at the rate of 15 days for each year worked. Her pay should have been Kshs. 5,175/- a month and the severance would have been Kshs. 23,287.50. The Claimant was terminated in my view unfairly as she was dismissed contrary to the law She is entitled to compensation but capped at 3 months which is Kshs. 15,525/-. The Claimant is therefore entitled to judgment against the Respondent as follows:-

1. House allowance Kshs 72,900/-
2. Severance pay Kshs. 23,287.50
3. Compensation for unlawful dismissal Kshs. 15,525/-
4. Certificate of service
5. Costs of the suit
6. Interest on the sums awarded at 1, 2 and 3 above at court rates from date of judgment till payment in full.

The Claimant is to surrender the access pass to the Respondent and in the alternative will pay the Respondent Kshs. 1,000/- for its replacement.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of September 2017

Nzioki wa Makau

JUDGE