



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 205 OF 2014

DIANA AMAYI.....CLAIMANT

VERSUS

PRIDE-INN HOTELS & CONFERENCING.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant brought this suit against the respondent seeking to recover ksh.390,828 being arrears in commission and salary plus compensation for leave days outstanding as at July 2013 when her employment was terminated.

2. The particulars of the claim included:

- a. Commission for February 201388,834
- b. commission for April 2013121,409
- c. commission for may 2013.....152,586
- d. salary for 11 days worked in July 2013 14,666
- e. 10 days pro rata leave for year 201313,333

390,828

3. The respondent denied liability to pay the aforesaid sum to the claimant. She contended that claimant worked for only 8 days in July 2013 when their contract ended. According to the respondent, the claimant did not complete one year after confirmation of her appointment and as such she did not earn any leave.

4. On the other hand the respondent averred that her business at Sai-Rock Hotel where the claimant was stationed was closed down following a court order prompting her to transfer the claimant along with other workers to Pride inn Nyalii on 8/7/2013 branch but the claimant refused the transfer. The respondent has consequently counter claimed for ksh.40,000 being salary in lieu of notice against the claimant for terminating the employment contract without serving one month notice.

5. The suit was disposed of by way of written submissions from the two parties of which the court has carefully considered alongside the pleadings and documentary evidence filed.

ANALYSIS AND DETERMINATION

6. There is no dispute that the claimant was employed by the respondent starting 2/7/2012 as per the appointment letter dated 2/7/2012. It is also not disputed that the respondents operations at Said Rock Hotel were halted by the court forcing her to transfer the claimant among other workers to Pride Inn Nyali branch by letter dated 8/7/2013. It is also not in dispute that the claimant raised concerns about her terms for the transfer which did not go down well with the respondents who dealt with the situation by again transferring the claimant to Pride Inn Nairobi branch by letter dated 10/7/2013. The transfer was to take effect from 12/7/2013 at 8a.m. It is also not in dispute that the terms of employment were to remain the same for the claimant in her new station in Nairobi. Lastly it is not in dispute also that the claimant protested the short notice for the intercity transfer and equal pay considering that cost of living in Nairobi was high.

7. The issues for determination are:

- a. **whether the claimant terminated her employment without notice to the respondent.**
- b. **Whether the reliefs sought by both parties ought to issue.**

Termination of the Contract

8. There is no dispute that the parties herein were enjoying cordial relationship until the court proceedings were instituted against the respondent by a third party prompting the respondent to transfer all her staff to other branches.

9. When the workers including the claimant raised concerns about their abrupt transfers, the respondent transferred the claimant further to Nairobi without change of terms of employment. The time given to the claimant to relocate to Nairobi was one day!

10. That was not fair in this court's view. It was a case of victimization for leading other workers in raising their concerns about abrupt transfers. The reason for the foregoing view is derived from the following excerpts from two letters by the respondent to the claimant dated 10/7/2013:

...” following your action of being a representative of the staff that refused transfer at the Labour office on 9/7/2013 during the case hearing and your consequence declaration to take issue to court, the management hereby request you to give a written explanation of change of mind to report to work as per the first letter...”

“...Pride Inn Hotels and Investments Limited, hereby acknowledge receiving your response to their letter dated 10/7/2013. The management would like to inform you that you are supposed to report to Nairobi Head Office in the same capacity as a marketer for pride Inn Hotels with effect from 12/7/2013 at 8am”.

11. The tune in the foregoing excerpts clearly explain the frustrations in which the respondent found herself in. On the one hand she had to comply with court orders while on the other hand she had to satisfy her staff needs

Her action of transferring the claimant from Mombasa to Nairobi within one day was however not justified. That notice for the transfer was impossible to comply with and rendered the contract impossible to perform.

12. The foregoing notwithstanding, the court finds that the cause of all the problems between the parties herein was the court proceedings which technically stopped the respondents operations at the station where the claimant was working. That coupled with the misunderstanding between the parties on the possibility of transfer to other branches of the respondents frustrated the performance of the contract by the two parties. It was therefore terminated by the disagreement of the two parties after the claimants work station was closed down by a court order initiated by a third party. Consequently, the court finds on a balance of probability that it was not the alone claimant who is to blame for the termination of the employment contract. The circumstances of this case is such that the only reasonable inference to draw

is that the contract was impossible to continue.

RELIEFS SOUGHT

13. The claimant was employed starting 2/7/2012. The allegation by the defence that her services started after confirmation of appointment on 1/1/2013 is dismissed for lack of any legal basis.

14. Consequently the court finds that the claimant had earned leave for one year being 21 days as per the appointment letter. She however claimed for 10 days leave and she is awarded ksh.13,333 as prayed.

15. As regards salary for days worked in July 2013, it is obvious from the transfer letter dated 10/7/2013 that her services had not been terminated on 8/7/2013 as claimed by the defence. In this court's view termination would only take effect on 12/7/2013 if she failed to report at her new station in Nairobi. The court therefore agrees with the claimant that she is entitled to salary for 11 days in July 2013 being ksh.14666 as prayed.

16. As regards the claim for arrears in sales commission, the claimant has submitted that the same has not been denied. The attention of the court has been drawn by the respondent's letter to the claimant's counsel dated 14/9/2013 in which the respondent forwarded the list of the customers (debtors) secured by the claimant for which commission was being claimed. The respondent did not dispute the claim but only asked the claimant to follow up the debtors for payment before she was paid her dues by the Managing Director Mombasa Region. The total debts for recovery was ksh.584,822 as at 13/9/2013 according to the records supplied by the respondent and filed in court by the claimant.

17. The court therefore finds that the claim for commission arrears of (Kshs. 88,834+121,409+152,586)=362,829 was not disproved by records by the defence. The employer is the custodian of employment records and has an obligation to produce them in court to disprove any verbal or other allegation by her employees.

18. In the present case, the respondent produced the records selectively. She produced only those which showed the debt not paid by some of the customers procured by the claimant and withheld all the records that concerns the claimant's outstanding commission. The court will therefore grant the claimant the prayer for the commission arrears of ksh.362,829.

19. Lastly in view of the earlier finding that the contract was terminated through frustration and not by the claimant's breach, the counter claim is dismissed for want of merits.

DISPOSITION

20. For the reasons stated above, judgment is entered for the claimant for ksh.390,828 plus costs and interest.

Orders accordingly.

Dated, Signed and delivered this 3rd October 2014

O. N. Makau

Judge