



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 304 OF 2015

CHRISTINE KAGENDO MAORE.....CLAIMANT

VS

BOB MORGAN SERVICES LTD.....RESPONDENT

JUDGEMENT

Introduction

1. The claimant was employed by the respondent as sales and Administration Officer from 5.1.2015. Her gross salary was kshs. 63,000/= per month but she was placed under Probation for 6 months. On 7.4.2015 she was served with a letter dated 2.4.2015 terminating her services. The termination was not preceded by a 7 day's notice as provided for under her appointment letter. She was however advised that she was to be paid her accrued salary and benefits under the appointment letter after clearing with the company. She felt offended and brought this suit contending that she was unfairly terminated within the meaning of section 41, 45 and 47 of the Employment Act (EA) and seeking terminal dues plus compensation for unfair termination.
2. The respondent has admitted that she employed the claimant as alleged in the suit but denies that she dismissed her unfairly on 7.4.2015. On the contrary, she avers that she fairly and lawfully terminated the claimant's services during the probation period due to poor performance of her duties. She further avers that she paid the claimant her lawful dues and issued her with a certificate of service.
3. The suit was heard on 16.11.2015 when the claimant testified as cw1 while the respondent called Mr. Dennis Michieka Orina as Rw1. Thereafter both parties filed written submissions.

Analysis and Determination

4. There is no dispute that Cw1 was terminated while serving under probation. The issues for determination are whether the termination was unfair and whether the reliefs sought ought to issue.

Unfair termination

5. Cw1 testified that on 7.4.2015 she reported back to work after the Easter holiday when the Branch Manager told her that her services were no longer required and then gave her a termination letter. That the termination was not preceded by the requisite 7 day's notice or warning about her performance. That she had not been given targets with which to measure her performance. Consequently according to Cw1, the abrupt termination of her employment was not only

devastating but also unfair.

6. In response, Rw1 admitted that Cw1 was terminated on 7.4.2015 after registering zero sales on all the respondents' services from January 2015 to the date of her termination. That the termination was without prior notice but she was paid salary in lieu of notice. That before the termination she had prior meetings with the Managing Director (MD) to discuss her poor performance.
7. After considering the pleadings evidence and the submissions by the two parties herein, the court is convinced that the termination was not unfair as alleged by the claimant. The termination having been done during the probation period was not subject to the procedural fairness enshrined under section 45 (2) (c) read with section 41 of the Employment Act. Section 41 above requires that before terminating an employee on ground of poor performance, the employer shall first accord the employee a hearing in the presence of another employee. In this case however the termination was only subject to section 42 of the Employment Act and the claimant's contract of employment. Section 42 of the Employment Act provides as follows:-

“(1) The provisions of Section 41 shall not apply where termination of employment terminates a probationary contract.

(4) A party to a probationary contract may terminate the contract by giving not less than seven day's notice of termination of the contract, or by payment, by the employer to the employee, of seven days wages in lieu of notice.”

8. The foregoing provision is in consonance with the letter of appointment which provided as follows:-

“Either party may terminate this agreement at any time giving the other seven (7) days written notice of termination during the probation period... or by payment of equivalent salary in lieu of notice...”

9. In view of the foregoing provisions of the law and the contract of employment the court finds and holds that the termination of the probationary contract was proper and within the law. All what was needed was payment of salary in lieu of notice to render the termination lawful and it was guaranteed when the respondent stated as follows in the termination letter

“You will be paid your accrued salary and benefits as stipulated in the letter of offer.”

Reliefs

10. Cw1 admitted in evidence that he was paid kshs. 27,700/= less statutory deduction leaving a net of kshs 20,899= . That the said sum comprised 7 days in lieu of notice, overtime, prorata leave and car allowance but she contended that the same was underpaid. In response, Rw1, denied the alleged underpayment and maintained that Dw1's lawful gross salary was kshs. 30,000/= exclusive of car and telephone allowances.
11. In this court's view, the compensation for terminating contract of employment is the gross earnings for the notice period. In this case the court agrees with the claimant's allegation that her salary in lieu of notice was underpaid when the respondent assessed the same base on kshs. 30,000/= exclusive of the allowances. Consequently the claimant is awarded kshs. 14,700/= less kshs 5,250/= paid leaving kshs 9,250/= . However, as regards the assessment of payment in respect of leave days earned, the court is satisfied that the car and telephone allowances were lawfully excluded. It is trite that unless otherwise agreed by the parties to the employment contract, only the basic salary should apply in the calculation of compensation for leave earned and not utilized. Lastly the claim for compensation for unfair termination is dismissed in view of the finding above that of probationary contract is not subject to the procedural fairness guaranteed by section 41 and 45 of the Employment Act.

Disposition

12. For the reasons highlighted above, judgment is entered for the claimant in the sum of **kshs.9,250/=** plus a quarter of the costs of the suit and interest.

Dated, signed and delivered at Mombasa this 12th day of February 2016.

ONESMUS MAKAU

JUDGE