



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 947 OF 2014**

**LORETTA KAMBE MBOGHOLI.....CLAIMANT**

**VS**

**MWANGOLA ESTATE LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent as a Telephonist from 1.8.2011 at Mombasa earning kshs 13101 per month. She worked continuously until 1.4.2013 when she signed one year contract ending on 31.3.2014 as a Sales lady but the salary remained the same. In December 2013, she was temporarily transferred to Voi in the same capacity where she worked up to 1.4.2014 and served a termination notice of one month. The reason for the resignation was that was her salary underpayment and the refusal by the respondent to pay the statutory minimum salary. On 20.4.2014 the respondent told her to stop working because the business was low. That after the termination she was not paid any terminal dues including the salary for the days worked in April 2014. She now brings this suit claiming terminal dues and certificate of service totaling to Kshs. 229,757.70

2. The respondent has admitted that she employed the claimant from 1.8.2011 until 1.4.2014 when she served a resignation notice of one month. However she left on 20.4.2014 before the lapse of the notice period. The respondent further avers that she transferred the claimant to Voi in December 2013 and instructed her to look for her own residence from January 2014. In the meanwhile she offered accommodation to the claimant in the hotel but the latter extended the stay until 20.4.2014 when she left the employment without paying the accommodation bill. The respondent therefore counter-claims for kshs.110,000 being the accommodation charges for 110 days between 1.1.2014 and 20.4.2014 .

4. The suit was heard on 14.10.2015 and 23.11.2015 when the claimant testified as Cw1 and the respondent called Mr. Thomas Mganga Mwangola as Rw1. The respondent has generally admitted the claimants claim but with a few alterations. Thereafter the parties agreed to file written submissions but only the claimant filed.

**Analysis and Determination**

4. There is no dispute from the pleadings and evidence that the claimant was employed by the respondent on one year fixed contract basis between 1.8.2011 and 1.4.2014. There is also no dispute that the claimant completed all the three separate contracts before serving a notice to cease from working for the respondent. There is also no dispute that she was being underpaid in salary. The issues for determination

are:-

- a. Whether the claimant deserted work or she was forced by the respondent to leave before serving his notice period
- b. Whether the reliefs sought in the suit and the counterclaim should be granted.

### **Desertion vs premature termination**

5. Claimant stated in her testimony that she was ready to serve the whole notice period but she was told by the respondent to leave on 20.4.2014 due to low business. Rw1 however denied that allegation and contended that it is the claimant who left work even before paying the accommodation bill at the hotel. However Rw1 admitted that it was good that she left because the business was low and thereafter all the remaining staff members were laid off.

6. After careful consideration of the evidence adduced, the court finds on a balance of probability that the claimant was forced to leave work before serving the whole notice period. Rw1 admitted that he was not exercising day to day supervision over the claimant and as such he was not competent to deny that Cw1 was forced out. Only her supervisor could challenge the evidence by her on the alleged termination before the lapse of the notice period. In any event one wonders why she had to serve a termination notice when the contract had in fact lapsed on 31.3.2014 according to the contract of employment.

### **Reliefs by the claimants.**

7. The claimant prays for kshs 14,052 as salary for the days worked in April 2014 and the same is allowed as prayed because the respondent has admitted the same. She further prays for kshs. 86,605.70 in respect of 81 accrued leave days. She was employed in 1.8. 2011 and worked till 20.4.2014 which is 2 year and 7 months. Her annual leave was 30 days which means that she earned 75.75 leave days. The first leave fell due in August 2012 hence she is awarded kshs. 16078.30 based on the statutory basic pay then being kshs.16078.30. The second annual leave fell due in August 2013 and as such she is awarded kshs.18,329.25 based on the statutory basic salary then under the 2013 Wage Order. Finally, the last leave is assessed on pro rata basis at the statutory rate of 1.75 days per month of service being 15.75 days x kshs18,329.25 /30= kshs.9,622.85. In total she is awarded kshs. 44030.40

8. She has prayed for salary underpayment under prayer b, c, d, and e of the claim of which the respondent has generally admitted. Prayer b and c being kshs.3020.40 and 16,766.30 respectively have been admitted and allowed as prayed as the underpayment for the period between 1.8.2011 to 31.12.2012. She will also get kshs.21,558.90 as the underpayment of salary between 1.1.2013 and 30.4.2013 as prayed. The award is based on the minimum basic pay of kshs.16,078.30 prescribed by the 2012 Wage order plus 15% being the house allowance less kshs 13101 monthly paid during the said period. She is also prayed for kshs. 87, 754.07 as the underpaid salary for the period between 1.5.2013 and 30.3.2014 based on the minimum basic salary of kshs.18329.25 plus 15% as the house allowance. The respondent has however admitted kshs. 83,518.95, and the court awards the sum admitted. In total is she awarded kshs.124864.55.

9. Lastly the claimant has prayed for a Certificate of Service and the same granted as provided under section 51 of the Employment Act.

### **Counter claim**

10. The respondent has counter claimed for kshs 110,000 being hotel accommodation fee at the rate of kshs. 1000 per day for 110 days from 1.2.2014 and 20.4.2014. The basis for such claim is that the claimant was being paid house allowance and as such she not entitled to be housed by the respondent. The court rejects that contention by the respondent because the claimant was so underpaid than she was receiving less than the statutory basic salary by over Kshs. 5,000 as found herein above.

11. Likewise the prayer for kshs.6, 555.70 being salary in lieu of 10 days not served in respect of the

notice period is also dismissed for the reason that the notice was not necessary. As the court has already found herein above, the fixed term contract lapsed automatically on 31.3.2014 and the claimant needed not serve any termination notice.in addition the contention by Cw1 that she was forced out of work due to low business has not been rebutted. Instead it has been corroborated by the admission by the Rw1 to pay salary in lieu of notice.

**Disposition**

12 For the reasons stated above the respondent's counterclaim is dismissed and judgment entered for the claimant for the sum of kshs.182,946.95 plus costs and interest. She will also have a Certificate of Service.

**Dated, signed and delivered this 26<sup>th</sup> day of February, 2016**

**ONESMUS MAKAU**

**JUDGE**