



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR COURT

AT MOMBASA

CAUSE NO. 584 OF 2014

JANET MUMBI NYINGE.....CLAIMANT

VS

DIANI BEACH HOSPITAL.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for employment terminal benefits plus compensation for unfair and unjustified termination of the claimant's employment by the respondent. The claimant avers that she worked for the respondent from 23.1.2006 until 24.1.2014 when she served the respondent with a termination Notice of one month. That soon after the respondent received the said notice, she cancelled the claimant from the Duty Roster and told her to proceed on leave pending further instructions. That because the claimant had not asked for the leave, she construed the order for leave to mean that she had been unfairly dismissed without notice and hence she brought this suit.

2. The respondent has denied the alleged dismissal avers that it is the claimant who deserted work from 1.2.2014 without any justifiable reason and all her calls to the claimant to explain her absence went unanswered. She therefore denies that the reliefs being sought by the claimant except for 23 days leave.

3. The suit was heard on 20.7.2015 when the claimant testified as Cw1 and called Lenox Mganga Zero as Cw2. On the other hand the respondent called Ms. Rachael Njeri Mwangi as Rw1. All the documentary evidence filed by the two parties were produced by consent and after the hearing the parties file written submissions.

Analysis and determination

4. After carefully considering the pleadings, evidence and submissions presented before it, the court finds that there is no dispute that the claimant was employed by the respondent as a nurse from 23.1.2006 to 24.1.2014 when she served a termination notice of one month. That after serving the said notice, the claimant was told to go on leave pending further instructions. That she was never given any further instructions by the respondent as promised as at 24.2.2014 when her termination notice lapsed. That as at the time of her departure from the respondent the claimant's salary had been increased to kshs. 51,000/= per month. The issues for determination are:-

(a) Whether the claimant voluntarily resigned from employment or

She was unfairly and unjustifiably dismissed.

(b) Whether the claimant is entitled to the reliefs sought.

Resignation vs unfair dismissal

5. Under paragraph 5 of her claim, the claimant pleaded that she served her notice to terminate her employment on 24.1.2014 and adds the following in paragraph 6:-

“6 The claimant avers that upon receipt of the notice, the Respondent cancelled the duties being allocated and performed by the claimant and informed the claimant to proceed on leave and await further instructions. The action by the respondent amounted to termination of employment”.

6. In paragraph 4 and 7 of the defence, the respondent stated as follows:-

“4. The respondent avers that the claimant’s letter dated 24th January 2014 was an unequivocal letter of resignation from employment in line with her contract of employment, it did not call for any response from the respondent and the claimant’s last day of work was to be the 24th February, 2014.

7. The respondent denies the contents of paragraph 7 and 8 of of the Memorandum of claim and reiterates that the claimant resigned from employment. Her employment was never terminated by the respondent and as such the respondent is not liable for breach of contract or unfair, wrongful and/or illegal termination as alleged or at all...”

7. From the foregoing excerpts from pleadings, the court finds that the claimant was never dismissed by the respondent but she voluntarily resigned by the letter dated 24.1.2014. In addition, the court further finds that the claimant has admitted in the said pleading that after serving the resignation letter she was never dismissed summarily but she was told to go on leave. She also confirmed the same in her evidence when she said that she was told to go on leave with effect from 29.1.2014. Cw1 also confirmed that the claimant was told by Dr. Rekhi to proceed on leave from 29.1.2014 pending her termination after resignation. Consequently, the answer to the first issue for determination is that the claimant terminated her employment through resignation.

Reliefs

8. In view of the foregoing finding that the claimant voluntarily resigned from her employment, the court declines to make declaration that the termination of her employment was wrongful, null and void. Likewise, and for the same reason, the claim for salary in lieu of Notice and Compensation for unfair termination is dismissed. In addition the claim for service pay is not granted because the claimant abandoned it after admitting that she was a member of both NSSF and the respondent’s pension scheme.

9. The claimant has prayed for maternity leave for 2008 and annual leave for the year 2008-2014. No particulars of the number of days outstanding were pleaded both in the claim and the reply to the defence. The respondent pleaded in her defence that the leave days outstanding for the claimant at the time of resignation was 23 and supported it with monthly attendance summary records for 2010 to 2014 which show that net leave days outstanding as at 1.2.2014, inclusive of public holidays and off days were 22.25 days. She calculated the said leave days using the rate of 2 days per month upto December 2011 and 1.75 days from January 2012 to January 2014. Without amending the claim the claimant filed a lengthy supplementary witness statement whereby she calculated her outstanding leave days including maternity leave and off days at 234 1/2 days. The maternity leave being claimed is for 2 months which fall due in 2008. The claimant alleges in the said statement that she was entitled to 3 months maternity leave that year.

10. In view of the fact that the particulars of the claimant's claim for leave, public holidays and off days outstanding as at February 2014 were not pleaded, the court does not have any basis upon which to evaluate the evidence adduced by the claimant. The evidence adduced by the claimant has no legs to stand on because the claim bears no particulars. It is trite that parties are bound by their pleadings. The collorary to the foregoing being that the court is barred from aiding parties who do not plead their cases well.

11. The court could have easily dismissed the entire claim for leave, public holidays, off days and maternity leave outstanding were it not for the admission made in the defence and the written submissions. As stated herein above, the defence admitted 23 leave days inclusive of holidays and off days. The same was supported by the Attendance records which were admitted by the claimant in this suit. They showed a net of 22.25 leave days inclusive of off days and public holidays as at February 2014. The respondent has admitted in her submission that after considering the leave records, that the claimant is entitled to 37 leave days inclusive of maternity leave for 2008. That she was only entitled to 2 months (60 days) maternity leave under the repeated Employment Act plus 24 annual leave out of which she took 47 days leaving 37 days. That as at 2008, her salary was kshs.42,000/= and as such the compensation for the 37 leave days should be based on the said salary.

12. In addition the respondent has submitted that as at 1.2.2014, the claimant had the said 22.25 leave days for the period from 2010. No evidence was adduced to prove that the parties had agreed to reduce the annual leave days from 2 days per month to 1.75 days. Consequently, the court will reassess the leave days for the period from January 2012 to January 2014 by topping up the figure quoted by the respondent by 0.25 days per month. Thus $0.25 \text{ days} \times 24 \text{ months} = 6 \text{ days}$. Added to the 23 days admitted in the defence the leave for the period between 2010 and 2014 is 29 days less the 24 leave days taken between 1.2.2014 and 24.2.2014 reduces the number to 5 leave days. The said 5 days are to be compensated based on the salary of kshs.51,000/= which works to kshs.8,500/=.

13. As regards to the maternity leave for 2008, the court has considered the supplementary statement by claimant which stated in paragraph 7 that she was due for her maternity leave in September 2008. That was after the current Employment Act 2007 had come into force on 2nd June 2008. Section 29 (1) of the said Act entitled the employee to 3 months maternity leave in addition to her annual leave. The court therefore awards a further 30 days on the 37 days admitted by the defence to total to kshs. 67 days. Based on the salary of kshs.42,000/=, the court awards kshs.93,800/=.

Disposition

14. For the reasons stated above, judgment is entered for the claimant in the sum of **kshs.102,300/=** plus half costs and interest.

Signed, dated and delivered at Mombasa this 19th February, 2016

ONESMUS MAKAU

JUDGE