

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. 462 OF 2018

WINFRED MUNYIVA LUVAI
CLAIMANT

VERSUS

KENYA FUTURE LIMITED.....
.....RESPONDENT

JUDGMENT

Introduction

1. In a Statement of Claim dated 4th April, 2018 and filed on 5th April, 2018, the Claimant sued the Respondent alleging unfair and unlawful termination of employment. She seeks an order for payment of Kshs.446,583.58, comprising wages for days worked in January, 2018, one month notice pay, salary underpayment, 21.25 of leave days not taken, severance pay, and 12 months' salary compensation for unfair termination, costs and interests thereon.
2. The Respondent filed a Reply to the Statement of Claim dated 22nd May, 2018, and filed on 24th May, 2018, denying the Claimant's claim and contending that the Claimant was only an intern at their Company.

3. The Claimant's case was heard on 5th November, 2024, when she testified in support of her case, adopted her witness statement dated 4th April, 2018, and produced her list and bundle of documents of even date as exhibits and marked as Claimant's exhibits Number 1-6.
4. The Respondent did not call a witness despite several opportunities allowed by the court for it to substitute their witness, who it alleged had left their service.
5. Submissions were received from the Claimant and have been duly considered.

The Claimant's Case

6. The Claimant's case is that she was employed by the Respondent on or about 8th February 2016 as a Receptionist/Clerk at a salary of Kshs.10,000 per month without house allowance, which amount she earned until 31st May 2016. She avers that her salary was then increased to Kshs.15,000 per month still without house allowance from 1st June 2016 to 30th October 2016, and later to Kshs.17,000 per month from 1st November 2016 to 30th September 2017.
7. It is her case that from October 2017, her salary was increased to Kshs.19,000 per month, which is the amount she earned until 4th January 2018, when her employment was terminated.
8. The Claimant contends that instead of adjusting her wages in line with the applicable Legal Notices (No. 117 of 1st May

2015 and No. 112 of 1st May 2017), the Respondent unfairly terminated her employment on 4th January 2018. She avers that upon termination, the Respondent failed to settle her lawful dues, comprising salary for 4 days worked in January 2018, accumulated underpayments, outstanding leave balance of 21.5 days, severance pay equivalent to 15 days' pay for one completed year of service, one month's salary in lieu of notice, and 12 months' salary as compensation for unfair termination.

9. She further contends that throughout her employment, no house allowance was paid and that she believed that the Respondent was complying with the Regulation of Wages. She avers that, despite her requests for salary increments, the Respondent only provided assurances without timely or adequate adjustments.

10. The Claimant states that she was underpaid in two distinct periods. Firstly, she claims an underpayment of Kshs.2,403.26 per month for 6 months, totaling to Kshs.14,419.56, and a second one, from 1st May 2017 under Legal Notice No. 112, her lawful monthly pay, inclusive of 15% house allowance, should have been Kshs.22,895.86, but she was paid Kshs.17,000.00. She therefore claims an underpayment of Kshs.5,895.86 per month for 5 months, totaling Kshs.39,479.30.

11. The Claimant itemizes her claim against the Respondent as totaling Kshs.446,583.58, comprising: Kshs.3,522.44 for 4

days' salary worked in January 2018, Kshs.22,895.86 as one month's salary in lieu of notice, Kshs.115,215.78 for alleged underpayment of wages, Kshs.18,712.96 for accrued leave (21.25 days after deductions), Kshs.11,486.22 as severance pay for one year (15 days), Kshs.274,750.32 as compensation equivalent to 12 months' salary for unfair termination.

12.The Claimant states that upon reporting to work on 4th January, 2018, she was issued a letter terminating her services, together with a delivery book, and she was asked to sign for the letter, but she declined. She avers that she was not called to any meeting related to the termination nor paid any money.

13.On cross-examination, the Claimant told the court that she had not produced an employment letter/contract, but that she had produced a termination letter which shows that she was employed by the Respondent.

14.She confirmed that she holds a certificate in computers, which she has not produced in evidence. She avers that she was a receptionist. It is her position that she was paid in cash and that the Respondent did not issue pay slips. She further confirmed that employees of the Respondent took leave one person at a time and that each person could take only 3 days at a time.

15.It is her testimony that she was not denied to go on leave. She denied using her mobile phone while at work and that she was not issued any warning. The Claimant admitted that she did not know what severance pay was.

16.The Claimant prays that her claim be allowed.

The Respondent's Case

17.The Respondent denies the Claimant's assertions and maintains that she was not an employee but a trainee engaged to gain practical experience as a Receptionist/Clerk. It states that there was no written contract or appointment letter, and she was not placed on the payroll or issued with payslips.

18.The Respondent avers that the Claimant lacked prior training or completed schooling and was therefore given an opportunity to acquire skills. It avers that she was assigned tasks from time to time and paid a stipend, not a salary, and which was fully settled.

19.The Respondent avers that the stipend was paid progressively, being Kshs. 10,000 between Feb–March 2016, Kshs.15,500 between June and Dec 2016, Kshs. 17,000 from Nov 2016 to Sept 2017, and finally Kshs.19,000 between Oct 2017 and Jan 2018.

20.The Respondent further states that in 2017, the Claimant began neglecting her duties, misusing office resources, including internet use for personal purposes, and failing to

take her training seriously, and that she was warned via emails dated 6th and 9th December 2017, but her conduct did not improve. The Respondent avers further that the Claimant displayed unprofessional behaviour toward clients, resulting in complaints and loss of business, and failed to submit required training reports.

21. The Respondent states that the Claimant was not terminated, but that she exited from the training program due to poor performance, misconduct, and failure to adapt to the work environment.

22. The Respondent prays that the claim be dismissed with costs.

Analysis and Determination

23. Having considered the pleadings, evidence on record, and the Claimant's oral testimony and her submissions, the court identifies the following issues for determination: -

- i. Whether the Claimant was an employee of the Respondent or a trainee/intern
- ii. Whether the termination of her services was unfair and unlawful
- iii. Whether she is entitled to the reliefs sought

Whether the Claimant was an employee of the Respondent or a trainee/intern

24. The Claimant's case is that she was employed by the Respondent on or about 8th February 2016 as a Receptionist/Clerk. On its part, the Respondent contends that

the Claimant was merely a trainee and not a substantive employee. Section 2 of the Employment Act, 2007 defines an employee thus: -

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner.”

25. In ***Everret Aviation Limited V Kenya Revenue Authority (Through The Commissioner of Domestic Taxes) [2013] KEHC 6352 (KLR)***, the Court emphasized that the true nature of a relationship is determined by the degree of control, integration, and economic dependence, and not the title given by the parties. The court emphasized that the law looks beyond labels and examines the substance of the relationship.

26. Similarly, in ***Ready-Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance, 1968 2 QB***, the Court set out key elements of employment to include mutuality of obligation, control by the employer, and payment of remuneration.

27. In the present case, the Claimant worked continuously from February 2016 to January 2018, where she was assigned duties, such as attending to clients and manning the Respondent’s reception area. It is also not denied that she was paid a fixed monthly amount, though termed a stipend, and she no doubt worked under the Respondent’s supervision.

28. Further, under Section 9 of the Employment Act, 2007, failure to issue a written contract to an employee does not negate the existence of an employment relationship; instead, it places the burden on the employer to prove that the employer-employee relationship did not exist.

29. In ***Nairobi Water & Sewerage Company Limited v Benson Maina Mwangi***, the Court held that where an employer fails to produce employment records, the employee's assertions may be presumed true.

30. The Claimant's case is further strengthened by the fact that the Respondent failed to call any witness to substantiate its claim of internship.

31. In the upshot, I find and hold that the Claimant was an employee of the Respondent.

Whether the termination of her services was unfair and unlawful

32. The Claimant contends that she was terminated from the service of the Respondent on 4th January 2018 without a hearing. The Respondent denies terminating the Claimant, but did not tender evidence or call a witness to support their position.

33. For a termination of employment to be considered fair and lawful, the employer must show that it complied with the requirements of Sections 41, 43, and 47 (5) of the

Employment Act, 2007, on both substantive and procedural fairness of the termination.

34. Section 47(5) of the Employment Act specifically requires that once an employee alleges unfair termination, the burden shifts to the employer to justify the termination.

35. The Court of Appeal in ***Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR*** held thus on substantive justification: -

“..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”

36. The Claimant has placed before this court a termination letter issued to her by the Respondent and authored by one Naveed Sheikh, which states that the termination of the Claimant's employment was immediate. Various reasons are listed in the said letter to justify the termination, including poor performance, internet abuse, and malice, amongst others.

37. In ***Nyeri Civil Appeal No. 79 of 2016, Kenya Power and Lighting Company Limited vs. Aggrey Lukorito Wasike***, the court, while underscoring the proviso of Section 43, held that: -

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair...”

38.The Respondent has not on its part led any evidence to demonstrate that the Claimant was notified of the reasons for which her termination was being considered, nor have the grounds listed herein been proved to be fair, valid, and justified.

39.I therefore have no difficulty finding the Claimant’s termination substantively unfair, and so I hold.

40.On procedure, the Respondent, not having produced any witness, has not shown that the Claimant was notified of the charges against her, asked to respond, and allowed an opportunity to make a representation in her defense prior to issuance of the letter terminating her services.

41.In ***Mary Mutanu Mwendwa v Ayuda [2013] eKLR***, the Court held that the Employment Act has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated, and is entitled to have a representative present.

42.Further, in ***Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013]***

eKLR, the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

43. In whole, I find the Claimant's termination both procedurally and substantively unfair and unlawful.

Whether the Claimant is entitled to the Reliefs

Underpayments & House Allowance

44. The Claimant relied on Legal Notices prescribing minimum wages and house allowance. In ***Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] KECA 58 (KLR)***, the Court of Appeal affirmed that statutory provisions are binding.

45. Further, Section 31 of the Employment Act mandates the provision of housing or the payment of a house allowance.

46. In the premise, I hold that the Claimant is entitled to payment of the salary underpayments and house allowances per the Regulation of Wages Orders.

47. The amounts are thus awarded as claimed.

Salary for Days Worked

48. This claim was uncontroverted, hence the claim for 4 days worked is allowed.

Leave Pay

49. The Claimant admitted she was granted leave periodically. However, she claims a balance of unutilized leave days, which claim is not controverted.

50. Under Section 74 of the Employment Act, the employer is required to keep leave records, and failure to produce them works against the employer.

51. I find the claim for leave balance payable as claimed.

Severance Pay

52. Severance pay is only payable in cases of redundancy under Section 40 of the Employment Act. The Claimant confirmed that she was not declared redundant.

53. The claim for severance pay therefore fails.

Notice Pay

54. Under Section 35 of the Employment Act, notice or pay in lieu is mandatory. Nothing shows that the Claimant was issued notice or paid in lieu of notice prior to her termination.

55. The statutory one month's salary in lieu of notice is therefore payable.

Compensation for Unfair Termination

56. Under Section 49(1)(c), the Court is mandated to award up to 12 months' salary as compensation for unfair termination/wrongful dismissal.

57. Considering the Claimant's length of service, the lack of due process in the termination, and her partial contribution, I deem an award of 4 months' salary sufficient compensation for the unfair termination.

58. In the end, the Claimant's claim succeeds, and orders granted as follows: -

- a) A declaration that the termination of the Claimant's employment was unfair and unlawful.
- b) An order that the Respondent pay the Claimant:
 - i. 4 days' wages worked in January 2018 at Kshs.3,522.44
 - ii. One month's salary in Notice at Kshs.22,895.86
 - iii. Underpayments of salaries at Kshs.115,215.78
 - iv. Leave pay for 21.25 days at Kshs.18,712.96
 - v. 4 months' salary compensation Kshs.91,583.44
- c) The Respondent will also bear the costs of the suit.

59. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 30TH DAY OF APRIL, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Mwangi present for the Claimant

Mr. Musungu h/b for Ms. Majid for the Respondent

Ms. Esther S - C/A

ORIGINAL