



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.238 OF 2015

(BEFORE D. K. N. MARETE)

GRACE JEBET KETER.....CLAIMANT

VERSUS

MEDIHEAL HOSPITAL & FERTILITY CENTRE LIMITED.....RESPONDENT

JUDGMENT

This cause is brought in by way of a Memorandum of Claim dated the 14th September, 2015. The issues in dispute are therein cited as;

- a. Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent.*
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in this memorandum of claim;*
- c. Whether the claimant is entitled to an award of a certificate of service;*
- d. Who should pay costs and interests of the suit?*

The respondent in a Respondent's Statement of Defence dated 30th October, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that she was orally employed by the respondent as a waitress on 1st July, 2009 at a salary of Kshs.7,500.00. There was no salary rise throughout her employment. She served the respondent dedicatedly, unsavourily and without any warning in her record until 22nd November, 2012 when termination was effected by the respondent's director. This is as follows;

- 5. The claimant avers that her services were orally terminated by the respondent when she was called by the administrator in the morning of 22nd November, 2012 and informed by the administrator that he had heard from some other employees that the claimant caused some employee to be terminated by the director. That in the circumstance the management no longer required her services and should immediately vacate the respondent's premises.*

6. The claimant aver that when she received the above allegations from the administrator, the claimant sought audience with the director upon whom the director informed the claimant that the management had made a decision and that the same was irrevocable.

It is her further case that this termination was unprocedural and in fragrant breach of the Employment Act, 2007 and particularly S. 41, 43, 44(2) and 45(2) (a) and (4) (b). She further cites the following as grounds of unlawful termination;

- a. The respondent terminated claimant's employment without following the laid down procedures in the Employment Act.
- b. The respondent dismissed the claimant without proofing that the reason for the termination was valid.
- c. The respondent did not give the claimant termination notice as required under Section 35 (b) of the Employment Act.
- d. The Respondent denied the claimant her lawful leave days contrary to the Employment Act.
- e. The Respondent failed to give the claimant certificate of service as required under section 51 of the Employment Act.
- f. The respondent failed to reduce the engagement with the claimant into a written contract as required by the Employment Act.
- g. The respondent failed to regulate the claimants working hours as required under section 27 (1) of the Employment Act.
- h. The respondent failed to pay the claimant her 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institution Act and section 49(c) of the Employment Act.
- i. The respondent underpaid the claimant.

She prays as follows;

12.

1. One month pay in lieu of notice Basic salary + house allowance

(8221 + 1233.15).....Kshs.9,454.15/-

2. House allowance for the entire period worked

(39months x 1233.15).....Kshs.48,092.85/-

3. Leave dues for the period worked

(One month salary x years worked)

9454.15 x 3.3 years.....Kshs.31,198.69/-

4. Compensation for unfair termination

(Section 49(c) Employment Act).....Kshs.113,449.8/-

5. Wages for November, 2012

(22 days).....Kshs.7,999.66/-

6. Under payment of wages

Legal Notice No.71 of 2012

8221.20 -7500=721 x 7 months.....Kshs.5,047/-

7. Severance pay

15% salary per year x years worked.....Kshs.56,157.25

TOTAL CLAIM.....KSHS.271,399.40/-

She in the penultimate prays as follows;

- a) Declaration that the dismissal was unlawful, unprocedural and unfair and in the circumstance of the claimant is entitled to compensation as prayed for herein above.
- b) The sum of Kshs.271,399.40/- as set out at paragraph 12 above.
- c) Cost of this suit and interests on at court rates from time of filing suit until payment in full and
- d) A certificate of service as per section 51 of the Employment Act.
- e) Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondent's case is that there existed no contract, oral or written between the parties and therefore denies termination or at all.

7. In further reply to paragraph 6 above the Respondent states that the claimants allegations are farfetched and the same cannot issue against the respondent since:-

- i. There never existed any contract whether written and/or oral between the claimant and the respondent.
- ii. The claimant was not an employee of the respondent.
- iii. There never existed any relationship between the claimant and respondent capable of being enforceable.

It is the respondent's case that this suit is bad in law and shall approach the court to dismiss it as such.

This matter came to court variously until the 19th July, 2016 aver it was heard *inter partes*.

The issues for determination are;

1. Whether the claimant was an employee of the respondent.
2. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief caught?

4. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant was an employee of the respondent. The claimant basis her claim on the authority of a NHIF card dated 8th September, 2015 that bears no.30345. It is her position that this respondent's employers number in that organisation. She also relies on a letter of application for employment and a demand letter dated 5th September, 2015. These are not rebutted by the respondent.

The claimant in his written submissions seeks to rely on Section 9 (2) of the Employment Act, 2007 which obligates an employer to reduce a contract of employment into writing as follows;

“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub-section (3)”

and also Section 10 (7) of the Employment Act further provides that;

“Where an employer fails to produce a written contract in legal proceedings then the employer must prove or disprove an alleged term of the employment relationship.”

She also relies on the authority of **Edward Isedia Mukasia Vs. Eldo Supermarket Limited 2016 eKLR** where this court observed as follows;

“Section 10 (7) of the Employment Act, 2007 binds employers to proof of terms of employment in the event of non production of a written contract of employment in all legal proceedings...”

This is coupled with Section 74 of the Act which provides that employers should keep written records of all employees and in any event produce these in evidence as would be required, the claimant rests a case of negligence in compliance with the law on the respondent. This is as follows;

“An employer should keep written records of all employees and in line with section 10 of the Act, the employer should in the circumstance produce all the records envisaged under section 74 in any proceedings before this Honourable Court.”

He also seeks to rely on the authority of **Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR** which emphasizes the requirements of substantive and procedural fairness in cases of termination and employment.

Section 45 (4) (b) of the Employment Act, 2007 provides as follows:-

....that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.”

He further sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

(a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.

(b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

(c) That the employer has heard and considered any explanations by the employee or their representative.

(d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The claimant further sets out a case of unlawful termination and submits this was contrary to Section 45 (2) of the Employment Act as follows;

A termination of employment by an employer is unfair if the employer fails to prove-

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure

The respondent's written submissions were filed out of time and therefore not usable in support of her defence.

The circumstances of this situation bring out a case for the claimant. This is because she illustrates and demonstrates a case of employment which the respondent merely denies. The respondent had ample opportunity to adduce the evidence in contradiction of this case for employment but chose not to. The case of employment therefore stands undemolished I therefore find a case of employment of the claimant by the respondent. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. Again, the claimant demonstrates a case of blatant disregard of substantive and procedural fairness in her termination. She was merely told to vacate her workplace by the respondent's administrator. The respondent's does not controvert this either but merely denies employment or even termination. I therefore find that the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. And this answers the 2nd issue for determination.

With a finding of unlawful termination of employment, the claimant is entitled to the relief sought.

I am therefore inclined to allow the claim and award relief and declare as follows;

i. That the dismissal of the claimant by the respondent was unprocedural, unfair and unlawful.

ii. One months pay in lieu of notice.....Kshs.9,454.15

iii. Six months compensation for unlawful termination.....Kshs.56,724.90

TOTAL.....Kshs.66,179.05

iv. That the respondent be and is hereby ordered to issue a certificate of service to the claimant within 30 days of today.

v. That the costs of this cause shall be borne by the respondent.

vi. That the costs of this claim be and are hereby assessed at Kshs. 60,000.00

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimant.
2. Mr. Wanyonyi instructed by M/s Kimaru Kiplagat & Company Advocates for the Respondent.