



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2243 OF 2012

NANCY WANZA MUTUKU CLAIMANT

VERSUS

NOBLE BLUE LIMITED RESPONDENT

Claimant in Person

M/S Ngonde for the Respondent

JUDGMENT

1. The Claimant was employed by the Respondent on 1st July 2007 as a secretary and worked continuously until the 21st August 2012 when her contract of service was terminated by a letter of termination of the same date.
2. At the time of termination she earned a gross salary of Kshs. 30,000/=. She doubled up as a secretary and office administrator. Her revised contract of service is dated 1st December 2010. Her specific duties are spelt out in the addendum to the contract.
3. During the hearing of the case, the Claimant was paid terminal benefits in the sum of Kshs.103,401.90 calculated as follows;
 1. salary for August 2012 in the sum of Kshs.30,000/=;
 2. severance pay for 6 years Kshs.90,000/=;
 3. payment in lieu of 2 months notice Kshs.60,000/=
 4. payment in lieu of Leave for the period 2008 to 2012 in the sum of Kshs.87,619/=
4. Total Kshs.267,619/= less PAYE Kshs.75,379.10 and tax Relief (Kshs.1,162.00) and less staff loan of Kshs.190,000/=).

Net paid Kshs.103,401.90.

Therefore the pending issues are as follows:

1. whether the Claimant served for eight years as she alleges or six years as contended by the Respondent; this would impact the calculation of service gratuity and payment in lieu of Leave;
2. whether or not the Claimant was entitled to house allowance at 15% of the Kshs.30,000/= monthly salary;
3. whether or not the termination was unlawful and unfair and therefore entitling the Claimant to compensation;
4. certificate of service.

When did the Claimant start working

5. The Claimant in her Statement of Claim and before Court alleges that she was employed on 4th April 2004 and worked until 21st August 2011. This is a period of 7 years and 4 months. She however produced the last contract of employment which commenced 1st December 2010.

6. The Respondent on the other hand states the company was registered on 18th May 2007 and attached a certificate to that effect and therefore the Claimant could not have worked for the Respondent prior to its incorporation.

7. **Mr. Joseph Mcharo**, the Director told the Court that the Claimant was the employee of the Respondent from inception in May 2007 but she was offered a contract from June 2007. She was initially an employee of Rakman Service Limited where the witness was a Director with two partners. This company was incorporated in 2004. The witness joined the Rakman Services Limited when the Claimant was already working there and so was unsure when she had joined it.

Since Rakman Services Limited has not been sued, it is clear that this dispute is between the Claimant and the Respondent NOBLE BLUE LIMITED. The claim cannot therefore predate, the incorporation of the Respondent and therefore any claims beyond May 2007 are incompetent and stand dismissed.

The implications are that the Claimant was employed by the Respondent for a period of six (6) years and not 8 years as alleged.

Gratuity

8. The Claimant was registered with the National Social Security Fund (NSSF) and in terms of **Section 35(6)(d)** of the **Employment Act, 2007**, she may be paid service gratuity in terms of agreement between the parties.

The Respondent has already paid her Kshs.90,000/= gratuity and is unwilling to pay more.

The Claimant is therefore not entitled to any further payment of gratuity since her contract of service does not provide for the same.

Leave Pay

9. With respect to payment in lieu of Leave days not taken, the Respondent computed outstanding Leave days between May 2007 and August 2012.

10. According to the Respondent the Claimant was entitled to 16 days for the year 2007, 16 days for the year 2008; 15 days for 2009, 15 days for 2010; 13 days for 2011 and 12 days for the year 2012. The Respondent therefore paid her a sum of Kshs.87,619/= in lieu of Leave. The Respondent produced Leave Application forms duly approved as follows:

on 25th November 2008 she was granted 2 months paid maternity leave;

on 31st March 2009, ½ day; 19th April 2010, 1 day, 6th March 2012, 2 days;

a leave form dated 24th May, 2011 for 3 days 1 is not approved;

one for 7th August 2012 for 2 days is approved. 7th January 2012, 2 days is approved.

Accordingly, only 7^{1/2} Leave days have been shown to have been duly granted by the Respondent.

11. In terms of the letter of appointment, the Claimant was entitled to 21 days annual leave per year and therefore a total of (21 x 6) 126 in the six years of service, less the 7^{1/2} days proven to have been granted. Total Leave days payable is therefore 118 ¹/₂ days.

The Court therefore awards Kshs.118,500/= less the Kshs.87,000/= already paid. Balance payable in lieu of leave days is Kshs.31,500/=.

Compensation

12. The Claimant had a very good work record according to herself and Mr. Joseph Mcharo, the Managing Director of the Respondent. She had served the Respondent company from its date of incorporation and was trusted with administrative responsibilities though initially was employed as a secretary.

In the words of the Respondent, the Claimant was literally in charge of the company operations. These responsibilities increased from April 2012, when the Managing Director was absent regularly due to the illness of his father in law.

Upon his return from the burial of his father in law he was disappointed in the manner the procurement and purchases were being handled in his absence.

He was particularly unhappy with one purchase of tiles which were procured and delivered at a construction site. That the order made was in excess of the required tiles but the remaining tiles were not returned to the office upon completion of works. The Claimant explained that she did not issue this particular order. The L.P.O. was signed by one **Gibson Mwakisha**, an interior designer and the tiles were delivered directly to the site. She said that she was not involved at all in the matter as there was a contractor responsible at the site.

13. The Respondent said that he had fully trusted her over a long time and had no reason to doubt her integrity but he was not comfortable with retaining her any longer as he was unsure the role she had played in the disappearance of the tiles and certain receipting of cash collected. He said that she was his trusted assistant and regretted the necessary decision he had taken to terminate her employment.

14. The Claimant pleaded her innocence and felt completely betrayed by an employer she had trusted and served so well, especially in the period when he was away from office while bereaved.

The termination was on 21st August 2012 and had first sent her on Leave on 13/8/2012 pending taking of the decision. The witness told the Court that he had considered reporting the over procurement of 31 boxes of tiles to the police but thought otherwise. He also blamed her for late coming and release of confidential information which allegations were denied by the Claimant.

Determination

15. A careful analysis of the evidence before Court indicates that no tangible evidence was availed to the Court on the allegations made against the Claimant.

The Claimant appears to have had a very close relationship with the Managing Director to an extent that the relationship had become emotive.

16. The Managing Director was at pains to explain the real reason why he terminated her services and did not meet the threshold placed on the Respondent in terms of **Section 43(1) & (2)** as read with **Section 47(5)** of the **Employment Act**. The effect of this was that the Claimant succeeded to show on a balance of probability that the reason for her termination was not valid within the meaning of **Section 45(1)** and **2(a)** of the **Act**.

17. Furthermore, no disciplinary hearing was held before she was terminated. The Managing Director met her in an hotel and then terminated her services without any due process. Her appeal was not dealt with to review the unlawful and unfair decision emotionally made by Mr. Joseph Mcharo, Mbogho, the Managing Director.

18. Accordingly the Court finds that the Claimant suffered loss and damage as a result of the unlawful and unfair conduct by the Respondent and awards her ten (10) months salary being compensation for the unlawful and unfair dismissal.

In the final analysis the Court awards the Claimant;

- i. Kshs.31,500 being the balance payment in lieu of leave days not taken;
- ii. Kshs.300,000/= being compensation for the unlawful and unfair termination;

Total Award: Kshs.331,500/=.

- iii. interest on the award at Court rates from the date of this judgment to payment in full;
- iv. costs of the suit;
- v. certificate of service within 30 days from date of this judgment.

Dated and Delivered at Nairobi this 9th day of July, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE