



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 47 OF 2015

JANE NELVIN MUTUA.....CLAIMANT

VERSUS

PANAROMA GARDENS HOTEL.....RESPONDENT

JUDGMENT

Introduction

1. This is a Claim for terminal dues plus compensation for unfair termination of the Claimant's employment contract by the Respondent on 6.11.2014. The Respondent has denied liability for the alleged unfair termination and blamed the Claimant for terminating her employment without notice through desertion.
2. The suit was heard on 27.7.2015, 16.12.2015 and 4.2.2016 when the Claimant testified as Cw1 and the Respondent called Benson Mutisya Mwilu and Crispin Macharia as Rw1 and Rw2 respectively. Thereafter both parties filed written submissions.

Claimant's Case

3. Cw1 testified that she was employed by the Respondent as a Receptionist on 7.8.2010 at a monthly salary of kshs. 8500. The agreement for employment was verbal. She worked as such until September 2012 when she was promoted again verbally to the position of Manager with a new salary of kshs 16000 per month. The salary was later increased to kshs. 30000 per month but Cw1 was only paid kshs. 17000 per month.
4. On 23.8.2014 Cw1 was sent on compulsory leave up to 3.9.2014 by the Rw1 who directed her to call him before returning for further directions. Cw1 complied and proceeded with leave and before returning to work on 30.9.2014, she called RW1 for directions as promised. The directions given after calling was that she should remain on leave. That the Rw1 kept on postponing her return to work until 6.11.2014 when Cw1 went to meet Rw1 in his office, when he told her that she had already been dismissed. She demanded to know the reason but none was given to her. She then demanded for salary and her terminal dues and Rw1 promised to pay through the bank. Finally she requested for her Certificate of service and she was given a letter backdated to 30.9.2014.
5. Cw1 was never paid the salary and separation dues as promised by the Rw1 prompting her to serve the demand letter dated 8.12.2014 followed by this suit. She contended that her termination was unfair because she was never served with any prior notice.
6. On cross examination, Cw1 denied that she deserted work and maintained that it is the Rw1 who gave her a compulsory leave and refused to allow her back to work. That she never received any

- warning or show cause letter or a call from the Respondent about the alleged absconding of duty. She explained that she worked the whole of July 2014 but got a 5 days leave from 13th – 18th August 2014.
7. She denied that she was suffering from Tuber Culosis (TB) in August 2014 and that she was unable to secure a Medical Certificate to enable her work in the Hotel. She explained that as the manager she did not require to present Medical Certificate from the Public Health Officer. She however admitted that she suffered TB in 2012 while serving as a Receptionist but the same was treated and she was fully healed and allowed back to work ever since. She denied that the disease recurred in 2014. She maintained that, after the medication a patient cannot transmit the disease to other people. She denied that she was frequently absent due to her sickness.
 8. Cw1 explained that on 26.8.2014 she called Rw1 at 9.18 am through her cell phone number 0716730 306 but he told her to wait until she was called back. She denied ever receiving any SMS from RW1 on 26.11.2014 at 10.30 am enquiring when she would return to work.
 9. She denied that she forged the Certificate of service dated 30.9.2014. She maintained that the certificate on the Respondent's Official Letter Head and bore her official stamp and the signature of the RW1. She denied making the documents herself and maintained that it was genuine document made by the Rw1.
 10. Cw1 admitted that she took 3 off days in September 2011, and 8 days in November 2011. That from January 2012 there some months she never took any off days because they were only 2 receptionists each serving a shift of 12 hours. She further admitted that she took of 2 off days from 14.7.2013 to 15.7.2013, 4 days from 17.7.2013, 4 days from 17.1.2014 to 21.1.2014, and 5 days from 13.8.2014 – 18.8.2014. She denied that she fraudulently filled the master roll to cover up her frequent absenteeism and the many days she took leave. She denied the allegation that she missed work for 378.5 days and failed to avail any sick sheets. She maintained that the only time she fell sick she was given a letter which she gave to the manager. She denied that she deserted work and maintained that she was sent on compulsory leave until she was dismissed on 6.11.2014 and issued with the certificate of service backdated to 30.9.2014.

Defence Case

11. Rw1 is the Managing Director (MD) of the Respondent. He confirmed that Cw1 was employed by him on 6.11.2010 as a Receptionist earning kshs 8000 per month. That the salary was increased to kshs. 9000 from April 2011 and kshs. 10000 from March 2012. That from February 2013 she was promoted to the position of supervisor earning kshs. 16000 which was later increased to Kshs. 17000. He denied that she was promoted to the position of Manager with a salary of kshs. 30000.
12. Rw1 explained that from 2012, Cw1 suffered from TB that presented itself with serious coughing and which alarmed guests and workmates. She therefore had to remain absent from work for days to seek medication. That the disease recurred in March 2014 and forced her to be out of work for the whole of April 2014. That CW1 never applied for sick leave formally but RW1 knew that she was unwell. That from 2010 to 2014 Cw1 filled only 4 leave application forms which were in her personal file. That her absence in April 2014 and August was not part of the 4 leave application forms in the file.
13. Rw1 further contended that as the person in charge of attendance register, Cw1 took more leave days than she was entitled to during her frequent absenteeism. That from 2010 to August 2014 she took 378.5 leave days against her aggregate entitlement of 294 days in respect of annual leave, public holidays, off days and sick offs. That the excess leave days taken were 84 which when added to the 22 days taken through the four leave application form totals to 106 days. He valued the excess leave days taken by the claimant at kshs. 60349 based on a monthly salary of kshs. 17000.
14. Rw1 denied ever sending Cw1 on compulsory leave or dismissing her as alleged. He maintained that Cw1 is the one who absconded work and his efforts to follow her up were in vain. He however stated that she called him on 26.11.2014 at 9.18am and he responded by SMS promising to call her back. That on 27.11.2014, he send SMS to her enquiring on when she was to return to work.
15. Rw1 contended that Cw1 forged the Certificate of service dated 30.9.2014 purporting that it was

- signed by him but using the wrong name of Benson M. Mutisya instead of Benson Mutisya Mwilu. That the Certificate also gave the wrong date of August 2010 as the date she started working for him instead of November 2010.
16. He urged for his counterclaim to be allowed because Cw1 terminated her services without notice. He prayed for Kshs. 17000 being salary in lieu of notice and kshs 60349 in respect of excess leave taken.
 17. On cross examination, Rw1 denied that Cw1 was promoted to the position of a manager. He maintained that Cw1 was only appointed supervisor after the former Manager left the Hotel in November 2012. That her appointment to the position of supervisor was temporary and she did not have any management status.
 18. On the other hand Rw1 explained that Cw1 was frequently sick and he allowed her sick offs and paid her full salary. He however did not produce any evidence of her alleged sickness. He further contended that CW1 falsified the master roll to cover up her absenteeism from work. He however admitted that he took no disciplinary action against her because he discovered the offence after she had left employment. He denied that he was keeping personal file for Cw1 and maintained that it was kept by her and she removed the leave application forms and left only 5 documents inside. He admitted that Cw1 was not to blame for false entries made in the master rolls for the period before November 2012 when she became the Supervisor.
 19. Rw1 explained that on 23.8.2014, Cw1 returned from a sick off and she was still coughing and he told her to go and obtain a Health Certificate form D. That she never returned by 27.8.2014 when he send SMS to her enquiring when she would return to work but she never responded until 26.11.2014 at 9.18am when she called him. He contended that he did not write any letter to Cw1 because he never knew her postal or physical address. He however admitted that he remained in touch with CW1 throughout by phone.
 20. Rw1 is the Respondent's Accountant since August 2014. He stated that he is charged with the responsibility of managing the payroll for the Respondent. He confirmed that he paid Cw1 her mid-month pay through her bank account while away because she was sick for the better part of the month. That she came to the hotel after receiving bank text notifying her of the mid-month payment and she confirmed the receipt of the payment. Later he paid the second tranche of the August salary but her name was removed from the payroll while preparing the payroll for September 2014 since she was not going to work and she was not communicating the reason for her absence.
 21. On cross examination, Rw2 stated that he never found Cw1 when he reported to the Respondent but he met her in August when she came to confirm whether her salary had been paid. He maintained that her salary was kshs. 17000 and he paid to her all the salary for August 2014. He confirmed that he removed Cw1 from the payroll in September 2014 with instructions from Rw1 for absenting herself from work without communicating any reasons. He further confirmed that he never saw any notice or correspondence calling her to explain her absence. He also admitted that he closed her file without preparing her terminal dues. He maintained that Cw1 never attended work from September 2014.

Analysis and Determination

22. There is no dispute that the Claimant was employed by the Respondent from 2010 and worked until August 2014 when Rw1 send her away to get a Health Certificate from the Public Health Office. There is further no dispute that Cw1 never resumed work thereafter and she was removed from the payroll in September 2014 on grounds of absenteeism and sickness. Lastly there is no dispute that the Rw1 and the Claimant remained in touch by phone between August and November 2014.
23. The issues for determination herein are:-
 - a. Whether the employment contract was terminated by the Claimant through desertion or she was dismissed by the Respondent.
 - b. Whether the termination was founded on a valid and fair reason.
 - c. Whether termination was done after following a fair procedure.
 - d. Whether the reliefs sought in the suit to issue.

e. Whether the reliefs sought in the counterclaim should issue.

Desertion vs. Dismissal

24. The Claimant's contention is that on 23.8.2014, she was sent away on a compulsory leave by the Rw1 until 30.9.2014 with instructions to call him before then for further directions. That when Cw1 called Rw1 before the compulsory leave lapsed, he postponed the date for reporting and kept doing so until 6.11.2014 when Cw1 went to talk to him and that is when she was informed that she had already been dismissed.
25. Rw1 admitted on oath that on 23.8.2014, he sent Cw1 away to get a Health Certificate after she reported to work with a terrible cough. He however did not specify the timelines within which Cw1 was to secure the Health Certificate and report back to work. Rw2 confirmed that Cw1 visited the office after payment of mid-month salary advance and he never saw her again. That in September 2014 Rw1 instructed him to remove Cw1 from the payroll because of her absenteeism and sickness.
26. After considering the rival evidence and submissions, I find on a balance of probability that the Claimant never deserted work but she was sent away by the Rw1 to seek a Medical Certificate but thereafter she denied the chance to report back by the Rw1.
27. The basis of the foregoing finding is majorly the evidence by Rw2 which I find to be very relevant in determining who terminated the employment contract between the parties herein. There is no doubt that the termination occurred in September 2014 when Cw1 was removed from the payroll and her personal file closed. The removal of Cw1 from the payroll was done by Rw2 acting on instructions from Rw1. The reason given to Rw2 by Rw1 was not that Cw1 had resigned and deserted but rather that Cw1 had absented herself without communicating any reason. The answer to the first issue for determination is therefore that the termination of the Claimant's employment contract was done by the Respondent in September 2014.

Reasons for Termination

28. Rw2 told the Court that the reason cited by Rw1 for terminating the services of Cw1 was absence from work without communicating any reason. The Court finds that the said reason was not valid and fair to warrant the summary dismissal of the Claimant. The reason for the foregoing finding is that Rw1 admitted on oath that he sent the Claimant away to get a Health certificate after she reported to work coughing.
29. In addition to the foregoing Rw1 also admitted on oath that he remained in touch with Cw1 over the phone and as such he cannot therefore purport rightly that Cw1 did not communicate the reason for her absence. Cw1 stated that during the said telephone contacts with RW1, the latter kept on postponing her return to work until she visited him at the office on 6.11.2014 and learned from him that she had long been dismissed in September 2014. Consequently, the answer to the second issue for determination is that the reason cited by the Rw2 for dismissing the Claimant was not valid and fair. **Procedure Followed**
30. Rw2 admitted on oath that he never saw any notice for termination or correspondence calling Cw1 to explain her absence. He just acted on instructions from Rw1 to remove Cw1 from the payroll. He then closed her personal file without preparing her terminal dues. Rw1 also admitted on oath that he never accorded any hearing or warning letter or show cause letter to the Claimant before terminating her services because she was nowhere to be found and he did not know her postal and residential address. I however find that contradictory with his admission on oath that he remained in touch with Cw1 over the phone.
31. Under Section 41 of the employment Act (EA) the Respondent was barred from dismissing the Claimant for the offence of absence from work without permission under Section 44 (3) and (4) (a) of the EA before first explaining the offence to her and according her a chance to defend herself. The answer to the third issue for determination is therefore in the negative.

Unfair Termination

32. Under Section 45 (2) of the EA termination of employment is unfair if the employer fails to prove

that the termination was founded on a valid and fair reason and that it was done after following a fair procedure. In view of the finding herein above that the reason for terminating the Claimant in September 2014 was not valid and fair, and that the procedure followed was unfair, I find and hold that the termination of employment contract by RW2 acting on the instruction from Rw1 is unfair within the meaning of section 45 of the EA.

Reliefs

Notice

33.The Claimant has prayed for kshs. 17000 as salary in lieu of notice. The Respondent has maintained that the monthly salary for the Cw1 was kshs. 17000. In view of the finding above that she was terminated unfairly and without prior notice, I award her kshs. 17000 in lieu of notice as prayed.

Accrued Leave

34.Cw1 prayed for kshs. 68000 as the value for her leave accruals for 4 years. Rw1 on the other hand contended that Cw1 had taken more leave days than she was lawfully entitled to by 106 days. The leave records availed by Rw1 however showed that Cw1 took only 14 leave days during the period of her service including 3 days taken in July 2013, 5 days in January 2014 and 6 days in August 2014. The allegation by Rw1 that Cw1 took 106 extra leave days is therefore unfounded and it is dismissed.

35.The question that follows is whether the Claimant is entitled to the claim for accrued leave as prayed. There is no evidence or law cited that entitled her to the claim for accumulated leave. Under regulation 9 of the Regulation of Wages (Hotel and Catering Trades) Order, an employee can only accumulate her annual leave upon mutual agreement with the employer. Regulation 9 states that an employee shall be entitled to:-

“---not less than twenty four working days leave with full pay and that leave may, in an exceptional circumstances and subject to mutual agreement be accumulated;”

36.In view of the foregoing, I find and hold that the CW1 has no legal right to claim accumulated leave for 4 years. His date of employment according to Rw1 was November 2010. Cw1 can only therefore claim leave for the last year of her employment being November 2013 to September 2014. That is about 11 months which works to 22 leave days under the provision of Regulation 9 aforesaid. Going by the leave records produced by Rw1, the leave days taken during January and August 2014 were 11. Cw1 is therefore awarded $11/30 \times \text{kshs.}17000 = 6233.35$ for the leave days outstanding at the time of her dismissal.

Compensation

37.Under Section 49(1) of the EA, this Court has discretion to award compensation for unfair and unjustified termination after considering the essential matters provided under section 49(4) of the Act. I have considered the fact that the Claimant did not contribute to her dismissal through misconduct but that she was possibly discriminated on account of her sickness or suspected sickness and award her kshs. 102,000 being six months' salary compensation. The Court has also taken judicial notice of the current situation of the deteriorating hotel business in the Kenyan coast due to terror threats and formed the opinion that CW1 could not secure another employment within a lesser period than 6 months. It is trite that the compensation for unfair termination is a relief meant to cushion victims of unfair dismissal while looking for alternative employment.

Overtime

38.The Claimant prayed for 4 hours overtime daily for 4 years. That she used to work on a 12 hours shift. She however admitted in evidence that there is time they used to work 3 Receptionists.

That later she became supervisor and then the Hotel Manager. The Court has not been given proper particulars of the claim for the overtime and no sufficient evidence was adduced to support that remedy. I consequently dismiss it.

Under Payment

39. The Claimant prayed for under payment of her salary for the 22 months she allegedly served as the Hotel Manager from August 2012. She bases the claim on an oral agreement which the Rw1 has denied. According to Rw1 he was only elevated to the position of supervisor which did not vest on her any Managerial status. The Claimant never invoked the relevant wage order published under the Labour Institutions Act to advance her claim for under payment. The Court will not aid her on that but instead will make a finding that the claim for the alleged under payment has not been proved and must therefore fail.

Disposition

40. In view of the findings stated above I enter judgment for the Claimant in the sum of Kshs. 125233.50 plus costs and interest.

Signed, Dated and Delivered at Mombasa this 15th day of July 2016.

ONESMUS MAKAU

JUDGE