



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 664 OF 2016

CLAIRE KAVANYA.....CLAIMANT

VERSUS

MOBICOM [K] LIMITED.....RESPONDENT

J U D G M E N T

IINTRODUCTION

1. This is a claim for alleged unfair termination of employment and nonpayment of terminal and contractual benefits brought by a former employee. It seeks to recover separation dues plus compensation for the alleged unfair termination of employment totaling to ksh.1,449,211.50 plus costs and interest.
2. The suit was heard on 30/1/2017 when the claimant testified as CW1 but the respondent and her counsel never attended the hearing despite them having been served with a hearing notice. After the hearing the claimant filed written submissions which I have carefully considered herein alongside the evidence tendered.

CLAIMANT'S CASE

3. CW1 testified that she was employed by the respondent on 6/12/2009 as a Shot Attendant at the Mombasa Branch situated along Digo Road. Her salary was ksh.18000 as at June 2016.
4. From October 2015 the respondent started deducting ksh.3000 from her salary to recover debt of ksh 40820 arising from alleged unremitted sales starting 2009. She denied the alleged debt and demanded proof but the branch manager Mr. Julius Ngotho provided none and continued to deduct the sum until June 2016.
5. CW1 further testified how from April 2016 all the stock was repossessed from her and thereby frustrated and prevented her from performing her duties. Despite attending work, the whole month of my 2016, she was not paid her salary and upon inquiry she was told by the manager that all her salary had been deducted to reduce the debt she owned to the company. Upon demand for her payslip, the same was never given to her. Instead the manager told her that she was on transfer to Nairobi branch. When she demanded for her transfer letter none was given and instead the manager told her that she had now been transferred to Ukunda branch. However no transfer letter was given for the alleged transfer to Ukunda.
6. After considering the frustrations she was undergoing in addition to failure by the employer to pay may 2016 salary, the claimant formed the opinion that she had been terminated. She therefore brought this suit

claiming leave for 7 years, overtime, house allowance, salary for May 2016, salary deductions plus compensation for unfair termination.

ANALYSIS AND DETERMINATION

7. The issues for determination are:

- (a) Whether the claimant's contract of service was terminated by the respondent.
- (b) Whether the termination was unfair.
- (c) Whether the claimant is entitled to the reliefs sought.

Termination by the Respondent

8. The claimant has contended that the frustrations at work place by the conduct of the Mombasa branch manager Mr. Ngotho who prevented her from performing her contractual duties. The said conduct included taking away all the stock for sale from the claimant, deducting ksh.3000 from her salary to recover an alleged debt arising from unremitted sales, failing to pay her salary for may 2016, and finally purporting to transfer her to Nairobi branch and later Ukunda branch without any transfer letter. The foregoing evidence has not been rebutted by the respondent.

9. It is now trite law that where an employer by his conduct prevents his employee from performing his obligation under the contract of service or in any other manner materially breaches the terms of the contract, the employee is entitled to repudiate the contract. That is what has become known as constructive termination. After considering the evidence adduced in this case, I have formed the opinion that the claimant's contract of service was constructively terminated by the respondent in June 2016.

Unfair termination

10. Under Section 45(2) of the Employment Act, termination of an employee's contract of employment 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 respondent has not tendered any evidence to prove that the termination of the claimant's contract of service was fair both substantially and procedurally. I therefore find and hold that the termination of the claimant's contract of service was unfair within the meaning of Section 45 of the Act.

Reliefs

11. Under Section 49 of the Act, I award the claimant ksh.18000 being one month salary in lieu of notice plus ksh.180000 being ten months salary as compensation for unfair termination. In awarding the ten months compensation, I have considered the fact that the claimant has served the respondent for fairly long period of 7 years without any warning letters. In addition I have considered the fact that she was not paid any gratitude or severance pay on termination.

12. The claim for deductions of ksh.3000 per month from December 2015 to May 2016 is not in consonance with the documentary evidence adduced. The deductions started earlier than December 2015, and even December 2015 and April 2016 the deductions were deducted at an equal rate of ksh.3000 per month. The amount of ksh.18000 for 6 months is therefore not substantiated and it is disallowed. The claim for salary for May 2016 is however allowed being ksh.18000. It has not been disputed that she remitted to the employer ksh.60497 on 9/6/2016 in respect of her staff debtor account. There was therefore no basis for the employer to continue withholding her salary for May 2016.

13. The claim for leave of 8 years is only allowed for 7 years. She will therefore get pay for 21 leave days per year which amounts to 147 days equaling to $(147/26 \times \text{ksh.18000}) = \text{ksh.101,769.25}$.

14. The claim for house allowance is however dismissed because it is clear from the payslips that the pay was gross and the claimant never raised any complaint before. Likewise the claims for overtime and public holidays worked are dismissed for lack of particulars and evidence to substantiate.

15. However the claim for certificate of service is granted because it is a statutory right under Section 51 of the Employment Act.

DISPOSITION

16. For the reason that the claimants contract of service was unfairly terminated by the respondent, I enter judgment for her on the sum of ksh.317,769.25 plus costs and interest from the date hereof. The said sum will be subject to statutory deductions. He will also have certificate of service.

Dated, signed and delivered this 13th October 2017

O. Makau

Judge