



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 46 OF 2019**

**KENYA UNION OF DOMESTIC,**

**HOTELS EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT**

**- VERSUS -**

**ST. BAKHITA GIRLS RESCUE HOME.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 01<sup>st</sup> April, 2022)

**JUDGMENT**

The claimant filed on 08.08.2019 the memorandum of claim on behalf of its member (grievant) one Joel Tipapa Nolpoor and filed through Hezron Onwongá, the respondent's Industrial Relations Officer. The claimant claimed against the respondent as follows:

- a) One-month salary in lieu of termination notice Kshs.17, 572.90.
- b) Underpayment of wages for May, 2018,  $13, 572 - 8,5072.00 = 5, 072.00 \times 12 =$  Kshs.60, 874.80.
- c) Annual leave for one year Kshs.17, 572.90.
- d) Service gratuity at 10% of the basic pay  $Kshs.17, 572.90 \times 10\% \times 1$  thus Kshs.1, 757.20.
- e) 12 month's salary compensation for unlawful termination  $17, 572.90 \times 12 =$  Kshs. 210, 874.80.
- f) Total claim Kshs.308, 652.60.

The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's termination of the grievant's employment was unlawful and illegal.
- b) Payment of Kshs. 308, 652.60 as claimed.
- c) Issue of certificate of service.
- d) Interest at court rates from the date of termination.
- e) Costs of the suit.

The claimant's case is that the respondent employed the grievant as a day security guard on 06.06.2018 at Kshs. 2,000.00 per month. The claimant worked up to 28.05.2018 when he was terminated without a valid reason. The grievant served for one year without any warning or adverse report against him. On 10.05.2019 the respondent issued a new letter of employment for same one-year tenure but omitting the gratuity in the earlier letter. The claimant alleged unfair termination in breach of sections 17, 18, 35, 36, 41, 43, 45, 46, and 49 of the Employment Act and section 48 of the Labour Institutions Act, 2007.

The respondent filed the memorandum of response on 27.11.2019 through Wanjiru Chege & Company Advocates. The respondent denied the claimant's allegations and claims and, prayed that the suit be dismissed with costs.

The grievant testified to support his case. The respondent's witness (RW) was Sister Mercy Shiundu, the respondent's manager. The claimant filed final submissions but the respondent failed to file as was directed by the Court. The Court has considered all the material on record and returns as follows.

**First**, the parties' shared evidence is that the respondent employed the grievant as a day security guard. The grievant confirmed that per payslips on record he was paid house allowance of Kshs. 4,000.00 per month; Medical allowance of Kshs.2, 500.00 per month; a gross salary of Kshs. 15, 000.00 per month; and his monthly net pay after due deductions was Kshs.13, 408.00. The grievant and RW also testified that the claimant was paid a further Kshs. 3,000.00 per month for the extra duties of milking the cows.

The further mutual evidence was that the grievant was initially employed by the letter dated 01.06.2008 for a term of one year. It provided for a gross salary of Kshs.12, 000.00. Clause 11 thereof provided for payment of gratuity calculated on the basic earnings calculated on the formula 10% of basic earning x 12-months x number of years worked. The letter was signed by the then respondent's manager Sister Annastacia but the grievant did not sign. RW arrived in December 2018 and discovered that the grievant had not signed the letter of employment. Thus, she reissued the letter dated 01.06.2018 running from the same 01.06.2018 to run for one year and the grievant and RW signed it as being done on 01.06.2018 as duly back dated. The letter omitted the clause on gratuity. RW testified that the initial letter of employment was valid only that it had not been signed by the grievant.

**Second**, the grievant testified that he had applied for renewal of the contract but which was declined. He then left employment on 31.05.2019 upon lapsing of the contract. The Court finds that the contract term lapsed and there was termination by effluxion of the contractual term. The claimant's alleged unfair termination is misguided. The prayer for declaration of unfair termination and compensation are declined. The Court further finds that the contract having been for a fixed tenure of one year, the claim for pay in lieu of termination notice is also declined. Clause 13 (b) specifically provided that the contract was terminable at the end of every contractual period without notice and if either party did not wish to renew. The Court finds that parties were bound accordingly.

**Third**, the Court finds that the claims for under payment and house allowance were unjustified. The evidence was that the grievant was paid house allowance and while pleading that he earned Kshs.9, 000.00 per month, the evidence was otherwise. The claimant did not also specifically plead the relevant minimum wage order applicable and how the computed was thereby arrived at. It is trite law that liquidated damages are specifically pleaded and strictly proved and the Court returns that the claimant has failed to do so and the claims and prayers in that regard will fail.

**Fourth**, RW testified that the initial letter of employment was valid. The same is awarded at  $10/100 \times 12, 000.00 \times 1$  making **Kshs.1, 200.00**. The claimant is entitled to a certificate of service per section 51 of the Employment Act, 2007. Looking at parties' margins of success, each party to bear own costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) Payment of **Kshs. 1, 200.00** by 02.05.2022 failing interest to run thereon at Court rates from the date of filing the suit until full payment.
- 2) The respondent to deliver the certificate of service by 02.05.2022.
- 3) Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01ST APRIL, 2022.**

**BYRAM ONGAYA**

**JUDGE**