



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CASE NO. 4 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

RIZWANA MOHAMED SALIMCLAIMANT

VERSUS

COOLXTREME LIMITEDRESPONDENT

J U D G E M E N T

Introduction

Rizwana Mohamed Salim was employed by the Respondent Coolxtreme Limited on 6th October 2008 as Office/Administration Clerk and worked with the Respondent until 31st January, 2014 when her employment was terminated. The Claimant's last salary was Shs.35,999/=. According to the Claimant's letter of termination dated 3rd January, 2014 the grounds for termination was review of operations of the Respondent's Western Branch situated in Kisumu where the Claimant worked.

The claim against the Respondent is that it refused to pay the Claimant's terminal dues. In her Statement of Claim filed on 13th January, 2015 the Claimant prays for the following orders:-

- (a) The payment of terminal dues lawfully and properly computed under the direction of this court
- (b) Interest on (a) at bank rates from the 31st day of January, 2014 and until payment thereof in full
- (c) Punitive and/or aggravated damages for breach of contract and for the violation of her statutory and constitutional rights together with interest
thereon at court rates of 14% per annum from the date of judgement and until payment thereof in full
- (d) Any other or further award as the court may deem fit and just to grant
in the circumstances.

The Respondent filed a defence denying all the allegations in the Statement of Claim except the descriptive paragraphs 1 and 2.

The case was heard on 15th July, 2015. The Claimant testified on her behalf while the Respondent is

General Manager Peush Mandalia RW1 testified on its behalf. Parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that she was in charge of the Kisumu office which was located in a residential house in Milimani Kisumu opposite St. Josephs Church. She was issued with a termination letter on 3rd January, 2014 which stated that her terminal dues would be paid once all company assets and stocks are accounted for. In December 2013 stock taking was done by the Claimant and the Human Resource Officer David Odhiambo. Some stocks and assets were stored outside the office in the parking lot. There was a store in the servant's quarters of the premises in which tools and materials were stored and the Claimant kept the keys. The assets and stock in the parking lot were used materials which had been brought from Nakumatt, a customer, and were kept in crates in the open. They could be accessed by anybody through the main gate. The keys to the main gate were with the security guard from Riley Falcon. The date of the stock taking done in December, 2013 was also the last working day for the Claimant. A report of the stock taking was prepared and signed by the Claimant and David. On 21st December, 2013 there was a meeting in the head office in Nairobi which was attended by all staff.

The staff was informed that the Western branch office in Kisumu was going to be closed because the Managing Director who used to support it had resigned.

The Claimant did not receive her terminal dues with the letter of termination. She was informed that this was because some of the Nakumatt stock was missing. By this time she had already handed over everything together with the keys to David.

In January 2014, she was directed to do another stock taking with David and another report was prepared. After the second stocktaking the Claimant's December 2013 salary which had been withheld was released. She was again summoned to Nairobi office where she met with RW1, the Director Jamir Samji, David the Human Resource Manager and Hamid Nanda the Financial Officer. They accused her of stealing the Nakumatt stock which were in the parking lot at the Branch office in Kisumu.

The Respondent declined to pay the Claimant's terminal dues on grounds that she had not explained the Nakumatt stock discrepancies.

The Claimant further stated that she did not take leave for the entire period she worked. She also testified that she took maternity leave in 2011. However when her final dues was calculated no provision was made for her annual leave for 2011 which according to the Respondent was forfeited when she took maternity leave.

The Claimant prayed for judgement against the Respondent for her terminal dues including annual leave.

Respondent's Case

RW1 who testified on behalf of the Respondent stated that as General Manager he reports to the Board on profitability of the company. In 2013 he recommended reduction in operation of Western Branch in Kisumu, was not making enough revenue. The board accepted his proposal and the Managing Director called all the staff of Western Branch to a meeting in Nairobi where they were informed about the scaling down of operations at the Branch.

He testified that Claimant carried out stock taking with the Human Resource Manager in December, 2013 while RW1 was on vacation. When he came back from vacation he studied the report of the stock taking which did not make sense. He therefore ordered for a second stock taking which was again carried out by the Claimant and David. There were a lot of missing stock which the Claimant

as the person in charge of the branch office was responsible for. She was asked to account for the missing stock although no monetary value was assigned to the lost stock.

RW1 testified that the Respondent worked out the Claimant's terminal dues and required her to sign confirming the workings before she could be paid but she had declined to sign. He testified that the Respondent was ready to pay as soon as she signs.

RW1 testified that the Claimant was entitled to 73.75 days leave and that no annual leave was included for 2011 when the claimant took maternity leave as she forfeited her annual leave for that year.

Issues for Determination

From the pleadings and evidence on record the following are in my opinion the issues for determination are the followings:-

1. Quantum of Claimant's terminal benefits
2. Whether Claimant's contractual and constitutional rights were breached.
3. Whether Claimant is entitled to exemplary and punitive damages.
4. Whether Claimant is entitled to interest on terminal dues at bank rates
5. Whether Claimant is entitled to interest on costs and to any other or further award.

From the facts of this case the termination of Claimant's employment was in actual fact a redundancy and the procedure applicable is that set out in Section 40 of the Employment Act. This is because the closure or scaling down of the operations of the Claimant's Western branch in Kisumu led to involuntary loss of employment by the Claimant and her colleagues without fault on their part thus amounting to a redundancy. They were therefore entitled to notification of the intended redundancy at least one month prior to the termination and also to a termination notice. A notification was supposed to be sent to the Labour Officer in charge of the area.

The procedure in Section 40 having not been followed, the termination was unlawful.

The terminal benefits payable to the Claimant should be the following:-

1. Notification of one month
2. Termination notice
3. Severance pay
5. Leave earned but not taken
6. Salary for days worked

The Claimant was given just under one months' notice from 3rd to 31st January, 2014 and was offered the following :-

- i) Service pay
- ii) Leave.

The Claimant's leave calculation for 2011 when she took maternity leave was not included. According to Section 29(1) & (7) of the Employment Act a female employee is entitled to three months maternity leave with full pay and shall not forfeit her annual leave for that year.

The Claimants terminal benefits should therefore be as follows:-

1. Pay in lieu of notification which was not done
2. Termination notice which she was given through the letter on 3rd January, 2014 while her employment was to terminate on 31st January, 2014.
4. She was to be paid service pay instead of severances pay. Since the rate is the same, no further payment is due.
5. Annual leave should be 94.75 days (inclusive of 21 days leave for 2011).
6. Pay for January, 2014.

In total the Claimant is entitled to

(i)	Notification	Shs. 35,999
(ii)	Severance	Shs. 90,000
(iii)	Annual leave	Shs.113,697
(iv)	Pay for January 2014.....	<u>Shs. 35,999</u>
Total		Shs.275,695

Less statutory deductions.

On the second issue I do not find that the Claimant's contractual and constitutional rights were breached by being asked to carry out stock taking at the branch she was in charge of before the branch was closed. There is no therefore basis to claim any damages on account of breach of contractual and constitutional rights on account of the same.

The Claimant further claims exemplary and punitive damages. As was held in the case of *Rookes v Bernard [1964] 1 ALL ER 367*, as applied by the court of Appeal in *Kenya Revenue Authority v Mengioni Salim Murgani [2010] eKLR:-*

"We have no hesitation in stating that on the basis of the evidence, the appellant's conduct could not be said to be oppressive, arbitrary or unconstitutional. Yet it is clear to us that it is for this reasons the court held that there was tortious liability by the appellant, and proceeded to award exemplary damages.

*As held in the celebrated case of **Rookes vs Barnard [1964] 1ALL ER** , there are only two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants or the government and in the case where the defendant's conduct had been calculated to make a profit for himself which might well exceed he compensation payable to the plaintiff. None of these ingredients was in existence in the matter before. the principles enunciated in **Rookes vs Barnard** were followed by this court in the cases of **Haria Industries v PJ. Products limited, [1970] E.A. 367** and in **Obongo & another vs Municipal council of Kisumu [1971] E.A. 91**. For this reason we think that the award of exemplary damages was a serious error".*

There is therefore no basis for payment of exemplary and punitive damages and the claim is rejected.

The Claimant further prayed for interest on both costs and terminal dues at bank rates. I award interest at court rates from date of judgement.

Orders accordingly.

Dated, signed and delivered in open court this 13th day of November, 2015

MAUREEN ONYANGO

JUDGE.