



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 287 OF 2016

BETWEEN

JESCA MWENDE MUTISO.....CLAIMANT

VERSUS

PWANI PARADISE BAR & RESTAURANT LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kitonga Kiiva Advocate instructed by KITUO CHA SHERIA, Advocates for the Claimant

Njoroge & Katisya Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 7th April 2016. She states she was employed by the Respondent as a Stock Controller, from 19th December 2011, to 19th April 2014. Her contract was terminated upon her return from maternity and annual leave. There was no notice and no valid reason. During maternity leave, there were deductions made on her salary without explanation. She asks the Court to find termination unfair, and grant her the following orders:-

- a) 1 month salary in lieu of notice at Kshs. 18,000.
- b) Unpaid salary of 19 days in April 2014 at Kshs. 11,400.
- c) Unexplained deductions at Kshs. 20,000.
- d) Damages for unfair termination at Kshs. 240,000

Total... Kshs. 289,400

- e) An order that the Claimant is paid all her terminal dues.

- f) An order compelling the Respondent to pay all terminal dues pending.
- g) An award of damages for unlawful and unfair termination.
- h) In the alternative, Judgment is entered for Kshs. 289,400.
- i) Costs and Interest.

2. The Respondent filed its Statement of Response on 9th September 2016. It is accepted the Claimant worked for the Respondent as a Stock Controller for the period shown in her Claim. She did not follow the laid down procedures in stock-taking, leading to the Respondent incurring financial loss. She applied for a combined 3 months' maternity leave, and annual leave of 21 days, adding up at 111 days. The application was made on 16th November 2013. Leave was approved effective from 16th November 2013. She was to return on 10th March 2014. During her absence, the Respondent discovered the default in stock-taking and loss occasioned to the Respondent. She was heard when she returned to work. She asked for further annual leave of 27 days which was granted, from 22nd March 2014, to end 17th April 2014. She did not return to work as expected. She thereafter lodged a complaint with the Ministry of Labour. It was resolved she is paid salary for 19 days worked in April 2014 and 6 off-duty days, all added up at Kshs. 15,000. The sum was deposited with the Labour Office. The Claim has no foundation.

3. The Claimant, and Respondent's Manager Anthony Wamola, both gave evidence on 22nd March 2017, when hearing closed.

4. The Claimant told the Court she was not issued a letter of employment. She was to go on maternity and annual leave starting 16th November 2013, ending 16th March 2014. She received a letter from the Respondent dated 15th November 2013 complaining about her performance. She replied and left. She returned on 15th March 2014. She saw the Director on 22nd March 2014, who instructed her to take an extended leave of 27 days. She returned on 19th April 2014. The Director asked her to go home, she would be recalled. She was not recalled. She consulted her Trade Union who reported the dispute to the Labour Office. It was recommended by the Labour Office that she is paid Kshs. 33,000 in terminal dues. This was never paid. She instructed KITUO CHA SHERIA, who filed this Claim. She was paid nothing by her Employer. She earned a salary of Kshs. 18,000 per month.

5. She told the Court on cross-examination she was advised by her Doctor sometime in October 2013, that her legs would continue swelling because she was exerting herself in performing her duty. She applied for maternity leave. She was paid her salary during maternity leave. She did not say she was treated unfairly by the Respondent, on account of her pregnancy. She was sent on compulsory leave by Co-Director Juliet Mwakio. She told the Court on redirection that she did not apply to go on the last leave of 27 days. She was aware of conciliation meeting at the Labour Office, which resulted in the recommendation that she is paid Kshs. 33,000 as terminal dues.

6. Manager Wamola told the Court the Respondent gave the Claimant a notice of termination. She was paid her terminal dues. She was not ill-treated.

7. The Claimant was to return to duty on 19th April 2014. She returned on 22nd April 2014. There was no explanation for delayed return. The Respondent realized there was a problem with stocks when the Claimant was on leave. She was asked to go back after 22nd April 2014 by Director Mr. Mwakio, and would be shown details of the problem detected in the stocks. She never went back. Mr. Mwakio attempted to call her on the phone without success. Wamola reported the missing stocks to the Police, and was issued an abstract. She reported dispute to the Labour Office through her Union. A conciliation meeting involving Parties was held at the Labour Office. The Claimant demanded to be paid a total of Kshs. 33,000 comprising notice pay, off-duty days and 19 days worked. The Respondent offered the sum, less 1 month salary explaining that the Claimant had absconded. It was agreed she is paid the remainder of Kshs. 15,000, which the Respondent remitted to the Ministry of Labour.

8. On cross-examination, Wamola told the Court there was evidence Kshs. 15,000 was remitted at the Labour Office by the Respondent. He did not have anything to show the Claimant returned to work on 22nd April 2014, and not 19th April 2014. Employees agreed money was missing. Some agreed to pay what loss they had caused to the Respondent. Kshs. 33,000 was the computation done by the Claimant's Union. It was reduced to Kshs. 15,000. He clarified in winding up his evidence, that the Claimant was not paid notice, because she absconded.

The Court Finds:-

9. The Claimant's prayers at paragraph 3.0 of her Statement of Claim are not clear. They are repetitious, and wrongly made as alternative prayers. They are a ragbag of prayers. It is not the first time KITUO CHA SHERIA, has brought poorly pleaded Claims before this Court.

10. From what the Court is able to discern, the Claimant was employed as a Stocks Controller by the Respondent Bar and Restaurant, on 19th December 2011. She worked for about 3 years and 4 months. She left employment on 22nd April 2014, under circumstances which are disputed.

11. She claims her contract was unfairly terminated, after she returned from a combined period of annual leave and maternity leave. She went for leave on 16th November 2013, and was to return on 16th March 2014. When she returned she was advised to take further annual leave of 27 days. She eventually returned on 19th April 2014. She was asked to see the Director Mr. Mwakio on 22nd April 2014. The Director told her to go home she would be recalled. She was not recalled.

12. The Respondent's recollection of events is largely similar to that of the Claimant except that, the Respondent states the Claimant absconded, after she was made aware there were enquiries surrounding missing stocks. She never returned to work after she was asked to see Wamola to discuss missing stocks.

13. The Court is not persuaded by the evidence of the Respondent that the Claimant just vanished. She had been on a long combined annual and maternity leave. She returned to work. The Respondent alleges to have discovered there were missing stocks, when the Claimant was on leave. She returned but rather than be taken through a disciplinary process, or criminal process, was asked to take prolonged annual leave of 27 days. She returned on 19th April 2014, and again the Director was not there to see her, have her arrested, or disciplined at the workplace; he only made himself available on 22nd April 2014. Even then, there was no disciplinary process set in motion against the Claimant. She was not referred to the Police. She was told to go home, as she had been told when she returned from previous leave. She would be recalled. She was not recalled. The Respondent alleges she absconded. There is no evidence she did so. There is no evidence the Respondent made any attempts to reach her, or, if it is to be believed she had in any way participated in loss of Respondent's stocks, bring her to justice.

14. The Court is satisfied termination was instigated by the Respondent. It was not based on valid reason. Allegations of poor stock-taking performance were never tested and established, through a disciplinary hearing. Termination was unfair for want of fair procedure and valid reason. ***The Claimant is granted the equivalent of 3½ months' salary in compensation for unfair termination at Kshs. 63,000.***

15. ***She is granted terminal dues as computed at conciliation, at a total sum of Kshs. 33,000.*** She did not abscond as concluded above, and there would be no reason to slice off 1 month salary in notice to the Respondent, at Kshs. 18,000.

16. No order on the costs.

17. ***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 a total amount of Kshs. 96,000 as detailed at paragraph 14 and 15 of this Judgment.

c) No order on the costs.

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

Dated and delivered at Mombasa this 15th day of November 2017

James Rika

Judge