



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1914 OF 2013

RACHEL MUHONJA AGANI.....CLAIMANT

VERSUS

CREATIVE CLEANING SERVICES LTD.....RESPONDENT

JUDGMENT

1. After several false starts, this Cause was heard on 7 February 2019 when Rachel Muhonja Agani (Claimant) commenced her testimony. She concluded her testimony on 30 October 2019.
2. Creative Cleaning Services Ltd (Respondent) opted not to lead any evidence.
3. The Claimant filed her submissions on 14 November 2019 while the Respondent's submissions were not on file by 29 November 2019, the set timeline.
4. The Court has considered the pleadings, evidence and submissions on record.

Constructive dismissal

5. The Claimant was employed by the Respondent on 1 July 2001 as a general worker. On 12 March 2011, the Claimant resigned after she was reassigned to a new work station.
6. The Claimant asserted that she was forced to resign because she was not assured of her security and safety at the new work station which was far from her residence and also because the Respondent refused to offer her transport.
7. A party contending *constructive dismissal* is expected to demonstrate that the employer made the work environment hostile leaving no other option but to leave.
8. It was not disputed that the Respondent redeployed the Claimant to a new work station. An employer reserves the discretion to transfer or deploy an employee as the business dictates.
9. In this case, the Court can find no reason to conclude that the deployment of the Claimant to a new work station created a hostile work environment entitling her to leave and assert *constructive dismissal*.
10. There must have been other people working in the vicinity of the new workplace. The Claimant did not provide any evidence to show or corroborate her fears of insecurity in the new assignment. The Respondent was also not responsible for the choice of residence by the Claimant.
11. This was not a case of *constructive dismissal* and therefore compensation and pay in lieu of notice are not available as remedies.

Underpayment of wages

12. The Claimant's substantive cause of action was on underpayment of wages from 2001 to 2010.
13. The Court requested and gave the parties time in the course of hearing to attempt to settle the question of underpayment of wages.
14. The parties, it appears did not seriously attempt to negotiate a settlement.

15. The Claimant set out in great detail at paragraph 8 of the *Statement of Claim* the salaries she was earning throughout the employment period, the applicable *Regulation of Wages Orders* setting/prescribing the minimum salaries and the amount of underpayments.

16. The Respondent made no effort at all to interrogate the details of underpayments, and the Court finds that the Respondent underpaid the Claimant by the sum of Kshs 169,567/-.

Contributions to workers Saccho

17. The Claimant did not provide any evidence support the claim that the Respondent did not remit her contributions to her Saccho. Even the amount was not disclosed.

Transport allowance

18. The Claimant did not prove that she was entitled to transport allowance or the contractual or legal foundation to the head of the claim and it is declined.

Service pay

19. The Claimant sought the equivalent of 1-month salary for each year worked as *service pay* totalling Kshs 74,173/- but failed to lead evidence as to the foundation for the formula used.

20. This head of claim/relief was not proved.

Conclusion and Orders

21. The Court finds and declares that the Claimant was not constructively dismissed.

22. However, the Court finds that the Claimant was paid below the prescribed minimum wages and awards her

(a) Underpayment **Kshs 169,567/-**

23. Claimant to have costs and interests on judgment sum from 29 November 2013.

Delivered, dated and signed in Nairobi on this 6th day of December 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muturi instructed by Nelson Harun & Co. Advocates

For Respondent Ms. Wangari/Mr. Musyoka instructed by Migos-Ogamba & Co. Advocates

Court Assistant Lindsey