



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATION COURT OF KENYA

AT MOMBASA

ELRC CAUSE NO. 189 OF 2013

LINET KADZO KENGA.....CLAIMANT

VERSUS

INDIANA BEACH APARTMENT HOTEL LIMITED..... RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a Claim for damages for unfair termination of the Claimant's employment by the Respondent on 14/7/2008. In addition the Claimant seeks to recover general damages for occupational disease suffered while on duty.
2. The Respondent has denied liability for any wrongful dismissal of the Claimant. In addition the Respondent has denied that she exposed the Claimant to any kind of work which caused on her the alleged medical condition.
3. The suit was heard on 16/7/2014, 2/10/2014, 13/10/2014, 3/11/2014, 13/3/2015 and 16/4/2015 when the Claimant testified as Cw1 and called **Sarah Baya** and **Dr. Ajoni Adede** as Cw2 and Cw3 respectively, while the Respondent called **Muhammed Salim Ahmed** as Rw1. After the hearing both parties filed written submissions through their respective counsel.

CLAIMANT'S CASE

4. Cw1 was employed by the Respondent from November 1993 to 1996 when she was terminated due to low business. She was re-employed from November 2002 as a Room Steward and General Cleaner for guest rooms. She used to do 12 rooms in a normal day but when her colleagues were off duty she could be assigned 15 rooms per day. She used to make up the beds some of which had heavy mattresses. She also used to carry beddings from ground floor to the laundry which was located on the 4th floor and there was no lift or trolleys. She used to report to work at 6 am and leave at 7pm but no overtime was paid to her.
5. From 2002 she was signing fixed terms contracts but she continued to work until the next contract was signed. The last contract to sign was commencing 1/3/2006 and ended on 30/4/2006. She however continued working until June 2007 when she began experiencing back problem which led to her going to hospital in September 2007 for treatment. She was found with a disc prolapse at her lower back and given a bed rest. She gave the treatment documents to the Respondent and the Manager **Mr. Banchan** told her to go home and rest as recommended by the Doctor and return to

work when she was well.

6. From September 2007 she was never paid any salary and no money for medical expenses were given to her by the employer. The doctor continued to extend her sick off until 30th June 2008 when the doctor allowed her to resume work but only for light duties. She reported back on 1/7/2008 with the doctor's recommendation letter but the Manager told her that she could not resume work due to her serious sickness. She was referred to the Director on 8/7/2008 but the Director also told her that she could not return to work due to her sickness. On 5/8/2008 she returned to the office to ask for her termination letter but the Manager told her that she had not been dismissed and she could continue with her work. She worked upto 3 pm when she was called to the office by the Manager who told her to leave the Respondent's premises or police be called in. When she refused to leave, the Manager escorted her to the Director's office who told her to leave due to her sickness. In the Directors Office she found 5 other officers who told her to go home. Cw1 however denied that there was any formal meeting with the said people at the Director's office.
7. Cw1 reported the matter to the labour office but she was referred to her trade union. The union demanded for her dues. Cw1 was also issued with Form DOSH 1 to claim compensation for the injuries and was also examined by **Dr. Adede** who assessed her permanent partial disability at 5%.
8. Cw1 was earning kshs.7,500 per month from which NSSF and NHIF was deducted levy but the employer never remitted to the relevant Agencies. She prayed for service pay from 1994 to 2008, compensation for unfair dismissal and for the injuries suffered. She also prays for refund of the unremitted NHIF and NSSF deductions.
9. On cross examination by the defence counsel, Cw1 maintained that some of her colleagues also complained of backaches. She further maintained that she used to work without leave or off days and whenever she went for one it was unpaid leave. She confirmed that her contracts were automatically renewed and she never stopped working even during low business season. Initially she used to sign short contract but later she worked continuously without signing any contract after her immediate boss Judy told her that she was a permanent employee.
10. She contended that when she became sick, the doctor recommended light duties but when she took the doctors letter to the Respondent she was chased away and the boss told the security not to allow her back to the hotel. She denied attending any meeting with the Respondent on 6/8/2008 where she was allowed to do light duties. She maintained that the last day she visited the office was on 5/8/2008 when she went to collect her termination letter with the advise from her union. Cw1 denied that she refused to do light duties after the employer allocated to her.
11. As regards the claim for leave she did not deny the leave application forms for the period between 30/6/2005 – 4/9/2006. She maintained that when she attended hospital, her NHIF card was rejected due to non- remittance of her contribution. She however admitted that her name was in the list of workers whose NHIF contributions were remitted. She confirmed that she was issued with Certificate of Service on 14/7/2008 but when she went for the termination letter on 5/8/2008 she was chased away. She maintained that she served for 5 years continuously as shown in the Form DOSH 1 which was filled by the employer on 12/11/2008 after the dismissal.
12. Cw2 used to work with Cw1 as Room Cleaner for the Respondent he confirmed that each Room Cleaner used to do 12 rooms in a normal day but the number of rooms could increase depending on people on off day. She confirmed that the laundry was on the top floor and there was no lift. She confirmed that Cw1 was never stopped during low season. Cw2 was never given any written contracts but she used to sign papers for payment twice a month. She confirmed that the work they were doing was very hard but they had no choice.
13. On cross examination by the defence counsel, Cw1 confirmed that she joined the Respondent in August 2006 and left in September 2007. She confirmed that she left the employment healthy.

14. Cw3 hold MB ch B from the University of Nairobi. He examined Cw1 on 16/5/2014 for injury suffered while at work on 1/11/2007. He confirmed that Cw1 suffered a Disc prolapse in the lower back and treated at Shimo la Tewa Hospital and under went physiotherapy and x-ray done. He relied on the Treatment notes from Shimo la Tewa hospital, X-ray Radiologist Report dated 23/2/2009 and Form Dosh 1 to assess Cw1's permanent partial incapacity at 5%. He prepared a medical report dated 16/5/2014 and charged her ksh.2000. He also charged kshs.3000 for court attendance.
15. On cross examination by the defence counsel, Cw2 confirmed that he examined Cw 2 6 years and 10 months after the injury. He however maintained that he relied on X-ray and radiologist report prepared 2 years after the injury and the Dosh 1 form. He further maintained that Disc prolapse is a permanent injury and it is not caused by pregnancy.

DEFENCE CASE

16. Rw1 is the Accountant and Human Resource Manager for the Respondent since the year 2000. He confirmed that Cw1 was employed by the Respondent as a Room Cleaner from 1993 to 1996 when she left. She was however re-employed in October 2002 in the same capacity of a Room Cleaner. Her duties included room cleaning, bed making and taking the dirty linen to the laundry. She used to do 9 rooms per day of 8 ½ hours. The rooms had either 2 single 3 feet by 6 feet beds or others had double bed of 6 feet by 6 feet. There were however others with triple, 6 feet by 6 feet bed plus a single 3 feet by 6 feet beds.
17. He explained that Cw1 was employed under seasonal contracts from 1/2/2003 to 30/4/2004, 1/1/2005 to 30/6/2005, 1/8/2005 to 31/1/2006 and 1/3/2006 to 30/4/2006. The contracts were not continuous but Cw1 was engaged on casual basis in the period between the seasonal contracts.
18. Rw1 confirmed that Cw1 started complaining of sickness in the year 2006 or thereabouts. She then brought sick sheet from her Doctor and went to stay at home. The sick sheet recommended for light duties for Cw1 and on 6/8/2008 Rw1 allocated her light duty of Linen Keeper. Cw1 however refused to take up the new job and demanded for a termination letter. The new job was given to her on 6/8/2008 during a meeting between her, Ishpal, Nathan, Ali Abdul and Rw1. After Cw1 left, her union wrote letter dated 19/8/2008 requesting that Cw1 be retired on medical grounds but before the Respondent met the union Cw1 served a demand letter through her counsel.
19. Rw1 denied that Cw1 was terminated and maintained that it is Cw1 who left work. He contended that Cw1 used to go for his annual leave or receive payment in lieu and produced leave application from for 2003 to 2006. He further contended that Cw1 was a member of NSSf and NHIF and all her contributions were remitted. He however clarifies that such remittances were only in respect of the periods she was serving under seasonal contracts.
20. On cross examination by the Claimant's counsel, Rw1 produced no written evidence that he is the Accountant and Human Resource Manager for the Respondent. He confirmed that Cw1 was not notified of the meeting held on 6/8/2008 with the Director and other officers. He further confirmed that Cw1 and him never signed the minutes for the said meeting. He further stated that on 6/8/2008, Cw1 had already left employment and did not sign the Attendance Register. On being shown letter from the union dated 19/8/2008, (D. Exh.4), requesting for retirement on medical ground, Rw1 changed his story to say that he does not know when Cw1 was terminated because there were many correspondences and Cw1 had been sick for a long time. He maintained that Cw1 was given light duties following the Recommendation by her doctor but she refused. He admitted that Cw1 fell sick while on duty. He further admitted that Cw1 was not allowed to attend the meeting on 6/8/2008 with a fellow worker or union representative. He denied that Cw1 was on permanent employment and maintained that he was serving on seasonal contracts and as casual in between the said contracts. He further maintained that NSSF and NHIF was deducted and remitted for Cw1 during the seasonal contracts and not when she was serving as a casual. He

confirmed that Form Dosh 1 dated 12/11/2008 was filled by him showing that Cw1 served for 5 years and that her salary was kshs.75,00 per month. He denied that Cw1 was unfairly dismissed and maintained that she left her job on her own volition. He confirmed that Cw1 was a good employee.

ANALYSIS AND DETERMINATION

21. After considering the pleadings, evidence and submissions filed, there is no dispute that Cw1 was employed by the Respondent between 1993 and 1996 and then from 2002 and 2008. There is also no dispute that Cw1 sustained injuries while on duty which was confirmed by medical evidence to include a Disc prolapse in her lower back. There is further no dispute that Cw1 was on prolonged sick leave until 30/6/2008 when her doctor allowed her to resume work but only to do light duties. The issues for determination are:

(a) Whether the Claimant was unfairly dismissed or she deserted work on her own volition.

(b) Whether the reliefs sought ought to be granted.

Desertion Versus Unfair Termination

22. Cw1 contended that she returned to work on 1/7/2008 after the doctor allowed her to do light duties. That she was not allowed back by the Manager who referred her to the Director on 8/7/2008. That the Director also refused her from returning to work citing the serious injuries she was suffering from. She immediately went to report to the labour officer who refer to her trade union to represent her. That the union advised her to go for her termination letter which she did on 5/8/2008 but she was denied and barred from returning to the Respondent. On a balance of probability, the court finds that Claimant was unfairly dismissed, within the meaning of **Section 45** of the Employment Act 2007. The reason for the foregoing finding is that the employer did not prove that Cw1 was so physically incapacitated that she could not render any services to the Respondent. Secondly the Respondent did not follow a fair procedure in terminating Cw1's services as required under Section 41 of the Employment Act in that she did not, before dismissing Cw1, accord her a hearing in the presence of a fellow employee or shop floor union representative of her choice. In addition the dismissal on ground of illness was not valid and it amounted to discrimination because the Doctor had certified that her permanent partial incapacity was only 5% and that she could perform light duties. In addition the Respondent acted without any advice from a qualified medical doctor when she dismissed Cw1.

23. The foregoing finding of unfair termination was not rebutted by the testimony of Rw1 and the exhibits cited. The alleged meeting and correspondences between the union and the Respondent were happening after the dismissal had already taken place when Cw1 was barred from resuming duty in July 2008. Her evidence that she showed desire to work to the Manager and that, she even worked on 5/8/2008 upto 3pm before the Director again dismissed her, was not rebutted by the Manager who allowed her back to work or the Director who ordered her to leave. In addition, the minutes of the alleged meeting of 6/8/2008 produced to prove that she refused light duties are not valid for want of any signature. Further the submissions by the defence that D.Exh.4 supports the fact that Cw1 refused to work and demanded retirement on medical grounds is dismissed because Cw1 denied that instruction to the union and the defence never called the author of the letter to contradict Cw1's testimony. Consequently the court finds on a balance of probability that the Claimant never deserted work voluntarily but was unjustifiably and unfairly terminated within the meaning of **Section 45** of the Employment Act.

RELIEFS

24. Under **Section 49(1)** of the Employment Act, where a dismissal is found to be unjustified, the employee is entitled to damages but where the dismissal was unfair the employee may be

reinstated or re-engaged subject to the considerations of the matters provided for under **Subsection (4)** thereof. In this case the Claimant prayed for damages and reinstatement as an alternative and as such the court will deem that he did not wish to be reinstated as the first prayer. Consequently the court will proceed to assess damages under **Section 49(1) supra**. The said provision entitles the unjustifiably dismissed employee to salary in *lieu* of notice, accrued benefits plus compensation of upto 12 months gross salary.

25. Cw1 is therefore awarded kshs.7,500 being one month salary in lieu of notice as prayed. In addition she will get 12 months gross salary for unfair and unjustified dismissal being kshs.90,000. The reason for the maximum award is that the Claimant may not get another job due to her health condition which she suffered while serving the Respondent. In addition to the foregoing reason, the dismissal was founded on discrimination on ground of ill-health.

26. The prayer for refund of NSSF and NHIF deductions is dismissed for the reasons that the deductions were remitted. According to Rw1, the only time when NSSF and NHIF was not remitted was during the periods when the Claimant was serving as a casual. In such periods, the contributions were never deducted from her earnings. That explanation is plausible. Cw1 did not produce NHIF statement to prove that no contributions at all were remitted as alleged by the Rw1 and indicated in the defence exhibits.

27. The foregoing finding however leads to the question of service pay. The Claimant's counsel submitted that the Claimant is entitled to service pay at the rate of 15 days salary per year of service. She served for 5 years which translates to kshs.18,750. The employer only remitted NSSF contribution for retirement during certain months of her 5 years of service but not for all the 60 months of the entire service as per NSSF statement filed by the Claimant. She is therefore awarded the kshs.18750 as prayed.

28. The prayer for leave was not proved and it is dismissed. Cw1 alleged that she never went for any leave or paid in lieu during her 5 years of service. She did not tabulate how many leave days she accrued and whether she had authority to accrue the leave. Her counsel submitted that no leave records were produced as exhibit to rebut her claim. That was however disputed by Respondent's submissions by referring to D. Exhibit 6 and 7. The said exhibits show that Cw1 was paid for some of her leave days and holidays worked. It is therefore wrong for the claimant's counsel to make blanket submissions that the Respondent did not adduce any evidence to disprove the leave claim.

29. The prayer for overtime is dismissed for lack of evidence and particulars. There was no prayer for general damages for discrimination and the submissions by counsel urging for such award is dismissed for being neither here nor there.

30. The prayer for damages for occupational disease is however allowed. In so doing the court has considered the Common Law duty on the part of the employer to provide a safe working conditions to her employees. Such obligation has been codified under **Section 6(1)** of our **Occupational Safety and Health Act 2007** which provides thus:

“Every Occupier shall ensure the safety, health and welfare at work of all persons working in his work place.”

31. In this case Cw1 stated that she was allocated hard and excess work to do including cleaning at least 12 rooms in a day, making up all the beds and then carrying the loads of dirty linen from ground floor to the fourth floor without the help of a trolley or lift. That some times she used to do more rooms if colleagues were on off duty or if the guests increased. She was never given any leave or rest days or public holidays. Instead she was paid cash as shown by the D. Exhibit 6 and 7. That was unfair labour practice which contributed to the Occupational sickness to the Claimant. The sickness forced her to be on sick leave for over a year without pay. The disease was assessed as temporarily incapacity of 14 months in Dosh 1 Form. Later Cw3 examined the Claimant and

prepared medical report dated 16/5/2014 (Exh.6) and assessed the injury as 5% permanent partial incapacity.

32. Based on the foregoing the Claimant's counsel submitted that the Claimant is entitled to an award of general damages of kshs.700,000. The defence counsel opposed the claim and submitted that no notification of the Occupational disease was served on the respondent under **Section 22** of the OSHA and the disease herein is not among the diseases listed under the second schedule of the Act. Without prejudice, however, the defence counsel submitted that, any compensation to the Claimant herein should be calculated in accordance with **Section 40(1)** read with **Section 35** of the Work Injury Benefits Act (WIBA) and not as suggested by the Claimant.

33. The court however dismisses the submission that damages are only available under WIBA and states that it has powers to award general damages at Common Law provided that any award made under WIBA is taken into consideration in order to avoid double benefit and unfair enrichment on the part of the claiming employee. In this case the Claimant only prayed for Common Law damages for the Occupational Disease sustained due to the employer's negligent to provide safe working condition and welfare for the Claimant as a result of which she suffered severe permanent injury or disease. No judicial precedents were cited by either party to guide the court in assessing the quantum of general damages for pain, suffering and loss of amenities. Consequently the court awards a discretionary sum of kshs.200,000. Lastly she is awarded kshs.2000 for Medical Report plus kshs.3000 for Doctor's court attendance.

DISPOSITION

34. For the reasons stated above, judgment is entered for the Claimant in this sum of Kshs.321,250 plus costs and interest from the date of filing suit in March 2010. It is so ordered.

Dated signed and delivered this 10th day of July 2015.

O. N Makau

JUDGE