



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1554 of 2010

TABITHA MASEGE..... Claimant

VS.

MOBILE LINK (K) LIMITED.....Respondents

Mr. Mokaya for Claimant

Mr. Ali for Respondent

AWARD

The claimant filed her claim on 14th December, 2010 through a memorandum of claim dated 10th December, 2012.

She prays *inter alia* for:-

1. Unpaid salary for August and September 2010 totaling Ksh.57,944
2. One Month Salary in lieu of notice Kshs. 28,972;
3. Unpaid NSSF deductions of ksh.10,000;
4. Terminal Benefits including severance pay, prorated leave;
5. Compensations for wrongful termination and/or dismissal; and
6. Costs of the suit and any other relief, the court may deem fit.

In her memorandum of Claim, the Claimant states that, she was employed by the respondent on 1st December 2000 as a cashier with a basic salary of Kshs.15,000, NHIF and NSSF inclusive. The letter of appointment is attached to the memorandum of Claim as Annex 'A'. At the time the Respondent's name was Mobile ya Wananchi (K) LTD.

That she rose through the ranks to become the Branch Manager at Mombasa. On or about 28th September 2010, the Claimant's service was summarily terminated. She claims the termination was without any reason and/or justifiable cause.

Annex 'b' to the statement of claim is a notice to show cause dated 28th September 2010, which reads as follows;

“We have recorded some discrepancies in your branch’s capital and this company needs an explanation of the same.

Enclosed is a copy of our stock taking report which has formed the basis of our query of the discrepancies raised.

We need to remind you that as a Manager to the branch you have an explanation to give to the company which we demand within the next three (3) working days in response to our Queries for our further action.”

The letter is on the letter head of “*Mobile Link (K) Limited*“ the Respondent and is unsigned.

Also attached is an email message dated 27th September 2010 sent at 4.54 p.m. from a Director of the Respondent, Issa Ahmed to Logisitics instructing that the Claimant is no longer authorised to collect or transact any business on behalf of the Respondent. This mail terminated her services on behalf of the Respondent.

The Claimant wrote to the Managing Director of the Respondent company on 30th September, 2010 in response to the said letter, and it reads *“I have received the unsigned letter to me by an anonymous writer dated 28th September 2010. The issue mentioned in paragraph (2) two on the same refer to a copy of stock taking report which you are supposed to attach for me to respond to in writing but was not attached. Please send me the stock taking report to enable me respond accordingly.*

As you are aware I have been instructed not to go to the office and the office keys were taken from me by the accountant Nelly Odero on 28th September 2010 at 17:30 hours.

To date I have not been paid my salary for August and September 2010, without any explanation.

I trust that my salary is my natural and my legal right as I have dutifully and honestly worked for it, your demand for any kind of explanations notwithstanding there in.

I hope to receive your response on the matter brought”.

The letter is signed by the Claimant and copied to the Supervisor Mombasa. It is annex ‘c’ to the memorandum of Claim.

As no response was forth coming, she wrote a reminder to the Managing Director on 6th October 2010 and indicated that she will take recourse to other means of dealing with the issue within 7 days if no response was forth coming. The reminder is also part of annex ‘c’ to the memorandum of Claim.

She has also attached to her claim a statement of National Social Security Fund member Number 632910814 which shows she was employed on 1st December, 2000. The statement indicates that the monthly contributions were Kshs.400 from the year 2005 to July 2010. In 2001, the contribution was Kshs.160 per month but contributions made were only for January to April. From May 2001 up to August 2004, no contributions are reflected in the statement.

Similarly no contribution was made for the months of August and September 2010.

By a letter dated 12th November, 2010 Messrs Ndemo Mokaya & Co. Advocates made a demand on behalf of the Claimant for payment of her terminal dues, failing which she would go to court.

On 18th November, 2010 the Respondent replied to the demand note as follows;

“In response to your letter Ref. RMN/048/2010 dated November 12th 2010 we hereby bring to your

attention the following facts;

1. That your client worked for us as a manager at the Mombasa branch.
2. That we recorded some discrepancies in the branch capital upon conducting a stock take from July 2010 to August 2010.
3. That the Manager was furnished with a letter dated September 28th 2010 requiring her to explain the discrepancies and to date no letter explaining the same has been received by us.

In regard to this, we hope that the manager will make good her liability as soon as possible”.

This is the last correspondence on the matter before it came to court.

The Respondent filed its reply to the claim on 20th January, 2011. The response maybe summarised as follows;

The respondent was incorporated on 19th January 2006, as per the Certificate of registration attached as annex ‘MKI’ to the response and that it employed the Claimant in January 2007. It has attached as Annex ‘2’ a breakdown of the salary of the claimant from January 2007 upto August 2010. It therefore denies it could have employed the Claimant in 2001 before its existence.

It therefore states the employment in 2001 was by a different legal entity, Wananchi (K) Limited whose Directors are different from the Respondents.

The Respondent adds that the Claimant’s Gross Salary at the time of dismissal had been reviewed to Kshs.22,000 on performance.

It asserts that at the time of dismissal, the Claimant while a Branch Manager Mombasa had failed to account for Kshs.441,510.50 which was part of the capital she was entrusted with as at 21st November 2009.

They have attached an acknowledgement dated 26th November, 2006 marked ‘MKB’ by the Claimant of the capital she was in charge of as at 21st November, 2009 in the sum of Kenya shillings One million, Four Hundred and Twenty One Thousand, Four hundred and Twenty Five (Kshs.1,421,425).

They have also annexed ‘M14’ a copy of a stock take report as at August 2010 showing the capital and the variance of Ksh.441,510.50 is shown therein and the Respondent states that the claimant has not accounted for the same to date and that the matter was reported to the police in Mombasa as ‘OB14’ of 29th September, 2010 marked ‘M15’. Respondent insists that the claimant was served with a copy of the audit report as is confirmed by Respondent’s letter to her advocate dated 18th November, 2010 marked ‘M16’.

It also asserts that all NSSF dues are paid to date and has attached statements showing Global contribution for the employees of the Respondent. In January 2007 to August 2010 but the documents do not explain the gaps between – 2001 to 2004 and between August and September 2010. The Respondent has filed a another claim for Ksh.441,510.50 being capital put under the charge of the Claimant as the Branch Manager Mombasa which she has failed refused and/or ignored to account for, or pay. The Claimant denied such liability.

The parties on 11th December, 2012 filed a statement of agreed issues dated 10th December, 2012 as follows;

1. Whether the Claimant was employed by the Respondent in 2001

2. Whether the services of the Claimant were unilaterally terminated.
3. Whether notice of intention to sue was ever issued.
4. Whether the Claimant is entitled to the unpaid salary for August and September 2010 totaling to Kshs. 57,944.
5. Whether the Claimant is entitled to 1 month salary in lieu of notice.
6. Whether the Claimant is entitled to unpaid NSSF deductions .
7. Whether the Claimant is entitled to full benefits, severance pay, prorata leave and compensation for wrongful termination.
8. Whether there is any other suit pending in court between the parties herein.
9. Whether this court has the jurisdiction to hear and determine the matter.
10. What reliefs the Claimant is entitled to.
11. Who pays the costs of this suit.

1. Whether the claimant was employed by the Respondent in 2001.

The Claimant has submitted a letter of appointment dated 1st December 2000 as a cashier and asserts that she continually worked for the Respondent until 28th September 2010. That she rose through the ranks during the period to become a Manager. The Respondent has denied this claim stating that the Claimant was employed by the Respondent on 1st January 2007. The Respondent has produced no letter of appointment of the Claimant on this date but alleges that the Claimant was employed in 2001 by a different entity without offering any explanation as to how she transited to the Respondent Company if at all.

On the other hand the Claimant has attached a statement from the National Social Security Fund which is titled "*provisional member statement of Account*", which indicates the following;

The Claimant registered on 26th April 2001, as member number 632900814 and her Employer was Mobile Link (K) Limited registered as No. 00666556. This statement was printed on 30th August, 2010 and shows the Claimant's monthly contributions from January 2001. The Print also indicates that the Claimant was employed on 1st December 2000.

The Respondent did not directly respond to this document which clearly contradicts its evidence on the employment date of the Claimant, the name of the employer and the status of NSSF contributions between January 2001 to July 2010. This document is also consistent with the evidence by the claimant that she was not paid a salary for the months of August and September 2010. Indeed the last contribution by the Respondent on her behalf was July 2010.

The Court has no hesitation to uphold the evidence by the claimant that she was employed by the Respondent on 1st December 2000 but was 1st registered with NSSF on 26th April, 2001. That the Respondent is liable to pay the unpaid NSSF deductions remitted as the gaps are clearly shown in the aforesaid statement which is uncontroverted. In this respect we have disposed of with issue Nos. 1 and 6 accordingly.

It is also clear that the Claimant through M/S Ndemo Mokaya & Co. Advocates issued a letter of demand dated 12th November, 2010. Indeed as early as 30th September, 2010 the claimant herself had written a letter demanding her salary for the months of August and September 2010.

No satisfactory reports have been made by the Respondent with regard to the claim for the two months' salary. The Court therefore finds that the Claimant timely made a letter of demand for her rights to be vindicated in this regard and also finds that, the Respondent is liable to pay her salary for August and September.

We are unable to tell how much bonus she was entitled to for the two months of August and September 2010.

However, going by the figures presented by the Respondent in its Annex '2', it is clear that claimant in the period January 2010 to August 2010 earned a gross salary of between Kshs.36,913 to Kshs.22,000. It is incumbent on the Respondent to provide the exact figure the Claimant was entitled to in the two months. She has indicated that she was entitled to Kshs.28,972 (including bonus for the two months).

We accordingly find that she is entitled to Kshs. 57,944 being gross January (including bonus) for the months of August and September 2010. Issues Nos. 3 and 4 are accordingly disposed of with.

2. Whether the services of the Claimant were unlawfully and unfairly terminated by the Respondent

The Court reframes issue No. 2 as above and make findings of facts as follows;

That certain allegations with regard to capital discrepancies were made against the claimant by unknown person through unsigned letter dated 28th September 2010. That on 27th September 2001 at 4.54 p.m. her services had been terminated by Issa Ahmed Director, by an email instructing that "*she is no longer authorized to collect stock or transact business on behalf of the Respondent*".

In her response to the unsigned letter of 28/9/ 2010 She indicated that she was stopped from getting to her office and office keys were taken from her by her subordinate, Nelly Odera on 28th September 2010 at 17:30 hours. This notwithstanding, she had been given 3 days in the unsigned letter to make an explanation of the discrepancies.

It is a fact therefore, the Claimant's service was terminated without any due process in terms of Section 41 of the Employment Act, 2007 which provides;

"(1) Subject to section 42 (1), an employer shall before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation".

Section 41 (2) on the other hand adds;

"Notwithstanding any other provision of this part, an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

Only an employee under probation is exempt from the provisions of Section 41.

The Claimant had served the Respondent since 1st December 2000 as the NSSF records clearly show and had served continuously until the date of termination on 28th September, 2010 a period of about 10 years.

There is no evidence of misconduct or poor work performance given by the respondent prior to the one incident which led to the summary termination of her services.

Other than an indication of her financial portfolio as the over-all Manager of the Mombasa Branch of the Respondent there is whatsoever no evidence adduced by the Respondent to prove the allegations made against the Claimant in a very casual manner .

No report of any sort of investigation on the matter was brought to the Court other than on OB report to the Police. No statements were requested by the police nor was any arrest and charge made in pursuit of the matter.

Indeed the request for documentation - via two letters dated 30th September 2010 and 6th October, 2010 by the Claimant to the Respondent to enable her answer the allegations went unanswered and the Respondent made no reference to the letters in its response and counter claim of Kshs.441,510.50 is completely unsupported by any sort of evidence whatsoever. No oral or documentary evidence was adduced on the matter. The court finds that not only were the allegations false but the counterclaim itself is without any basis and is vexatious in nature. The same is dismissed accordingly. To this end, the court finds that the Claimant has discharged her onus in terms of Section 47(5) of the Employment Act to show that her employment was wrongfully and unfairly terminated.

To the extent that no attempt was made to justify the reason for the summary termination of the Claimant by the Respondent, the Court finds that the Respondent has failed to establish on a preponderance of evidence that it had a justifiable and valid reason to terminate the contract of employment of the claimant in terms of Section 43(1) and (2) as read with Section 45(1) and 45(2)(a) and (b)(i) of the Employment Act.

Furthermore, given the manner in which the summary termination was effected without any justification and/or due process, the court also finds that the termination was not done in accordance with a fair procedure. Therefore, the Respondent has not discharged its burden in terms of Section 47(5) of the Act.

Accordingly the termination of the employment contract of the claimant was substantively unlawful and procedurally unfair.

Remedies

The court has already found that the Claimant is entitled to;

- 1) unpaid salary for August and September, 2010 in the sum of Kshs.57,944; and
- 2) unpaid NSSF deductions in the sum of Kshs.10,000

Following the determination that the summary dismissal of the claimant was substantively unlawful and unprocedurally unfair, the court finds that the claimant is entitled to;

- 3) One month salary in lieu of notice in the sum of Kshs.28,972
- 4) With regard to the claim for compensation for unfair dismissal, the claimant had served for 10 years diligently, was treated in an inhumane and casual manner by the Respondent on spurious grounds which, the Respondent did not bother at all to justify.

The Claimant lost her means of support and prospects for the employment as a result of those damaging and unfounded allegations. The Court orders that the Respondent pays her eight (8) months gross salary at the rate of Kshs. 28,972 per month for the unlawful an unfair dismissal in the sum of Kshs.231,776.

5. The Claimant is also entitled to the costs of the suit

Total award to the Claimant is Kshs.299,720.00 accordingly.

Finally, the Respondent should provide the claimant with Certificate of Service from 1st December 2000

to 28th September, 2010 within 14 days from the date of this Judgment.

It is so ordered

Dated and Delivered in Nairobi this 9th day of May, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE – INDUSTRIAL COURT