



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 66 OF 2013
(Originally Nairobi Cause No. 1503 of 2012)

DIANA LIAKALA AMAYI

CLAIMANT

v

SUNRISE RESORT APARTMENTS & SPA

RESPONDENT

JUDGMENT

1. Diana Liakala Amayi (the Claimant) filed a Statement of Claim against Sunrise Resort Apartments & Spa on 29 August 2012 and the matter in dispute was stated as *unfair termination from duties of Diana Liakala Amayi by the Respondent*.
2. In the statement of Claim, the Claimant particularized her claims as unpaid salary from 1-22 May 2012 of Kshs 33,000/-, One month salary pay in lieu of Notice of Kshs 45,000/-, 4 days leave of Kshs 6000/-, leave allowance of Kshs 5000/-, entertainment allowance of Kshs 67,500/- and airtime for the month of May of Kshs 2500/-. The Claimant also sought a declaration that the termination was unconstitutional and mention was made of severance pay and other contractual benefits.
3. The Respondent filed a Reply to Claim on 2 October 2012 in which it was denied that the Claimant's termination was unfair and that the same was in accord with the law.
4. The Respondent further pleaded that it was ready and willing to pay the Claimant salary for 22 days worked in May 2012 of Kshs 33,000/-, pending days of Kshs 6000/-, One month salary in lieu of notice of Kshs 45,000/- and airtime allowance of Kshs 2500/- less any loans and statutory deductions.
5. On 24 October 2012, the Claimant filed a Reply to Defence in which she maintained that her termination was unfair and otherwise reiterated her claims.
6. The Cause was placed before Justice Abuodha in Nairobi on 1 November 2012, at which appearance the Claimant appeared in person while Mr. Wanyonyi appeared for the Respondent and the Judge directed that the file be transferred to Industrial Court, Mombasa for hearing and determination.
7. On 4 April 2013 the Cause was placed before me and the Claimant was absent while Ms. Mtekele appeared for the Respondent. Ms. Mtekele suggested that the Cause do proceed to hearing on 22 May 2013. I granted the request of Ms. Mtekele and set the hearing for 22 May 2013 and further directed the Deputy Registrar to notify the Claimant about the hearing date. The Deputy Registrar however duly notified both parties about the hearing date through her letter dated 8 April 2013.

8. On 22 May 2013, only the Claimant appeared when the matter was called out and having satisfied myself that the hearing date was fixed at the request of the Respondent directed that the hearing commence at noon.

Claimant's case and evidence

9. The Claimant gave sworn testimony. She testified that the Respondent approached her from her previous employer and offered her a contract as a Sales and Marketing Executive through letter dated 27 January 2011(Exh. 1). The contract was effective 7 February 2011 at a salary of Kshs 38,000/-, housing allowance of Kshs 7000/-, entertainment allowance of Kshs 7000/- per month, airtime allowance of Kshs 4000/- per month and duty meals.
10. On 22 June 2011 the Respondent through a letter of even date (Exh. 2) confirmed her and the entertainment allowance was increased by Kshs 500/- per month.
11. On 22 May 2012 the Claimant further testified that the Respondent's Human Resources Manager wrote to her a letter terminating her services with effect from the date of the letter (Exh. 3). The letter indicated that the termination was in accordance with clause 13 of her appointment letter.
12. On the same day, the Claimant wrote to the Respondent about her final dues and hoped the dues would be calculated based on the benefits set out in the appointment letter.
13. The Claimant also testified on the circumstances surrounding her termination. There was no notice and no reasons were given in the letter of termination.
14. According to the Claimant, a new Group General Manager was appointed by the Respondent in September 2011 and the new General Manager informed the Respondent's employees that allowances would no longer be paid. The Claimant was not ready to let go of the allowances. Attempts to address her concerns did not bear any fruit and even when another General Manager came on board in April 2012 no solution was forthcoming.
15. The Claimant's testimony was that between September 2011 and her termination on 22 May 2012 she was being paid only her basic salary of Kshs 38,000/- per month without the allowances.
16. To discharge this burden the Claimant testified that the termination was unfair because she was not given any notice nor did the termination letter set out any reasons. She further testified that she had not been given any previous warning letters and that the Respondent had refused to issue her with a Certificate of Service.
17. The Claimant did not agree with the computations of the Respondent as regards her final dues.

Respondent's case

18. Although the Respondent did not attend the hearing I will set out the case it pleaded. Because the Industrial Court (Procedure) Rules 2010 allow the Court to determine a case before it on the basis of pleadings, documents filed and submissions of parties without hearing them, if they agree, it is my humble view that in circumstances where a Respondent has filed pleadings and documents it seeks to rely on but does not appear for the hearing, the Court has a duty to consider the pleadings and documents.
19. The Respondent in the Reply to Claim already referred to, admitted that the Claimant was its employee with effect from 7 January 2011(the letter produced by the Claimant talks of 7 February 2011). Apart from the admission the Respondent pleaded that the termination was fair and in compliance with the law and that the entertainment allowance payable to the Claimant had been changed to reimbursable allowance from September 2011. The Respondent further set out the final dues it considered the Claimant was entitled to as set out in paragraph 4 above.

Issues for determination

20. Flowing from the foregoing, the issues which arise for determination are whether the termination of the Claimant was unfair and if so what would be the appropriate remedies.

Whether the termination was unfair

21. Section 41 of the Employment Act has set out the procedures an employer must demonstrate it

- complied with for a termination to pass the procedural fairness test. The section has caused a radical transformation in the employment relationship by incorporating what has been known for long as natural justice or the right to a fair hearing in public/administrative law. Natural justice or right to a hearing or procedural fairness was never part of the common law on employment contracts. It has now been incorporated into employment contracts through statute.
22. It is also incumbent upon an employer to prove the reasons for termination as required by section 43 of the Employment Act and further prove that the reasons are valid and fair as expected by section 45 of the same Act.
23. Section 47(5) of the Employment Act on the other hand places a burden upon an employee who complains of unfair termination or wrongful dismissal to prove that the unfair termination or wrongful dismissal has occurred while the employer is required to justify the grounds for the termination or dismissal.
24. In *Alphonse M Mwachanya v Operation 680 Ltd*, Mombasa Cause No. 146 of 2012, I had this to say about what an employer needs to show to demonstrate that it has complied with the requirements of section 41 of the Employment Act

In my considered view in order for an employer to meet the legal requirements of procedural fairness section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following:

- i. **Explained to the employee in a language the employee understood the reasons why it was considering the termination.**
- ii. **Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.**
- iii. **Heard and considered any explanations by the employee or his representative.**
- iv. **Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and complied with its own internal disciplinary rules.**

In the context of section 41 of the Employment Act, 2007 it is not enough for an employer to simply set out the reasons for termination or dismissal in the termination or dismissal letter. The letter of termination/dismissal's primary purpose when the whole parameters of sections 10, 12 and 41 of the Employment Act is considered is to convey the decision reached by an employer after holding a disciplinary hearing.

25. The Claimant has established that she was terminated by letter dated 22 May 2012. Further the unchallenged evidence of the Claimant is that no warning letters or notices were issued. No hearing was conducted nor was the Claimant given an opportunity to make representations before the decision to terminate her services was taken. The Respondent in the termination letter made reference to clause 13 of the appointment letter. Summary dismissal is also subject to the procedural fairness test set out by section 41(2) of the Employment Act. The termination was not in compliance with section 41(2) of the Employment Act on summary dismissals.
26. And because the Respondent did not even attempt to justify the termination as required by section 47(5) of the Act or show in its Reply to the Claim how and whether section 41 of the Act was complied with, I do not hesitate in finding that the termination of the Claimant was both procedurally and substantively unfair.
27. Apart from procedural fairness, the Employment Act has also burdened employers with the obligation to prove the reasons for termination and to prove that those reasons are valid and fair.
28. The Industrial Court (Procedure) Rules 2010 require that the parties file/set out evidence in their pleadings. The Respondent did not take advantage of the opportunity afforded it by the rules to give any inkling as to prove the reasons for the termination or that the reasons were valid or fair.

Appropriate relief

Unpaid salary 1 May 2012 to 22 May 2012

29. The Claimant under this particular head of Claim sought Kshs 33,000/-. The Respondent in the Reply to claim admitted it was ready to pay the same. The Claimant has established that she is entitled to this claim. Section 49(1)(b) of the Act in any case requires the employer to pay earned wages or a proportion thereof.

One month salary in lieu of Notice

30. I have found that the termination was unfair. The Claimant had sought Kshs 45,000/- under this head. The Claimant had offered Kshs 45,000/-. Sections 35(1) and 36 of the Act are explicit on payment of salary in lieu of notice. Clause 12 also makes provision for termination with one month notice or payment of one month salary in lieu of notice. The Claimant is entitled to one month salary in lieu of notice.

4 days leave

31. Both parties in the pleadings were in agreement that the Claimant was owed the equivalent of Kshs 6000/- being pending leave days. The Claimant is entitled to the same.

Leave allowance

32. Clause 5 of the Claimant's appointment letter provided that she was entitled to Kshs 5000/- as leave travelling allowance. The duty to keep and produce employment records is placed squarely upon an employer by sections 10 and 74 of the Employment Act. The Respondent did not annex or produce any documents regarding leave entitlements/payments to the Claimant. The Claimant is entitled to the claim for leave allowance as well.

Entertainment allowance

33. The Claimant testified the allowances were withdrawn with effect from September 2011. The Respondent admitted in the Reply to Claim that the allowances were withdrawn. Withdrawal of the allowance should not have been unilateral. It had to be agreed to mutually because it was part of the contract between the parties.

34. The entertainment allowance had been set at Kshs 7500/- at the material time. From September 2011 to May 2012 is 9 months. The Claimant is therefore entitled to Kshs 67,500/- as claimed.

Airtime for May 2012

35. The Claimant's letter of appointment indicated she was entitled to Kshs 4000/- per month as airtime. She is seeking pro-rated sum of Kshs 2500/-. She was terminated after serving for about three weeks. She merits this as well.

Compensation for unfair termination

36. I have found that the termination of the Claimant was unfair. The reliefs I have been discussing above are more like the entitlements of the Claimant.

37. Section 49 of the Employment Act has provided for the primary remedies in cases where the Court finds that termination of employment is unfair. These are reinstatement, re-engagement and payment of the equivalent of a number of months gross wages not exceeding twelve months.

38. The Claimant did not expressly ask for compensation. But in this respect I must emphasize that the compensation is a statutory remedy and the Claimant is a lay person with no legal knowledge, skills or training but nevertheless at paragraph 8 of the Statement of Claim she submitted that she was seeking adequate compensation.

39. Section 49(4) of the Employment Act has set out some 13 factors to be considered by the Court in awarding compensation. Not all the factors will be applicable in all cases. In the case under consideration the Claimant had been lured out of her previous employment but served the Respondent for a relatively short period of time. Considering all the factors and weighing and balancing the interest of justice and equity, it is my considered view that the equivalent of two months gross pay would meet the ends of justice in the instant case. The Claimant's gross monthly pay was Kshs 52,000/-. She is entitled under this head to Kshs 104,000/-.

Certificate of Service

40. Section 51 of the Employment Act is clear that an employee is entitled to be issued with a Certificate of Service. The nature or circumstances in which an employee and employer separate is not a material factor. The Respondent is obliged to issue a Certificate of Service to the Claimant.

Conclusion and Orders

41. In conclusion I do find, hold and declare that the termination of the Claimant was procedurally and substantively unfair and award her

a. Unpaid salary May 2012	Kshs 33,000/-
b. One month salary in lieu of Notice	Kshs 45,000/-
c. 4 days accrued leave	Kshs 6000/
d. Leave travelling allowance	Kshs 5000/-
e. Entertainment Allowance September 2011 to May 2012	Kshs 67,500/-
f. Airtime for May 2012(pro rata)	Kshs 2500/-
g. Two months compensation	Kshs 104,000/-
TOTAL	Kshs 263,000/-.

42. The Respondent to issue the Claimant with a Certificate of Service.

43. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 28th day of June 2013.

Justice Radido Stephen

Judge

Appearances

Diana Liakala Amayi
Claimant in person

Cootow & Associates on record for Respondent but
did not appear at the hearing