



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR COURT

AT MOMBASA

CAUSE NO. 628 OF 2014

ANASTACIA WAMBUI WANJIRU.....CLAIMANT

VS

THE MANAGEMENT OF MEDINA PALMS.....RESPONDENT

JUDGEMENT

Introduction

1. The claimant was employed by the respondent as Food and Beverage (F&B) Captain on 11.9.2013 under a fixed term contract of 9 months. The contract ended on 11.6.2014 but it was renewed for an equal term of 9 months which was to end on 12.3.2015. Her salary was kshs. 14,400/= plus House allowance of ksh 3,600/= per month but it was increased to ksh 19,200/= plus House Allowance of kshs 4,800/= per month. The contract was terminable by one month notice or salary in lieu of notice. However, the employer could terminate the contract summarily if the claimant was found guilty of gross misconduct as defined under the Employment Act 2007.

2. On 20.10.2014 a guest complained against the claimant's conduct in relation to services at the hotel. On 21.10.2014, she was given 2 days off because the guest purportedly did not want to see her in the hotel. When she reported back to work after the 2 days off she was told to report back on 29.10.2014 to be told what disciplinary action would be taken against her by the management. That on 29.10.2014, she reported to the Human Resource Management office where at the Human Resource Manager and the General Manager told her that she had committed offences and the management had decided to terminate her services and that she should go for the dismissal letter plus separation dues on 30.10.2014.

3. She now brings this suit claiming her terminal dues salary for the un expired period of the contract plus compensation for unfair termination of employment. She avers that the termination was unjustified and unfair and it amounted to breach of the fixed term contract. The respondent has denied liability and averred that the claimant was fairly dismissed for gross misconduct committed on 20.10.2014. That the claimant was rude to a guest on phone and when she was warned by her immediate boss, she invaded the guest's privacy in the guest room in the name of going to apologise for her earlier misconduct. That the claimant was given a hearing on 29.10.2014 at the Human Resource manager's office but her defence was not satisfactory and hence the dismissal on 30.10.2014. The suit was heard on 18.11.2015 when the claimant testified as Cw1 but the respondent never attended and therefore hearing proceed exparte.

Analysis and Determination

4. There is no dispute that Cw1 was employed by the respondent under fixed term contract from 11.9.2013 to 11.6.2014. That the contract was renewed for another 9 months to end on 12.3.2015. That the contract was terminated prematurely by the respondent on 30.10.2014 on allegation that the claimant had committed gross misconduct of denying a guest room service during breakfast and thereafter invading the privacy of the guest by visiting his room in the name of going to apologise for the earlier misconduct. The issue for determination is whether the termination was unfair and unjustified and whether the reliefs sought should issue.

Unfair and Injustified termination

5. Cw1 has denied the misconduct under oath and she contended that in the month of October, the hotel had many guests due to an annual offer, and due to a small number of staff, the F&B manager directed Cw1 that there would not be room service that week. That as result of the Manager's directive, Cw1 politely declined to offer room service to a guest who had sought the service over the phone. That the guest became abusive and Cw1 notified F&B manager about the conduct of the guest. That shortly thereafter, the guest lodged a complaint with the F&B manager against Cw1 after which the manager advised Cw1 to go and apologise to the guest which she did at his room where he was with his wife and a child. That the matter was resolved and she went home after her shift ended. That she was surprised the following day when she was told by the Human resource manager to go back home and return on 23.10.2014 because the guest did not want to see her in the hotel. That on 23.10.2014 she was told by the Human resource manager to report back on 29.10.2014 which day she found the Human resource manager and the General Manager who told her that she had committed an offence of annoying a guest and that they had decided to terminate her services. That Cw1 was never allowed to state his defence and her appeal was never responded to.

6. Thereafter she lodged a complaint to the Labour office followed by this suit. She contends that the termination was unfair and too harsh because she had a clean record of discipline. That she had acted in obedience to the directive from his immediate boss.

7. The foregoing evidence by Cw1 was not contested by the defence. Therefore on a balance of probability the court finds and holds that the termination of the claimant's contract of employment was unfair and unjustified. First, she had a clean record of service for over a year. Second she acted in obedience to directive from her immediate boss, the F & B Manager to freeze all room service due to increased number of guests compared to the small number of staff. Third she went to apologise to the guest in his room in obedience to the directive by the F&B manager Mr. Mwakangi and in deed the guest willingly allowed her in his room to apologise. Fourth, the claimant was never accorded a fair hearing within the meaning of section 41 of the Employment Act (EA).

8. Section 41 of Employment Act, provides that, before an employer terminates the services of an employee for misconduct under section 44(3) and (4) of the Employment Act, he shall first explain to the employee the reason for the intended termination. The said explanation shall be in a language that the employee understands and the employee shall have the right of being accompanied by fellow employee or shop floor union representative of his choice. That the employee and his companion shall then be invited to make their representation for consideration before the decision to terminate his services is made.

9. In this case such due process was not followed. Other than the averments in the defence that claimant was accorded fair hearing, no evidence was adduced to prove the allegation. The Human resource manager, and the General Manager who terminated the claimant never testified herein to prove that they complied with section 41 of the Employment Act. Likewise the Food and Beverage manager never testified to rebut the claimant's evidence that he froze the room service on 20.10.2014 and that he also directed Cw1 to go and apologise to the guest who had been denied room service.

Relief

10. The claimant was employed on her 9 month contract. She served 4 months and she had 5 months outstanding before the contract lapsed. It is trite that damages for premature termination of fixed term

contract is basically the total earnings for the un expired period of the contract plus any accrued benefits. In this case the claimant was earning a gross salary of kshs. 24,000 x 5 months outstanding under the contract = kshs. 120,000/=. She is also awarded kshs.5,538/= being accumulated overtime for 6 days, kshs 4,615/= being 3 rest days worked plus kshs. 2,855/= being service charge for October 2014. The claim for compensation for unfair termination is dismissed because it would give the claimant double benefit and unfair enrichment. The reason being that the award of the total salary for the un expired period of the contract placed the claimant in the financial position she should have been but for the unfair termination of her employment. She is therefore disqualified from making further claims.

Disposition

11. For the reasons stated above, judgment is entered for the claimant for the sum of **kshs.133,008/=** plus costs and interest.

Signed, Dated and Delivered this 11th day of December, 2015

ONESMUS MAKAU

JUDGE