



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 70 OF 2014

LEAH MAKUNGU MUSASIACLAIMANT

VERSUS

LEENA APPAREL [LTD]RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for accrued employment dues plus compensation for unlawful termination of the claimant's employment by the respondent on 31/5/2011. According to the claimant she worked for the respondent for 17 years and 5 months continuously without going for any leave and she was grossly underpaid while working as a Machine Operator and later as a supervisor. She accused the respondent of not serving her with a termination notice or paying her salary in lieu of notice and even after notice of intention to sue having been issued on her the respondent has defaulted to pay termination dues to the claimant.
2. In response, the respondent has admitted having employed the claimant as a machine operator on contract basis on various occasions since 1994 but denied ever promoting her to a supervisor or at all. The respondent has averred that the claimant worked as a machine operator until her last contract signed on 25/3/2011. The respondent further averred that the claimant was employed on 3 months renewable contracts and was paid all his leave days earned after the end of every respective contract. The respondent has in addition denied that she laid off the claimant and contended that it is the claimant who deserted work. The respondent has also denied the claim for severance pay.
3. The suit was heard on 21/7/2014 and 5/11/2014 when the claimant testified as Cw1 and the respondent called Shadrack Otieno Oruko and Silvia Muasya as RW1 and 2 respectively. Before the suit started on 21/7/2014 the parties consented to having all the documents filed by both sides admitted as exhibits.

CLAIMANT'S CASE

4. CW1 explained that she was orally employed by the respondent on 5/1/1994 as a Machine Operator at a monthly pay of ksh. 7000. She worked as such until 2004 when she was promoted to be a supervisor of the other operators. Her salary was increased later to ksh.9000 per month plus overtime pay. On 10/5/2011, the respondent manager Mr. Murgesh called her to his office and told her to go home for a week because work had reduced in her line. When she returned after one week, the manager told her to go home and wait until she was called back to work. After a few weeks CW1 returned to the office but the boss told her that her work was over and he advised her

- to collect a termination letter later to take to the NSSF which she did on 22/6/2011.
5. CW1 maintained that she worked for the respondent from 1994 to May 2011 when her services were terminated due to reduction of work. She produced the letter by the respondent dated 22/6/2011 to prove that she served from 5/1/1994 to 31/5/2011. After the termination, CW1 was only paid ksh.2000 as farewell because according to his boss, she was not entitled to any benefits. According to CW1 the respondent did not serve her with any termination notice. After the termination, CW1 never got any other employment until 2013 when she got casual employment of cleaning services. CW1 denied ever signing any written contract of employment with the respondent. She further denied receipt of any payment in lieu of the leave earned. She prayed for accrued benefits plus compensation for unfair termination.
 6. On cross examination by the defence counsel, CW1 denied ever signing any written contract of employment with the respondent. She denied the signature on a copy contract produced by the defence but admitted that the photo on it was hers. CW1 denied ever signing any payslips and maintained that the respondent never used to give her any payslips. She further mentioned that she used to sign on worksheet every end of the month and receive her salary through the bank. She denied the signature appearing on the copy of worksheet produced by the defence as Appendix B. CW1 stated that her employment number was 583 and maintained that in 2004 she was promoted verbally to be the supervisor Buttonholes Batex and Button attach Section. She denied any receipt of money for the leave earned after every 3 months and further denied the signature appearing on Appendix 3 aforesaid. She denied that she was working for fewer hours than required and maintained that she used even to work overtime. She maintained that since 1994 she only worked for the respondent and contended that during the time when work was reduced, the respondent brought work from other companies for processing at her factory. CW1 explained that she personally never instructed Gunga Advocates to write any demand letter but her daughter is the one who instructed the said lawyer when CW1 was sick. Lastly CW1 maintained that she never deserted employment but she was laid off due to reduction in work.

DEFENCE CASE

7. RW1 works for the respondent as an Accountant. He confirmed that CW1 was employed by the respondent as a Machine Operator in mass production factory. When he joined the respondent in 1995, he found CW1 still working there. He told the court that CW1 left employment in 2011 according to the records of her payment. According to RW1, CW1 never worked from June 2011 but he did not know how she left. He explained that CW1 like other workers was employed on short term contracts like the one produced as Appendix A for the period between 1-2-2011 and 30/4/2011. He further explained that after the lapse of every respective contract, CW1 was paid all his leave days on prorata basis at the rate of 1.75 per month of service. He produced Appendix B and D to show payment of leave days earned and the job title for the CW1. RW1 explained that the respondent has a Mr. Murukesan Bilal as manager and not Murgesh and contended that the letter produced by CW1 allegedly written by Mr. Murgesh was not genuine and lacked any signature. He maintained that CW1 was never promoted as she alleged and denied that she was unlawfully dismissed by the respondent.
8. On cross examination by the claimants counsel, RW1 admitted that CW1 worked for the respondent from 1994 to 2011. He also admitted that he was not present when CW1 was employed. He explained that CW1 worked for 4 days in June 2011. He further admitted that he could only produce the last contract for 3 months. He also admitted that the respondent did not take any action against the CW1 for uttering the fake letter dated 22/6/2011.
9. RW2 is the respondents supervisor in the Buttonhole Department. She joined the respondent in 1995. RW2 explained that CW1 was employed as a Machine Operator since 1994 in the Buttonhole Department and left employment in 2011. RW2 further explained that CW1 employed on 3 months contracts but was paid a salary on monthly basis. She explained that CW1 was paid all his leave days after the lapse of each contract. RW2 however clarified that, in 2011 one was being paid his leave after 6 months.
10. On cross examination by the claimant's counsel, RW2 stated that she became supervisor from 2002. She also explained that from 2002 all wages were paid on monthly basis. She admitted that there was no leave at the respondent. RW2 was not aware whether the respondent contacted CW1

to find out why she deserted work. She admitted that the respondent's manager is called Mr. Murgesh.

11. After the close of the hearing both parties filed written submissions of which the court has carefully considered in this judgment.

ANALYSIS AND DETERMINATION

12. After carefully considering the pleadings, evidence and submissions, there is no dispute that CW1 worked for the respondent from 1994 to 2011 as a machine operator. No senior manager or witness of the respondent testified to contradict CW1's evidence that she served under a verbal contract. It is also common knowledge that Mr. Murgesh, the manager who terminated CW1's services on ground of reduction of work did not testify to deny that allegation by the CW1. It has also not been denied that CW1 was earning ksh.9000 per month plus overtime as at 2011 when her services were terminated. The issues for termination are whether the termination of CW1's services was unfair and unlawfully and whether the reliefs sought should be granted.

UNLAWFUL TERMINATION

13. The reason given for the termination of the claimant's services and which was not contested was that work had reduced. That meant that CW1 was declared redundant. The procedure followed to lay her off was however in breach of Section 40 of the Employment Act. The said provision require that before declaring an employee redundant, the employer must first serve a notice of at least one month in writing to the employee or his trade union and also to the labour officer. Thereafter a fair selection process is done to identify the workers to be laid off. Finally, the employer must pay to the employee to be laid off all his accrued employment benefits, salary in lieu of notice plus severance pay. In this case, the process followed to lay off the claimant was not in accordance with the said procedure prescribed by Section 40 *supra* and that rendered the lay off of the claimant unfair and unlawful termination..

RELIEFS

14. In view of the foregoing finding, the court proceeds to award the claimant dues and compensation as per Section 49 of the employment Act. She will therefore get ksh.9000 one month salary in lieu of notice. She will also get ksh.108000 being 12 months gross salary as compensation for unfair termination. The prayer for service pay is dismissed because CW1 admitted that she was a member of NSSF and that the employer gave her a letter to take to NSSF after she was laid off, possibly to pursue her benefits. Likewise the prayer for leave earned is dismissed for being time barred except 3.5 leave days earned on prorata basis between April and May 2011. The claim for under payment is also dismissed for lack of particulars and evidence. There are no particulars and clear evidence adduced to show when the salary was was increased from ksh.7000 to ksh.9000.

DISPOSITION

15. For the reasons above stated judgment is entered for the claimant in the sum of ksh.117000 plus costs and interest.

Dated, signed and delivered this 27th February 2015.

O. N. Makau

Judge