



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 212 OF 2013

JACKLINE WAKESHOCLAIMANT

VERSUS

AROMA CAFÉ.....RESPONDENT

J U D G M E N T

BACKGROUND

The Claimant was employed by the respondent in March 2012 as a waitress for a gross salary of ksh 15000 per month. In September 2012, the respondent unilaterally and without claimants consent reduced her salary to ksh.10,000 per month. The claimant never the less continued in the service until 12/6/2013 when she was unlawfully and wrongfully dismissed. She now brings this suit claiming damages for wrongful and unlawful termination and accrued employment benefits including salary arrears of ksh.5000 per month for 10 months totaling to ksh.327,500/ plus costs and interest.

The respondent has denied the allegation of wrongful and unlawful dismissal of the claimant and instead accused the claimant for deserting work without notice. She further avers that the claimant consented to the reduction of her salary from ksh.15000 to ksh.10000/ per month to avert declaration of redundancy due to the respondent's financial problems. The respondent admitted that the claimant was entitled to ksh.4000/ being salary for days worked in June 2013 plus Ksh.10,000 being one month accrued leave. She however counter claimed for ksh.10000 being one month salary in lieu of notice because the claimant deserted work without notice. The case was heard on 12/11/2013 ex parte when the claimant testified as CW1 and called Annette Dama Achesa as CW2.

CLAIMANTS CASE

CW1 stated that she was employed by the respondent in March 2012 as a waitress for a monthly salary of ksh 15000/. In September 2012, her salary was reduced to ksh.10000 per month without her consent. On 26/9/2012 she was given an agreement dated the same day to sign for the reduction of her salary but she declined to sign. She continued to work despite the reduction of her salary because she had no choice until June 2013 when she was dismissed.

On 12/6/2013, CW1 went to work as usual and while on duty the supervisor called Chris told her to go home to wait until he called her back. She complied although she was not given any reason to the said decision. She waited for the supervisors call in vain and decided to demand for her dues through her advocates. The respondent replied the demand letter denying that she had dismissed the claimant. The claimant prays for salary for June 2013, severance pay, notice pay, leave pay, 12 months' salary for unfair

dismissal, salary arrears of ksh.5000 for 10 months.

CW2 stated that she was employed by the respondent as a waitress in March 2012 together with the CW1. Her salary was ksh.15000 just as it was for the CW1. In August 2012, CW2 fell sick and while at home she was called and told that she should not report back to work. As at the time of her dismissal the salary for CW1 was ksh.15000.

After the hearing the claimant's counsel filed written submissions.

ANALYSIS AND DETERMINATION

Upon perusal of the pleadings and upon considering the evidence and the submissions filed, the following issues arise for determination;

- a. **Whether the reduction of the claimants salary was lawful.**
- b. **Who terminated the contract of service**
- c. **Whether the termination was wrongful and unfair.**
- d. **Whether the claimant is entitled to the reliefs sought**

Was the reduction of salary lawful

The uncontested testimony of the CW1 is that she did not consent to the reductions of her salary. She produced as exhibit a salary adjustment agreement dated 26/9/2012 which she declined to sign. The respondent did not rebut that evidence instead she stated in her Memorandum of response at paragraph 8.

“...by accepting the subsequent salaries as from October 2012, the respondent assumed the claimant had accepted the change....”.

The burden was upon the employer to secure a consent of the new term of the contract from the employees. Instead she made an assumption based on the fact that the employee accepted the subsequent lower pay.

Consequently, the court finds in favour of the claimant by holding that the reduction of the salary from ksh.15000 to ksh.10000 per month was unlawful for want of express consent from the employee. A written contract cannot be amended by assumptions on the part of any party to the contract.

Who terminated the contract?

The uncontested testimony of claimant is that she was instructed by the supervisor Mr. Chris to go home and wait until she was called back. When no call was made to her she instructed her advocates and hence this suit. The said Mr. Chris never testified or recorded any statement to rebut the evidence by the claimant. The statement by Samuel Musyoka dated 26/8/2013 did not help any matters because he did not testify in court. It was not therefore tested by cross examination and it will therefore not be accorded evidential value. The reason being that it would prejudice the claimant because on 19/9/2013, the parties agreed that they were to call two witnesses each. The claimant complied with the directions but the defence failed.

Consequently the courts finds and holds that the employment contract was terminated by the respondent when Mr. Chris the supervisor send the claimant home and directed her not to report to work until she was called back.

Was the dismissal wrongful and unfair

It is trite that a dismissal is wrongful if it was done in breach of a term of contract regarding notice prior to the dismissal. On the other hand, dismissal is deemed unfair or unlawful if it is done in breach of a statutory obligation regarding the reasons and procedure to be followed by the employer in dismissing

the employee. It follows therefore that whereas both the employers and employees can wrongfully terminate a contract of employment, the doctrine of unfair termination only applies to the employers.

In the present case, the termination was made by the respondent when Mr. Chris sent the claimant home summarily and failed to call her back as promised. The claimant attended work and was ready to continue were it not for the orders to go home by Mr. Chris. The termination was wrongful because no prior notice of one month was given to her as per Section 35 of the Employment Act and the sample copy of letter of contract filed in court by the defence.

On the other hand the dismissal was unfair because no justifiable reason was given for the dismissal and no disciplinary hearing was accorded to the claimant before the dismissal. That was in violation of Section 41 and 45 of the Employment Act which bar an employer from dismissing an employee unfairly that is without a justifiable reason and without following equitable procedure. Consequently the court finds and holds that the dismissal of the claimant was wrongful and unfair.

Whether the reliefs sought ought to issue

Section 49 of the Employment Act provides for remedies available in circumstances of the present case. The claimant is therefore entitled to one month salary in lieu of notice under Section 35 of the employment Act considering his pay intervals of one month. She is also entitled to salary for the days worked in June 2013 ($12/30 \times 15000$) = 6000.

The claimant is also entitled to leave of one month as claimed and admitted by the defence. The claimant will therefore get ksh.15000 for the accrued leave days. The prayer for severance pay is dismissed because the dismissal was not through redundancy. The claimant will however get 12 months gross salary for unfair dismissal which amounts to ksh 180000/-. She will in addition get her salary arrears of ksh.5000 for 9 months starting September 2012 to May 2013 which amounts to ksh.45000/-. The counter claim is dismissed for lack of prosecution. Even if it was prosecuted obviously it would fail for lack of merit.

DISPOSITION

As a consequent of all the foregoing matters, judgment is entered for the claimant against the respondent for:

- a. **One month salary in lieu of notice15,000**
- b. **12 days worked in June 2013..... 6,000**
- c. **One month accrued leave15,000**
- d. **12 month salary for unfair dismissal.....180,000**

- e. **Salary arrears of ksh.5000 for 9 months.....45,000**

261,000

- f. Costs and interest from the date of filing the suit.

Orders accordingly

Dated, Signed and delivered this 14th day of February 2014.

O.N. Makau

Judge

