



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 92 OF 2016

BETWEEN

JANEPHER NELIMA WANJALACLAIMANT

VERSUS

SEA TURTLE LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Chala & Company Advocates for the Claimant

Muraya & Wachira Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 11th February 2016. She states she was employed by the Respondent as a Supervisor on 18th January 2011. She rose to become a Manager. Her contract was terminated on 3rd November 2015 by Respondent's Director Colin Stuart after staff went on strike. She earned Kshs. 20,000 per month, as of the date of termination. She states that termination was unfair, and prays for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 20,000
- b) Annual leave over the period of 5 years worked at Kshs. 100,000
- c) Gratuity at 18 days' salary for every year worked at Kshs. 64,285
- d) 12 months' salary in compensation for unfair termination at Kshs. 240,000
- e) Severance pay at Kshs. 50,000
- f) Underpayment at Kshs. 720,000

g) House allowance at Kshs. 300,000

h) Unpaid salary for November 2015 at Kshs. 20,000

Total.... Kshs. 1,514,285

i) Certificate of Service to issue

j) General Damages for loss of earnings.

k) Costs, interest and any other relief

2. The Claimant testified and closed her case, on 15th November 2016. Parties agreed on 29th June 2017 that the Respondent relies entirely on its documents and witness statements. They confirmed filing of their Closing Submissions on 22nd September 2017.

3. The Claimant stated she became Manager in 2013. The Respondent operated a butchery. She was given a written contract. Workers went on strike on 3rd November 2015 saying they had not been paid their wages. Director Colin Stuart alleged the Claimant incited the strike. Stuart sent Police Officers to Claimant's house, alleging she had stolen. She was arrested and taken to Court in Kwale. The case was withdrawn for want of evidence. She was never issued a letter of suspension or summary dismissal. She never went on annual leave, and did not receive house allowance. She was not paid her salary for September, October and November 2015.

4. The Respondent's position is that the Claimant was employed by the Respondent on independent contract. She failed in improving Respondent's sales. The Respondent lost Clients. Business declined. Colin Stuart offered to employ the Claimant in a different capacity. She threatened and taunted Colin Stuart. She stole from the Respondent. Colin Stuart reported to the Police. The Claimant was arrested, charged and was bailed out on health grounds. All these led to her being dismissed. The Respondent urges the Court to dismiss the Claim.

The Court Finds:-

5. The Claimant was employed by the Respondent, initially as a Supervisor, in January 2011. She later became a Manager, earning a salary of Kshs. 20,000 monthly. She was summarily dismissed in November 2015. The exact date of dismissal is not clear. She suggests dismissal was on 3rd November 2015. An unsigned letter of summary dismissal exhibited by the Respondent indicates the Claimant was dismissed on 14th November 2015.

6. The record does not support the submission by the Respondent that the Claimant was an independent contractor. She was paid a monthly salary; she was suspended; and was eventually summarily dismissed. These acts by the Respondent are not consistent with independent contracts. The Claimant was in an ordinary employment relationship with the Respondent.

7. Some of the prayers by the Claimant are clearly without foundation. She has not established the prayer for general damages for loss of earnings; underpayments; gratuity; and severance pay. These prayers are not supported in evidence and law.

8. Section 41, 43 and 45 of the Employment Act 2007 imposes obligation on the Employer to show termination decision is arrived at fairly, based on valid reason.

9. There were various allegations made against the Claimant, particularly in the Witness Statement of Colin Stuart. These allegations were not established. The allegations ranged from the Claimant inciting staff to strike, stealing, insulting superiors, threatening and taunting the Director, poor performance and forcible removal of Respondent's property. There were no charges put to the Claimant. There was no

hearing. Termination did not meet the test of fairness under Section 41, 43 and 45 of the Employment Act 2007.

10. ***The Claimant is granted the equivalent of 5 months' salary in compensation for unfair termination at Kshs. 100,000.***

11. ***She is allowed the prayer for notice pay at Kshs. 20,000.***

12. The Respondent provided nothing by way of annual leave records, to show the Claimant utilized her annual leave days, or received pay in lieu of such utilization. The Claimant did not however show that she was entitled to 30 days of annual leave, to justify the prayer for Kshs. 100,000 for 5 years. ***She is allowed annual leave pay based on the statutory minimum of 21 days of annual leave, for 5 years at Kshs. 80,769.***

13. ***Certificate of Service to issue.***

14. No order on the costs.

15. ***Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant the equivalent of 5 months' salary in compensation for unfair termination at Kshs. 100,000; 1 month salary in lieu of notice at Kshs. 20,000; and annual leave pay at Kshs. 80,769 – total Kshs. 200,769.

c) Certificate of Service to issue.

d) No order on the costs.

e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 24th day of November 2017

James Rika

Judge