



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

ELRC CAUSE NO. 591 OF 2014

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS & HOSPITAL WORKERS.....CLAIMANT

VERSUS

NORTH COAST BEACH HOTEL.....RESPONDENT

J U D G M E N T

INTRODUCTION

The Claimant brings this Suit on behalf of Mercy Kasyoka Munyoki (grievant) who alleges that she was unfairly dismissed by the Respondent on 13.9.2013 and denied her terminal dues. The Suit seeks to recover compensation for unfair termination plus accrued benefits amounting to Kshs. 1,139,352.

The Respondent has denied liability for unfair termination and averred that the grievant was employed on fixed terms contract which lapsed. It is the defence case that the contract did not provide for automatic renewal. It is further defence case that the grievant was not entitled to any notice before termination because she was all along aware when the contract term was to end.

This Suit was heard on 14.5.2015 when the grievant testified as CW1 and Respondent called Charles Owidhi as RW1. Thereafter Counsel for the two parties filed written submissions.

CW1 was employed by the Respondent on 1.3.2009 as a Food and Beverage (F&B) Supervisor. Her salary was Kshs.11,500 per month. The contract was for 6 months but it was renewed continuously until 13.9.2013 when she received a letter dated 9.9.2013 notifying her that her employment contract was not renewed. The letter advised her to go for her dues the following week. When she went for the dues, the employer calculated the same at Kshs.12000 but CW1 rejected it and reported the matter to her Union.

CW1 prayed for leave not taken between 2009 and 1.6.2011 plus 18 off days worked; salary for 13 days worked in September 2013; pay in respect of 2 off days and 2 public holidays outstanding at the time of termination; service charge arrears for July 2012 to January 2013 plus arrears for August 2013; and salary arrears for July 2012 to February 2013 when the salary increment was effected. She further prayed for acting allowance for the 12 months she acted as the F&B Manager; shoes allowance from 2009 to 2013 as provided for in the CBA; 2 months' salary in lieu of notice; and 12 months compensation for unlawful termination.

On cross examination by the defence Counsel, CW1 contended that her salary was under paid in relation

to the CBA which ranked her at Job group 8. She classified that the Public Holidays she claimed included Good Friday, Easter Monday, Labour day and Madaraka day. She maintained that she was paid acting allowance only in January and February 2012. She admitted that she was not supposed to accumulate leave beyond 45 days. She explained that her contract expired on 30.8.2013 but she continued working until 13.9.2013 when she received the letter dated 9.9.2013 notifying her that her contract was not renewed. She contended that in the past it was normal to continue working even upto 2 months before the contract was eventually renewed. She clarified that the 9% increment she was demanding was derived from the CBA. She maintained that the terms of her employment contract were governed by the CBA.

DEFENCE CASE

RW1 is the Personnel Officer for the Respondent. He confirmed that CW1 was employed as F&B Supervisor by the Respondent under fixed term contract which expired. He denied that she was terminated. He contended that CW1 had only 10 leave days and 2 off days outstanding and produced records to prove that CW1 went for all other off days. He contended that CW1 was appointed to act as F & B Manager only in January and February 2012 and she was paid her acting allowance according to the pay slips exhibited. He denied that CW1 was under paid in respect of her salary and maintained that she was paid according to the 2012 CBA. He explained that in January 2012 her basic salary was Kshs. 10405 and House Allowance of Kshs.5573.

On Cross Examination by the Claimant's Counsel, RW1 confirmed that master roll produced herein was only for September 2013. He confirmed that CW1 was a member of the Union and her contract was governed by the CBA. He maintained that he complied with the CBA in paying CW1. He further maintained that the CBA provided for short term contracts under clause 19. He however admitted that the short term contracts were not to extend beyond one year. He admitted that the CBA provided that after serving for one year the employee shall not be terminated. He admitted that CW1 worked under 6 month contracts for 3 years in aggregate. He however denied that another person was employed after the CW1's contract ended.

ANALYSIS AND DETERMINATION

After considering the pleadings, evidence and submissions, there is no dispute that CW1 was employed by the Respondent between 2009 and September 2013. There is also no dispute that the contract of employment for the grievant was governed by the CBA between the Claimant and the Respondent. The issues for determination are whether the termination of the grievant was unfair and unlawful and whether the reliefs sought ought to issue.

UNFAIR AND UNLAWFUL TERMINATION

Section 45(2) of the Employment Act (EA) defines unfair termination as one whereby the employer fails to prove that it was founded on a fair and valid reason; and that it was done after following a fair procedure. In this case, the employer terminated the employee's contract by letter dated 9.9.2013. The reason cited was that her contract had lapsed and had not been renewed. According to the employer CW1 was serving on a 6 months fixed term contract which lapsed automatically. Consequently, the Respondent maintained that CW1 was, at all material times, aware when her contract would expire and as such she did not require any service of Notice for termination. The Claimant on the other hand has contended that CW1 had become permanent employee under the CBA after completing one year under fixed term contract. She cited clause 19 of the CBA as the basis of her contention that CW1 had become protected from termination of employment without following the law and the CBA. She has referred the court to ***EL&RCC NO. 109 OF 2014 KUDHEIHA vs. North Coast Beach Hotel*** which involved termination of 2 employees under similar circumstances as in this case and where Rika J. declared the termination unfair and awarded compensation plus terminal benefits.

This Court agrees with the evidence and the aforesaid decision by Rika J. The reason for the foregoing finding is that the Respondent did not prove that there existed any valid and fair reason for the summary

termination of the grievant's employment. The only reason cited was that the employment contract had lapsed automatically. That was not true because, under clause 19 of the CBA, the employer was barred from using short term contracts unfairly to avoid employing the grievant permanently. The employer was also only allowed to employ under short term contracts when there was special reason and that such arrangement was not to extend beyond 12 months. In this case no special circumstances were demonstrated and the contract was extended beyond 12 months. That was unfair labour practice and cannot be allowed.

The consecutive renewal of the contract for over 4 years or so rendered the employment relationship one of indefinite term only terminable by notice or as otherwise provided for by the law. The termination was therefore without justification. In relation to the foregoing, the procedure followed to dismiss the grievant was unfair. It was made on 9.9.2013 when the termination letter was written without any hearing or prior notice to the grievant. The termination was not based on section 36 of the Employment Act and therefore the Procedure followed rendered it wrongful and unfair. For the reasons aforesaid the Court finds on a balance of probability that the termination of the grievant's employment was unfair and unjustified.

RELIEFS

In view of the foregoing findings, the Court grants the prayer for declaration that the termination of the grievant's employment was unfair and unjustified. He is therefore awarded 12 months' salary for the unjustified termination. She is awarded the maximum because under the CBA she was not entitled to any gratuity for long service until she had completed a minimum of 5 years but CW1 served for years. In addition she was not able to secure any alternative employment within that period of 12 months. The last consideration is that she did not contribute to the termination through any misconduct at all.

The grievant is also awarded 2 months' salary in lieu of notice in line with clause 9(a) of the CBA. She will also get pay in respect of leave days accruing from 2011. The reason for not awarding the leave for the period before 2010 is that the said Claim is time barred with respect to section 90 of the Employment Act. In addition, she did not prove that she had been authorized to accumulate her leave under clause 12(a) of the CBA or the Law. Neither the Claimant nor the Respondent stated how many leave days had accrued to the grievant before termination. The Respondent merely showed the Court the leave application forms filed as defence exhibits. It appears on the said records that the grievant was being given 15 leave days per year as opposed to the 26 days provided for under the CBA. She is therefore awarded the balance of 11 days per year in arrears for the 2011 to 2013. As at 6.8.2013, she had accrued 10 days leave as per the leave application signed on 24.7.2013 just before her termination. In view of the foregoing evidence, the Court finds on a balance of probability that the grievant accumulated 41 leave days at the time of her termination. The 41 leave days are to be multiplied by her monthly basic salary.

The Claim for underpayment for the period before 2011 is dismissed for being time barred. The claim for underpayment between 2011 and June 2012 is also dismissed for lack of evidence. The CBA produced in Court by the Claimant was only for the period starting July 2012. The grievant will therefore only get compensated in respect of arrears for July 2012 to June 2013 at the rate of 10% of the basic pay plus House Allowance. The basic pay for Job group 7 in July 2012 was Kshs.20173 and House Allowance was Kshs.5574. The former was increased by 10% to 22190.30 and the latter increased by 557 to 6131 raising the gross pay to Kshs.28321.30. The Respondent however continued to pay the gross pay of Kshs.15978 up to January 2013 causing her a loss of Kshs.74058 which she now claims as salary arrears.

The Claim for arrears in respect of service charge was not proved and it is dismissed. The Claim for salary for the 13 days worked in September 2013 is not disapproved and is allowed and assessed at $Kshs.28,321.30 \times 13/30 = Kshs.12272.60$. She is also awarded shoes allowance for the year 2011 to 2013 being $Kshs.500 \times 32$ months = Kshs.16000. The Claim for acting allowance is dismissed as no letter of appointment was produced as evidence. Lastly she is awarded leave travelling allowance arrears for the 3 years at the rate of $Kshs.4400 = Kshs.13200$.

The summary of the award is as follows:-

Compensation	339855.60
Salary in lieu for notice.....	56642.60
Leave 41 days.....	30326.75
Leave travelling allowance.....	13200.00
Salary for September 2013.....	12272.60
Under payment.....	<u>74058.00</u>
<u>542355.55</u>	

DISPOSITION

For the reasons stated above judgment is entered for the Claimant declaring the termination of the grievant's employment unfair and unjustified and awarding the grievant Kshs.542355.55 plus costs and interest.

It is so ordered.

Dated, Signed and delivered this 24th July 2015.

O. N. MAKAU

Judge