



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO.291 OF 2014

DORICA W. MCHAWIA.....CLAIMANT

VS

SEVERIN SEA LODGE LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for employment terminal dues plus compensation for wrongful termination of the claimant's employment by the respondent on 10.4.2014. The respondent denies liability for wrongful termination of the claimant's services and avers that the termination was in accordance with her contract of employment and the Collective Bargaining Agreement (CBA). She avers that she paid to the claimant Salary and House allowance for 14 days worked in April 2014, 23.5 leave days not taken, Service charge for April 2014, Travelling allowance for March 2014, 3 months payment in lieu of notice and 8 years gratuity pay and maintains that the claimant is not entitled to any further relief. Before the trial the parties recorded settlement in respect of the issue of Service Gratuity, Leave and Salary in lieu of notice. The main issue for determination revolves around the manner of the termination of the employment contract. The suit was heard on 1.10.2015 when the claimant testified as Cw1 and the respondent called Senior Personnel Clerk, Mr. Mark Mwandonga as Rw1.

Claimant's case

2. The claimant worked for the respondent between November 2003 and 14.4.2014. That upto 2005 she was working on casual basis but he was given letter dated 10.12.2005 appointing her Food and Beverage Control Clerk. That in April 2010, she was appointed Acting Cost Controller on direction that she would earn kshs.1,351.00 as the Acting Allowance instead of the correct allowance provided under the CBA.
3. According to Cw1, the correct acting allowance was 30% of the salary of the substantive office holder of the office she was acting which translates to kshs.6,147.00 per month. That she was also underpaid salary as a casual worker from January 2004 and June 2005 at the rate of kshs.8,954.00 per month which translates to kshs.125,365.00. That she was also not paid House allowance from January 2004 to June 2005 at the rate of kshs.6,805.00 which translates to kshs.95,270.00. That she was also not paid leave allowance for 2004 which amounts to kshs.29,309.00. She further prayed for kshs.48,517.00 for public holidays worked for 8 years of service. She also prayed for salary for 14 days worked in April 2014 plus compensation for unfair termination. On cross examination however she confirmed that the leave was calculated considering public holidays

worked.

Defence case

4. Rw1 confirmed that the claimant was employed as casual employee as Control Clerk earning kshs.365 per day which was based on the Regulation of Wages Order published by the Government and it included House allowance. That from 2010 to 2014 she was the Acting Cost Controller Grade 8. That under the 2012 CBA, the salary for Grade 8 was kshs.21,000.00. That as at 2014 she was earning kshs.22,522.00 against kshs.16,391.00 which was the salary for the substantive office for her post. That in calculating leave days earned and taken the public holidays worked were considered. On cross examination Rw1 admitted that the CBA entitled Cw1 to 30% of Basic plus House allowance of job Grade 8 as the acting allowance for the post she was acting. He however maintained that salary for 14 days worked in April 2014 was paid alongside the other terminal dues paid through her bank account.

Analysis and Determination

5. The issues for determination arising from the pleadings, evidence and submissions are whether the termination of the claimant was unfair and wrongful and secondly whether the reliefs sought should be granted.

Unfair and wrongful termination

6. The claimant contention is that the termination was unfair because she was not served with a proper notice. The termination letter dated 10.4.2014 partly stated as follows:-

“... the tourism industry is seeing a down turn in business due to the

security instability in the Country. This has resulted in some restructuring of departments due to the continuing low business forecasted. As a result we are terminating your services as from 10.4.2014. Your last working day will be 14.4.2014. You will be paid all monies owed to you as per your terms of employment.”

7. There is no doubt from the foregoing excerpt from the termination letter that the claimant was terminated on redundancy after the restructuring of the respondent's establishment due to low business. The question is whether the procedure followed to lay off the claimant was in accordance with the Law. Under section 40 of the Employment Act (EA), an employer is barred from declaring his employee redundant before first serving atleast one month notice in writing to the employee's union and the Labour officer. Secondly the employer must conduct a fair selection procedure to identify the employees to be laid off. Lastly the employer must pay to the affected employees all dues accruing from their employment plus severance pay. In the present case, the termination was not preceded by one month notice in writing to the claimant's union and the Labour office. Consequently the procedure for terminating the claimant on ground of redundancy was not in consonance with the mandatory provisions of section 40 of the Employment Act and as such the termination was unfair and wrongful.

Reliefs

8. In view of the foregoing finding the claimant is awarded 8 months salary as compensation for unfair termination which based of salary of kshs.22,522.00 works to kshs.180,176.00. In making the award, the court has considered the fact that due to low business in the tourism sector, it was not possible for the claimant to secure an alternative job within 8 months after her lay off. Additionally the court has also considered the fact that the respondent has agreed to pay the claimant service gratuity for the 8 years served. The claim for three months notice and leave outstanding have also been agreed upon vide the consent order recorded on 1.10.2015.
9. The claim for public holidays worked is dismissed because Cw1 admitted that the public holidays

worked were factored while calculating for the leave days taken. The claim for leave allowances for the year 2004 and House allowance for 2004 to June 2005 are also dismissed because they are time barred. The alleged entitlements arose while the claimant was serving on casual contracts which ended in December 2005 when she was appointed on permanent basis under a different contract. In any case, even if the claim for house allowance was not time barred the court agrees with the testimony of Rw1 that the daily wage paid to the claimant while serving on casual basis then, was inclusive of the house allowance as per the Wage Orders published by the Government.

10. The claim for underpayment of acting allowance for the period between 2010 and 2014 is considered. The letter appointing the claimant to act as the Cost Controller gave her kshs.1,351.80 as gross acting allowance as opposed to the 30% of the minimum wage of the grade. She was acting, as provided for by the CBA as per the testimonies by both Rw1 and Cw1. Additionally the claimant was not supposed to act for more than 3 months from 10.4.2010 as per the CBA according to the CBA. The question that arises is, what was the claimant's salary and what was the minimum pay for the Cost Controller. The CBA produced by the defence is for 2012/2014. It did not cover the period when the claimant was appointed on acting capacity. Cw1 stated that the underpayment was ksh.6,147.00 per month but she never showed how she arrived at the said figure. She in fact admitted during cross examination that she did not know the salary for the post of Cost Controller. Consequently the claim for underpayment of kshs.288,300.00 was not proved. The court will therefore only award kshs.166,221.00 submitted for by the defence. Lastly the claim described as "Less paid salary" is dismissed for want of particulars and evidence.

Disposition

11. For the reasons stated above judgment is entered for the claimant in the sum of **kshs.346,397.00** awarded herein above plus **kshs.157,493.69** agreed as between the parties on 1.10.2015 making the aggregate sum of **kshs.503,890.70** plus costs and interest.

Dated, signed and delivered this 6th day of May 2016.

ONESMUS MAKAU

JUDGE