



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 424 OF 2013

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

UNITED SPORTS CLUB TRUSTEESRESPONDENT

J U D G M E N T

The claimant union has brought this suit on behalf of Fridah Mutheu Mureithi hereinafter called (grievant) seeking employment benefits plus compensation for wrongful and unlawful termination of employment. The respondent did not file any defence after service of summons.

The suit was heard exparte on 16/6/2014 when the grievant testified as CW1.

CLAIMANT'S CASE

CW1 was employed by the respondent on 1/9/2009 as Food and Beverage Manager (F&B manager) by an oral contract. Her salary was ksh.12300 plus house allowance of ksh.2700 although the Collective Bargaining Agreement (CBA) provided for Ksh.3700 house allowance.

CW1 contended that she used to start work at 7a.m. and end at midnight. She did not have any off days or rest day but worked throughout. On 30/11/2010 her services were terminated without any benefits on the ground of poor performance. According to CW1, that ground for termination was false and not valid because she had not been served with any prior warning letter. She further defended her performance by maintaining that when she was recruited she found the respondent's kitchen sales at ksh.500,000 per month of which she was able to increase to ksh.800,000 per month within 3 months period.

After dismissal the matter was reported to the union and labour officer. The respondent admitted employment relationship with the CW1 and deposited Ksh.26628 at the labour office as the accrued employment benefits for the CW1. According to the CW1, the labour officer conciliated the dispute and made a report recommending that CW1 be paid public holidays and off days worked, accrued leave days plus compensation for unfair termination.

CW1 prayed for leave and leave travelling allowance as per the CBA. She also prayed for overtime of 6 hours per day for 14 months served. She further prayed for compensation for unfair termination which according to her was occasioned by her demand for offs and rest days. The total claim according

to the pleadings is ksh.740,043.90.

After the hearing, the claimant filed written submissions.

ANALYSIS AND DETERMINATION

The issues arising from the pleadings, evidence and the written submissions are:-

- 1. Whether the termination of the grievant employment was unfair.**
- 2. Whether the relief sought ought to issue.**

Unfair termination

Termination of employment is rendered unfair under Section 45 of the employment Act if the employer fails to prove that the reason for the termination is valid, and fair and that the procedure followed in reaching the decision to terminate was fair. In the present case, the reason for termination was unsatisfactory performance of work according to the termination letter dated 2/11/2010. The termination was by one month notice effective from 1/12/2010. The court finds that the respondent did not discharge the burden of proving the validity of the reason for the termination being, poor performance of work since no defence or evidence was tendered.

In addition, the respondent did not prove that she complied with Section 41 of the Employment Act before terminating the grievant's services. The said provisions requires in mandatory terms that before dismissing an employee for poor performance, the employer shall first accord the employee a fair hearing in the presence of a fellow employee of his choice. That was not done in this case as the grievant was only given a termination letter without any prior hearing or performance appraisal based on agreed achievable targets.

Consequently, the court agrees with the CW1's uncontested evidence that the termination of the grievant's employment on ground of poor performance was unfair within the meaning of Section 45 of the Employment Act as read with Section 41 of the said Act.

Reliefs

The prayer for salary for November 2010 is granted being Ksh.12399+3700 = Ksh.16000. CW1 will also get one month salary in lieu of notice because she as given one month notice instead of two months as per the CBA. She will also get ksh.1000 being underpayment of house allowance for the period between 1st January 2010 when the CBA became effective and 30th November 2010 when CW1 was discharged that total underpayment total to ksh.11000.

The prayer for 11 holidays worked is granted at Ksh.6,769.00 because the court presumes that the claimant was paid for the said holidays at normal working days rate. The claim grievant is also awarded one months and 5 days pay in lieu of accrued leave which works to ksh.18,666.70. The claimant is also awarded ksh.3600 as prayed for leave travelling allowance. The prayer for off/rest days is awarded being 4 days per month for 14 months at ksh.34,461.50. The court presumes that she had been paid for the working on the rest days at the normal rate as such she should not claim double pay.

The claim for severance pay is dismissed because the termination was not through redundancy. The prayer for overtime is dismissed for lack of evidence. The grievant will however get 6 months gross salary for unfair termination being ksh.96,000. In the court's view 6 months was reasonable time for the claimant to secure an alternative job.

DISPOSITION

For all the reasons stated above, judgment is entered for the claimant on behalf of the grievant for ksh.202,497.20 plus costs and interest.

Dated, Signed and delivered this 29th August 2014.

O. N. Makau

Judge