



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 314 OF 2014

GLADYS MACHOCHO NINAH .....CLAIMANT

VERSUS

AMMAH SERVICE STATION LTD .....RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant brought this suit on 23/7/2014 and amended it on 2/12/2014. She seeks to recover ksh.709,048 being accrued employment benefits plus compensation for unfair termination of her employment by the respondent in March 2014. It is the claimant's case that she went for maternity from June 2013 but before it lapsed she called her boss and requested for one month extension. However when she later called to say that she was ready to resume work after the one month extension, the respondents told her to wait until she was called back. After waiting for several months she reported to work in March 2014 only to be offered another employment as Mpesa attendant which she turned down. According to the claimant, she never went for any annul leave but she used to be paid little money in lieu of leave. In addition, the claimant has averred that throughout her service at the respondent she used to be paid a salary that was below the minimum salary prescribed by the statute.
2. In her defence, the respondent has denied liability for unfair termination of the claimants services and avers that its the claimant who failed to return to work after the lapse of her maternity leave. It is the defence case that the claimant abandoned duty and or resigned without notice and never called the respondent to explain her failure to resume duty after the maternity leave. The respondent has therefore counterclaimed for ksh.8520 being one month salary in lieu of notice.
3. The suit was heard on 27/10/2014 and 4/11/2014 when the claimant testified as CW1 and the respondent called Mustafa T.N. Dungerwala testified as RW1. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 was employed by the respondent as a pump attendant from August 2006 through a verbal agreement. She was paid weekly at the rate of Ksh.150 per day in arrears. She continued to serve under that contract until February 2011 when she was converted to permanent employee again under verbal agreement. Her salary was enhanced to ksh.8500 per month in arrears. According to CW1, she never went for leave between 2006 and February 2011. Instead she used to be paid Ksh.2000 in lieu of leave. She however went for leave between 2011 and 2012.
5. In April 2013, CW1 applied for maternity leave for 3 months and resume in August 2013. in July

- 2013, CW1 called RW1 and successfully requested for an extension of her leave by one month. However in September CW1 called Mustafa to notify him that she was ready to resume work but she was told to wait. Thereafter CW1 kept calling Mustafa but the latter kept on postponing the return of CW1 until March 2014 when he called her back and gave her another job of Mpesa Attendant for ksh.300 daily wage. When CW1 turned down the offer for the new job, RW1 told her that her employment was over. CW1 maintained that her employment was therefore unfairly terminated and without any notice.
6. CW1 contended that since 2006 her salary was underpaid with respect to the minimum wage prescribed by the law. She prayed for one month salary in lieu of notice, arrears of the underpaid salary and other prayers as pleaded in her suit. She denied ever deserting employment and blamed her employers for her failure to not resume duty after her leave. She therefore prayed for the dismissal of the counterclaim.
  7. On cross examination by the defence counsel, CW1 explained that she started working as a casual employee being paid on weekly basis at the rate of ksh.150 per day and continued as such until 2011. She maintained that every time she requested for leave during that period, she was paid ksh.2000 which she considered to be underpayment. She explained that she requested for maternity leave from RW1 verbally and later requested him for an extension of the leave again verbally. According to CW1, she never used to deal with RW1 through written correspondences. She maintained that when RW1 allowed her to return to work in April 2013, he showed her a different job. CW1 however refused the new job because it was for a low pay and RW1 had refused to pay her terminal dues for the previous job. CW1 however did not have any written documents to prove her allegation of leave extension and offer of a new job. CW1 confirmed that she was never paid any salary between October 2013 and April 2014. She admitted that she never reported the matter to the labour office to complain about the breach of her rights.

#### DEFENCE CASE

8. RW1 is the Director of the respondent. He confirmed that CW1 was his employee since 2006 as a casual earning Ksh.250 per day but being paid on weekly basis. He contended that CW1 never complained of any low pay during her service. He maintained that CW1 went for all her annual leave during Christmas season every year. RW1 confirmed that he employed CW1 on permanent basis from 2010 and in 2013 she sought for a 3 months maternity leave to return in August 2013. CW1 however never returned until March 2014 and RW1 gave her a fresh job as Mpesa Attendant which she declined.
9. RW1 maintained that CW1 never called him during her maternity leave for extension of her maternity leave. He denied ever dismissing her or transferring her to any new job. RW1 blamed CW1 for not serving her with any notice of termination and prayed for salary in lieu of notice. He maintained that between 2010-2011 he used to pay CW1 ksh.250 per day and he never enhanced it. He maintained that CW1 used to go for leave in early December and return on 7<sup>th</sup> January every year. He denied the claim for compensation by accusing CW1 for the termination of the contract.
10. On cross examination by the CW1's counsel, RW1 stated that he keeps all records of employment for his employees except leave records. He maintained that he paid CW1 ksh.250 during his casual service until when she became permanent when her salary became ksh.8500 per month. He admitted that the said pay was below the minimum wage set by the law. He further admitted that CW1 went for 21 unpaid leave during the period she served on casual basis. He maintained that he paid CW1 all her salary during the maternity leave. He admitted that he never called CW1 when she failed to return after her maternity leave but he employed another pump attendant to replace her. He explained that when CW1 returned between February and March 2014, he offered her a new job at a lower pay of ksh.300 per day but she refused and insisted on her former job of pump attendant which was no longer available. He however concluded by maintaining that he never terminated CW1's employment.

#### ANALYSIS AND DETERMINATION

11. After going through the pleadings, evidence and submissions by the two sides, the court finds no

dispute in the fact that CW1 worked for the respondent as a Pump Attendant from 2006 to 2013 when she took maternity leave for 3 months and never returned to work as scheduled. There is also no dispute that CW1 was receiving a pay that was below the minimum wage prescribed by the law. The issue for determination are:

- a. **Whether the claimant deserted work without notice or was unfairly terminated.**
- b. **Whether the orders sought ought to issue.**

### **Desertion VS unfair termination**

12. Under Section 47 of the Employment Act, the employee has the burden of proving that he was unfairly terminated while the employer's burden is to justify the termination. In the present case, CW1 explained that while on her maternity leave in July 2013, she called RW1 for extension of her leave by one month but thereafter she was not allowed back. RW1 has denied the alleged call for the extension of leave. No other evidence was placed before the court to prove that CW1 did in fact call RW1 in July 2013 and secured an extension of her maternity leave. Consequently the court finds that CW1 has not discharged her burden of proving unfair termination. RW1 was therefore entitled to treat CW1's failure return from her 3 months maternity leave as breach of contract. The delay in returning to work from August 2013 to February or March 2014 was unreasonably long time especially when there was no correspondence proved between the parties herein. RW1 was therefore entitled to repudiate the contract and hire another pump attendant to mitigate loss. The court therefore blames the claimant for the termination of her employment.

### RELIEFS

13. In view of the finding above, that CW1 is to blame for the loss of her employment, the prayer for pay in lieu of notice and compensation for unfair termination are dismissed. Likewise the claims for underpayment and leave for the period before July 2011 are dismissed for being time barred. The prayer for salary for the period between August 2013 and March 2014 is dismissed because CW1 had absconded duty and thereby terminated her employment.
14. She will however get salary arrears in respect of the underpayment for the period between July 2011 and July 2013 being Ksh (9815-8500)x10 months = 13150, for the period between May 2012 and April 2013 she will get (Ksh.11,100-8500)x12 months = 31209.60 and for the period between May and July 2013 she will get ksh(12654.90-8500)x3 months=12464.70 making the total salary arrears ksh.56824.30. Lastly she is awarded prorata leave for July 2011 to May 2012 of  $(1.75 \times 7) = 12.25$  days  $\times 12654.90/30 = 5167.40$ . The foregoing award is subject to the ksh.8500 counterclaimed by the defence being salary in lieu of notice.

### DISPOSITION

15. For the aforesaid reasons, judgment is entered for the claimant in the sum of ksh.53,491.70 plus costs and interest.

**Dated, signed and delivered this 13<sup>th</sup> February 2015.**

**O. N. Makau**

**Judge**