



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 520 OF 2014

BETWEEN

MARY NZEMBI KIMWELI CLAIMANT

VERSUS

AEGIS [KENYA] LIMITED t/a

LEOPARD BEACH RESORT & SPA RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Tindika & Company Advocates for the Claimant

Mburu Kariuki & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim, on the 22nd October 2014. She states she was employed as a Public Area Cleaner by the Respondent Hotel, on 30th June 2005. She was paid Kshs. 495 per day, amounting to a monthly salary of Kshs. 12,870. She was summarily dismissed by the Respondent, on the 21st October 2013. She received another letter from the Respondent dated 23rd October 2013, indicating summary dismissal had been reduced to regular termination, whereof the Respondent offered to pay the Claimant a total sum of Kshs. 80,551 in terminal dues. She did not accept the offer as she considered termination was unfair and unjust. She claims compensation and the following terminal benefits from the Respondent:-

- a) 3 months' salary in lieu of notice at Kshs. 27,000.
- b) 3 months' house allowance in lieu of notice at Kshs. 19,518.
- c) September 2013 balance salary at Kshs. 4,050

- d) October 2013 salary at Kshs. 9,000.
- e) House allowance for September 2013 at Kshs. 6,506.
- f) House allowance for October 2013 at Kshs. 6,506.
- g) Annual leave for 2012/2013 at Kshs. 15,506.
- h) Travelling allowance for 8 years at Kshs. 33,600.
- i) Underpayment of wages for July and August 2013 at Kshs. 5,272.
- j) Pending days at Kshs. 1,852.
- k) Maternity leave October 2009 to February 2010, at Kshs. 42,330.
- l) Termination gratuity for 7 years at Kshs. 54,271.
- m) Salary for 7 months, for 2012 at Kshs. 108,542.
- n) Unpaid salary for 2 months in, 2006 to 2013 at Kshs.217, 084.
- o) Monthly compensation for working shoes at Kshs. 42,000.
- p) Compensation at the equivalent of 12 months' salary at Kshs. 108,000.
- q) Costs and interest.

2. The Respondent filed its Statement of Response on the 10th December 2014. It concedes to have employed the Claimant as Public Area Cleaner on seasonal or temporary contracts, effective 30th June 2005. She was to be paid for days actually worked in accordance with the particular contract. She was summarily dismissed for gross misconduct. The sanction was later commuted to regular termination, upon the intervention of the Claimant's Trade Union. She was given an opportunity to be heard, and the reasons for summary dismissal communicated to her. She did not work in continuity as the Hotel would close on certain occasions for renovation. The Hotel was gutted by fire and remained closed for 7 months, during which the Claimant was away, and is not entitled to claim unpaid salary over the period. Shoe allowance was not included in her contract. She never applied for maternity leave. She did not bring it to the attention of the Respondent that she needed to go on maternity leave. The Respondent prays the Court to reject the Claim, with costs to the Respondent.

3. The Claimant testified, and closed her case, on the 10th July 2015. The Respondent testified through its Resident Manager Mr. Francis Marube, on the 12th February 2016. Parties confirmed the filing of their Closing Submissions on the 29th July 2016, when the Judgment of the Court was reserved for 18th November 2016.

Claimant's Testimony

4. The Claimant told the Court she was employed by the Respondent as a House Keeper. She served on 3 months' contracts at the outset. She was employed on 1st July 2005. Her 1st contract indicates she was to earn a salary of Kshs. 4,896 per month and house allowance of Kshs. 2,578. She produced a bundle of the contracts running between 2005 and 2013. She would work as a Casual Employee after a particular contract lapsed, and revert to periodic contracts after such casual service. In total, she worked for 8 years.

5. The Management carried out a spot check on staff lockers on 18th September 2013. Shampoo, Coconut Broom, 3 cups of yoghurt and assorted items were found in the Claimant's locker. She was issued a letter

of summary dismissal dated 21st September 2013.

6. She consulted her Trade Union KUDHEIHA. There was a meeting between Management and the Works Committee. The Works Committee suggested the Claimant is returned to work and issued a warning by the Respondent. The Management insisted the summary dismissal decision be upheld. The Trade Union Branch Office was called in. The Union suggested to the Respondent that the Claimant should be returned to work, or have the summary dismissal decision, commuted to regular termination. The Claimant explained she did not have the intention to steal the items which were found on her. She had retained the broom and the shampoo in her locker so as to be able to start work early the following day, as the store opened late. The Respondent acceded to commutation. The Respondent offered the Claimant terminal dues, which she rejected. She instructed her Advocates to issue demand before she filed this Claim against the Respondent.

7. She claims 3 months' salary in notice, under clause 9 of the CBA concluded between KUDHEIHA and the Respondent. 3 months' house allowance in notice pay is also under the CBA. She was only paid service charge in September 2013. She never went on annual leave. She was not paid leave travelling allowance. These are based on the CBA. She took maternity leave in October 2009 and returned February 2010. She was not paid her salary during maternity leave. There was a salary increment for staff. She did not recall the details. She testified her salary was not adjusted. She claims underpayments. Clause 16 [g] of the CBA made provision for supply of 2 pairs of shoes every year. The clause was disregarded. The Hotel closed twice a year. She was supposed to continue earning her salary during closure under the CBA. She was not paid. When the Hotel burnt down, regular Employees continued to be paid their salaries for the 7 months the Hotel was under repair. The Claimant was not paid. Termination was unfair. No justification was given for the decision. She prays for compensation. She prays for costs.

8. Cross-examined, the Claimant testified she was first employed in 2005. She did housekeeping. She was not on duty 1st June 2012 to December 2012. Her contract had lapsed. She continued to work as a Casual Employee once her contracts lapsed. She was in casual employment when she took maternity leave. She was paid every end of the week. She was found with certain items belonging to the Respondent during the spot check. She was supposed to collect the items from the stores. She was not heard before dismissal. There was a meeting involving Management and the Works Committee. She was heard. She worked for 8 years. She was not paid her dues. She disagreed with the computation of dues made by the Respondent. She was given 3 pairs of shoes covering a period of 8 years. Her contract had lapsed at the time the Hotel burnt. The Respondent was compensated by its Insurer, after the Hotel burnt down. The Claimant testified she was still an Employee during the closedown. The contracts did not say that upon expiry, the Claimant would continue to work as a Casual Employee. She was underpaid in July and August 2013. Termination was unfair. She agreed it was inappropriate to keep Respondent's items in her locker. It was because of her mistake that her contract was terminated. Redirected, she confirmed the items were found on her. There was no finding of guilt in the meeting involving Management and the Works Committee. She was given a reason for termination. This came after summary dismissal. She worked continuously except when the Hotel was closed, or when she was on leave. Her employment status vacillated between periodic contracts and casual employment. She prays the Court to allow the Claim.

Claimant's Submissions

9. The Claimant submits summary dismissal was procedurally and substantively unfair. She was not given an opportunity to be heard. She was not given valid grounds justifying the decision. The Respondent disregarded Section 45 of the Employment Act and Clause 10 of the CBA. The Claimant was to be treated as a Regular Employee under Section 37 of the Employment Act, and Clause 19 of the CBA. The Claimant submits the Court has upheld Section 37 and Clause 19, in relation to an Employee similarly situated as the Claimant herein, in ***Cause Number 109 of 2014 between KUDHEIHA v. NORTH COAST BEACH HOTEL***. The Claimant submits she was a Regular Employee, entitled to the terminal dues and compensation sought, under the Employment Act and the CBA.

Respondent's Testimony

10. Francis Marube told the Court he has worked for the Respondent for 16 years. He recruited the Claimant as a Cleaner in the year 2005. She cleaned public areas within the Hotel. She was employed on seasonal contracts, the last which expired on 31st March 2013.

11. Hotel items were disappearing under her watch. A search was conducted by the Respondent. The Claimant was found to be hiding Hotel items which ranged from brooms to yoghurt. The Management called the Works Committee who verified the items were not supposed to be in the custody of the Claimant. She was suspended.

12. After further consultations involving the Management and the Works Committee, it was determined the Claimant is dismissed. She sought review of the decision through her Trade Union. Upon further consideration, the Management reviewed the sanction, substituting summary dismissal with regular termination. Due process was followed. The Claimant was present throughout.

13. Salary was paid to her last day. She was given annual leave of 23 days for 2012. After the contract of 31st March 2013 expired, she worked on and off, as a Casual Employee. In 2012, Employees were kept at home, as the Hotel was being renovated. There was a skeleton staff left. Maternity leave was given to Employees in permanent positions. The Claimant was not eligible for maternity leave in 2009-2012. The Hotel closes down every May and June of the year. It does not operate for 2 months each year. Employees utilize their annual leave entitlement then. She utilized her annual leave. Shoes were provided up to 2012. The Claimant is entitled to shoes allowance for the year 2013. She had notice of termination.

14. On cross-examination, the Witness testified some of the items recovered from the Claimant, were items one would expect to be held by a Cleaner. The Calculation of Dues document, dated 23rd October 2013, indicates the following:-

I. Date of 1st contract: 1st July 2005.

II. Date of last contract: 31st March 2003 [2013?]

III. Last day worked: 21st September 2013.

IV. Duration: 8 years and 3 months.

The Claimant was partly casual and partly on contract. The Hotel closes 2 months every year. Permanent Employees go on annual leave. Seasonal Employees go home. They are not paid anything.

15. Francis testified he had not carried to Court, the letter through which the Claimant was suspended. He was not sure if the Claimant was issued any warning letters before termination. She was not charged with any offence. The Respondent consulted the Union, and changed the sanction from summary dismissal to regular termination. The date indicated as the effective summary dismissal date, was imposed as the date of regular termination. She appealed after dismissal. There was a meeting held on appeal. Minutes of this meeting were not availed to the Court. Redirected, the Witness told the Court the Respondent did not apply the sanction of summary dismissal immediately. The Works Committee confirmed the Claimant was found to irregularly have Respondent's items. There was a central place where cleaning items were kept. The items were recovered in her personal locker. She appealed against summary dismissal. The sanction was reduced to regular termination. There was sufficient notice of termination. She did not have continuity in service.

Respondent's Submissions

16. The Respondent submits that the items found in the Claimant's locker, were not all what would constitute her tools of trade. The items were not supposed to be stored by the Claimant. She was heard in the presence of her Union Officials. She was given valid reasons justifying termination. The Respondent complied with the substantive and procedural requirements of termination law under Section 41 and 45 of

the Employment Act 2007. The Claimant appealed against summary dismissal and the Respondent commuted the sanction to regular termination. She did not show she was entitled to maternity leave and gave no evidence showing she met the requirements of Section 29 of the Employment Act which regulates maternity leave. She was a Casual Employee, whose employment was terminable by notice issued at the end of a particular day. Termination was fair.

The Court Finds:-

17. The Calculation of Dues document referred to in paragraph 14 of this Judgment, which is an employment record authored by the Respondent, clearly shows the date the Claimant was employed, the date she last worked, and the duration of employment. The duration of employment is stated to be 8 years and 3 months, which tallies with the evidence given by the Claimant.

18. It is therefore needless to submit that the Claimant was in casual employment, whose employment was terminable at the end of any given day. She was an Employee for an aggregate period of 8 years and 3 months as shown in the document authored by the Respondent.

19. The Court agrees with the submission of the Claimant that she was similarly situated to the Grievant in this ***Court's Cause Number 109 of 2014 between KUDHEIHA v. NORTH COAST BEACH HOTEL***. It was held that clause 19 of the CBA entitled the Employee to serve as a regular Employee, not seasonal or temporary Employee. The Claimants in either case had served for aggregate number of years removing them from being eligible for seasonal, temporary or other irregular forms of employment. Their terms and conditions of employment had concretized through the passage of long years in service, into regular employment, as intended under Section 37 of the Employment Act 2007.

20. This is not to say however that the Claimant was in active service, during the entire period of 8 years and 3 months of employment. There is evidence which the Court accepts, that the Hotel was closed for 7 months in 2012 after a fire incident. It would not be reasonable to expect the Respondent to pay salaries for no work done, and during a period when the Respondent was out of business with no income stream. An Employee is ordinarily paid for work done; payment of arrears of salaries for a period when the business has closed down, upon a tragic fire event, would not be in the nature of fair remuneration, for fair work done. The claim for unpaid salary of 7 months in 2012 is rejected.

21. The Hotel was closed for 2 months every year to allow for renovation. No work was performed by the Claimant during such breaks, to entitle her to arrears of salary from 2006 to 2013, which is claimed on uniform base rate of Kshs. 15,506 per month. The salary paid to the Claimant varied under the different contracts, and the base rate cannot therefore be a uniform figure. The claim for unpaid salary over the period 2006 - 2013 is declined.

22. The claim for annual leave for the year 2012/ 2013, granted the prolonged period when the Hotel was closed, and the Claimant away from work, seems to the Court to have no merit. Similarly the prayer for travelling allowance, based on a presumed annual leave entitlement for a period of 8 years, considering the breaks in those years, has no merit. The Claimant offered no medical records showing she was pregnant in 2009, and sought maternity leave under the procedure prescribed under Section 29 of the Employment Act. She did not show she fulfilled what the law would expect of her, in event of pregnancy and need to go on maternity leave. Her claim on maternity pay is not founded on Section 29 of the Employment Act and is rejected. The prayer for 'pending days, double rate' is unclear and not given any degree of elucidation in the evidence, pleadings or submissions of the Claimant. The Court is not able to grant this item.

23. The Court was not shown the Wage Instrument upon which the prayer for underpayment of salary for July and August 2013 is based. This was not made clear in the evidence and submissions of the Claimant and is declined. The Claimant was not working in the month of October 2013. Her last day worked was 21st September 2013 when she was summarily dismissed. Her prayer for salary and house allowance for October 2013 is without evidential support and is disallowed. She was not entitled to full salary and house allowance for September 2013 as claimed. She worked for 21 days, and received her pay for days

worked. The prayers for full salary and house allowance for September 2013 are disallowed.

24. The balance of her prayers relates to compensation for unfair termination; footwear allowance; gratuity; and notice pay.

25. Was termination fair? The Claimant was a Cleaner. She was found to hold in her locker an assortment of items, which belonged to her Employer. These included cups of yoghurt, which were unrelated to her job description. Her explanation was that she needed to wake up early and work, and the tools of trade locked in the common store, would delay her endeavour. This may well be so, but not all the items found on her, fitted the description of tools of trade. It was logical for the Respondent to conclude the Claimant was involved in theft of Respondent's items. She was engaged in an act of gross misconduct. There was a valid reason justifying summary dismissal.

26. The Works Committee was involved in consultation with the Management before the Claimant was summarily dismissed. She lodged an appeal against the summary dismissal decision. Her Union was brought in, and negotiated to have summary dismissal reduced into regular termination. The Claimant was offered terminal dues under the CBA which she declined.

27. There was no formal disciplinary hearing leading to the decision to summarily dismiss the Claimant, as contemplated under Section 41 of the Employment Act. However, the Claimant had the benefit of being in the company of Works Committee Members during the first phase of consultation between the Management and the Works Committee. The Parties seem to have been in agreement that the Claimant was found to have taken custody of the Respondent's items irregularly. There was a common ground on the commission of an employment offence. The Claimant was aware about the offence she had committed. There was no formal disciplinary hearing, but this, looked at within the entirety of the circumstances, cannot in the view of the Court, amount into breach of fair procedure under Section 41.

28. The Employer was ready to engage the Claimant's Trade Union after 21st September 2013, and explore the possibility of reinstating the Claimant, or reducing the sanction against her, to enable her leave under the CBA on regular termination. There was a meeting of minds between the Employer and the Union in the end that the Claimant should not be reinstated, but should leave under regular termination.

29. In the view of the Court therefore, the demands of substantive and procedural justice were met. If there were any departures from the law, such were minor and inconsequential. The Employer and the Union engaged their industrial relations machinery in full, and in all fairness, came up with a solution that respected the rights and obligations of the Employer and the Employee. The Claimant should have accepted her role in the authorship of what befell her, accepted terminal benefits offered to her, and moved on. The prayer for compensation for unfair termination is rejected.

30. In Sum the Court finds the Claimant should have accepted the terminal dues as offered by the Respondent in the computation dated 23rd October 2013. Most of the items listed at the balance of her prayers under paragraph 24 of this Judgment, have been included in the computation. Notice pay and gratuity were included in the computation. The Court does not take away from an Employee what has been offered by the Employer. Francis testified that the Respondent provided shoes up to the year 2012, and the Claimant would be entitled to the allowance for the year 2013. The CBA provided that an Employee would be provided with 2 sets of uniforms and footwear, or in default be paid Kshs. 500 monthly in compensation for footwear. The Court shall grant the Claimant Kshs. 500 x 9 months= Kshs. 45,000 in compensation for non provision of footwear. In total it is ordered:

a) The Respondent shall pay to the Claimant terminal benefits at Kshs. 80,551 as offered on 23rd October 2013, together with Kshs. 45,000 as footwear allowance- total- Kshs. 125,551.

b) The full amount shall be paid within 21 days of delivery of this Judgment.

c) Interest granted at 14% from the date of Judgment.

d) No order on the costs.

Dated and delivered at Mombasa this 18th day of November, 2016

James Rika

Judge