



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 183 OF 2018**

**KENNEDY OCHIENG HONO .....CLAIMANT**

**VERSUS**

**ARYA SAMAJ KISUMU.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's case is contained in a Memorandum of Claim dated 25<sup>th</sup> January, 2018 and filed before court on 3<sup>rd</sup> May, 2018. The Claimant seeks payment of one month's salary in lieu of notice, salary underpayment, house allowance, leave allowance and 12 months' salary as compensation for unlawful termination.
2. The Respondent filed its response to the claim on 7<sup>th</sup> June, 2018, wholly denying the Claimant's claim. The Respondent asserted that the Claimant was never terminated, but instead, he deserted duty.
3. The Claimant responded to the Respondent's statement of response to his claim on 16<sup>th</sup> July, 2018. The matter was first set down for mention for directions on 18<sup>th</sup> October, 2018, when a hearing date was fixed. The hearing did not take off owing to a request by parties to try mediation.
4. The mediation process was unsuccessful and the mediator issued a certificate of non-compliance premised on the Respondent's failure to avail herself for the mediation and hence this judgment.
5. The Respondent did not participate in the matter thereafter in spite of service. The Claimant proceeded by formal proof, where he testified in support of his case.

**The Claimant's Case**

6. The Claimant's case is that he was employed by the Respondent in February, 2016 as a care taker/general labourer. He states that his salary was Kshs. 4,500 per month.
7. The Claimant's further case is that he was terminated from the service of the Respondent on 22<sup>nd</sup> September, 2017 without notice and without any justification.
8. The Claimant states that he was employed through a verbal agreement with the Respondent. He further states that he was underpaid throughout his service with the Respondent, as his salary fell below the minimum allowable under the Wage Regulations applicable at the time.
9. The Claimant states that he was not paid a house allowance nor allowed to take his leave or compensated in lieu of his leave days in his entire time with the Respondent.
10. It is the Claimant's case that he was not given notice nor taken through a disciplinary process prior to termination. He further states that the termination was triggered by his request for a salary increment.
11. The Claimant submitted that the Respondent's act of termination was arbitrary, unlawful, unjustified, illegal and a contravention of the labour rights enshrined in the law.
12. The Claimant prays that this court awards him the reliefs set out under his memorandum of claim.

## **Determination.**

13. I have considered the claim, the Claimant's oral testimony and the documents produced in support of the claim. The issues for determination in the matter are:

- a) Whether the Claimant was unfairly terminated
- b) Whether the Claimant deserves the remedies sought.

### **Whether the Claimant was unfairly terminated**

14. Determining a fair termination, is pegged solely on the dual issue of procedural fairness and substantive justification. The Claimant's case is that he was terminated upon requesting for a salary increment. He further stated that he was not taken through a disciplinary process nor given notice prior to termination.

15. The Respondent's statement of response only indicated that the Claimant deserted duty. There is no proof or mention of show cause or a letter terminating his service. The Respondent did not issue the Claimant with a letter of appointment, which would have helped the court deduce the kind of employment relationship that existed between the parties herein.

16. The Claimant's evidence indicates that he was being paid a monthly wage, which in itself is confirmation of an employment relationship.

17. The Respondent decided not to participate in the matter and hence leaving the court with only the Claimant's side of the story. There is no proof that the Claimant absconded duty as asserted by the Respondent.

18. To amount to a fair and lawful termination, the employer is bound to adhere to the tenets espoused in Sections 41, 43, 45 and 47(5) of the Employment Act. **(See Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR).**

19. In the absence of evidence to the contrary, the court finds and holds that the Claimant's termination was both procedurally and substantively unfair and unlawful.

### **Whether the Claimant deserves the remedies sought.**

20. The Claimant's prayer is for payment of a one-month salary in lieu of notice, salary underpayment, house allowance, leave allowance and 12 months' salary as compensation for unlawful termination.

#### **One month's Salary in Lieu of Notice.**

21. Notice prior to termination or payment in lieu thereof, is a statutory guarantee. Section 36 of the Employment Act demands that a party wishing to terminate an employment contract pays the other party, an amount equivalent to the period of notice they were entitled to receive. The Claimant's claim is for a one month's salary in lieu of the termination, which period is the statutory minimum.

22. The Respondent did not prove issuance of this notice and for this reason, the court finds the claim merited and the Claimant is awarded a one-month salary in lieu of notice.

#### **Salary Underpayment**

23. The Claimant's case is that he was paid a salary of Kshs. 4,500 monthly. This is demonstrated vide a payment voucher dated 3<sup>rd</sup> March, 2017 produced before this court.

24. The underpayment is premised on the amounts payable to general labourers under the Minimum Wage Regulation applicable between February, 2016 and September, 2017, being the period, the Claimant was in the service of the Respondent.

25. In the year 2016, the applicable regulation is the Regulation of Wages (General) (Amendment Order, 2015) which came into operation on 1<sup>st</sup> May, 2015. The amount payable to a general labourer per this Regulations was Kshs. 10,954.70. The Claimant's salary was Kshs. 4500/-. The under payment in the period between February, 2016 to 30<sup>th</sup> April, 2017 is Kshs. 90,365.80.

26. The amount payable to general labourers in the period between 1<sup>st</sup> May 2017 and September, 2017 when the Claimant was terminated, is that provided under the Regulation of Wages (General) (Amendment Order, 2017) that took effect from 1<sup>st</sup> May, 2017. The amount payable to general labourers under this Regulation was Kshs. 12,926.55. The Claimant was paid a monthly wage of Kshs. 4500 which is underpayment by Kshs.42,283/-.

27. In whole, the court finds that the Claimant was underpaid by Kshs. 132,648.80 and which he is hereby awarded.

#### **Leave allowance and House allowance**

28. The Employment Act requires that an employer either provides suitable shelter or pays a house allowance to their employees. Nothing shows that the Claimant was paid a house allowance during his service with the Respondent. The payment voucher produced by the Claimant gives a general figure without itemizing the payment. I find the claim merited and is allowed.

29. On leave allowance, only the employer would have proved whether or not the Claimant took his leave days through production of leave forms. This not having been done, leads the court to the conclusion that the Claimant did not utilize his leave days and is hereby awarded 31 days pay being leave for the unutilized leave 21 days in 2016 and 10 days in 2017.

### **Compensation for Unfair Termination**

30. The court has declared the termination of the Claimant unfair and unlawful. This per Section 49 of the Employment Act, 2007, entitles the Claimant to compensation.

31. In determining whether to make an award of compensation the court is to consider the 13 factors set out under section 49 (4) of the Employment Act. (**Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR**).

32. The Claimant having been a general labourer, would mean that he could easily find comparable employment. Bearing this in mind and considering that remedies are not aimed at facilitating the unjust enrichment of an aggrieved employee but to redress economic injuries in a proportionate way, I award the Claimant a three months' salary in compensation for unfair termination.

33. In conclusion, judgment is entered in favour of the Claimant as against the Respondent, in the following terms: -

- i. One Month's Salary in lieu of notice at Kshs. 12,926.55/=
- ii. Salary underpayment at Kshs. 132,648.80/=
- iii. House Allowance at Kshs. 32,722 (*15% of the monthly salary calculated at Kshs. 10,954.70 upto April, 2017 and Kshs. 12,926.55/=May to September, 2017*)
- iv. Leave Allowance at Kshs. 11,987/= (*31 days*)
- v. 3 Months' salary as compensation for unfair termination at Kshs. 38,870/=
- vi. Half the costs of the suit as the Respondent did not fully participate in the matter.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Odhiambo present for the Claimant

N/A for the Respondent

Ms. Christine Omollo- C/A