



**Ouma v Dado (HON) (Cause 51 of 2018)**  
**[2022] KEELRC 13036 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13036 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**  
**CAUSE 51 OF 2018**  
**JW KELI, J**  
**OCTOBER 27, 2022**

**BETWEEN**

**ROSELINE ATIENO OUMA ..... CLAIMANT**

**AND**

**ASHA- HUSSEIN DADO (HON) ..... RESPONDENT**

**JUDGMENT**

**Issue: Wrongful Dismissal And Terminal Benefits**

1. The Claimant *vide* statement of Claim dated July 4, 2018 lodged in court on July 4, 2018 sought the following orders against the Respondents:-
  - a. That the dismissal of employment contract of the Claimant was unfair, unlawful ad illegal hence null and void.
  - b. That the Respondent pays the Claimant herein the matter sum of kshs 537,536.37 as tabulated in the statement of claim paragraph 13(1) to (6) above.
  - c. That the Respondents pay interest on the total amount at court rates.
  - d. That costs of this cause be provided by the respondents.
2. The Claimant together with the Memorandum of Claim filed verifying affidavit sworn on June 20, 2018, claimant's witness statement dated June 20, 2018, claimant's list of witnesses, claimant's list of documents and bundle of documents.
3. On the July 24, 2019 the law firm of Makokha Wattang'a & Luyali filed Notice of Appointment of even date to act for the respondents. The respondents are a couple and are sued jointly as the employer.



4. On the July 24, 2019 the respondents through Mr Makokha Advocate sought time to file defence. The claimant indicated she had served them on the July 4, 2018. The court granted the respondents 14 days leave to file statement of defence. No defence was filed.
5. On the October 5, 2021 the Respondent's Counsel Mr Makokha indicated that his clients had been unwell from COVID and requested for more time to file defence. The court while appreciating the grant of the leave previously nevertheless granted 14 more days to the Respondent to file their defence. Time was extended again on the February 16, 2022 and still no compliance when court fixed date of March 22, 2022 for fixing hearing date. The court on the March 22, 2022 fixed the suit for hearing.
6. On the September 20, 2022 the case proceeded on formal proof being undefended.

### **The Claimant's Case**

7. The Claimant's Case (undefended) was heard on the September 20, 2022. The claimant relied on the statement of claim filed in court on the July 4, 2018 and adopted her witness statement dated June 20, 2018 as her evidence. The Claimant produced documents under list of documents dated July 4, 2018 as her evidence.
8. In summary as per witness statement dated June 20, 2018 and filed on the July 4, 2018 is that she was employed by the respondents as house help on the November 15, 2011 earning kshs 10,000/- gross salary per month . That she worked from 7.30 am to 5.30pm without overtime. That she worked for 5 years with clean records from the date of employment to July 16, 2017. That there was no accommodation and was not paid housing allowance for the period of 5 years. That she paid house rent residence at Kawangware village (Nairobi County) from her monthly salary which place was far from employer's residence. That the Respondents underpaid her according to legal notices on minimum wage and did not assist when she asked for salary increment. That she did not take annual leave but when she wanted to go home the respondent granted her few days which was deducted from her salary. That she has been trying to approach the Respondents to settle the matter amicably in vain. That the court to assist and make orders for respondents to pay terminal dues as tabulated.
9. In the claim paragraph 11 the claimant states that she decided to go home and stay with her parents at Matayos village within Busia County.

### **Determination**

#### **Issues for determination**

10. This is a claim for unlawful termination. The issues for determination cover substantive fairness in terms of reasons for termination and procedural fairness. The Claimant did not identify the issues for determination. The court considered the following issues proper in determination of the dispute thus:-
  - a. Whether there was unfair termination
  - b. Whether the claimant is entitled to reliefs sought

#### **Whether there was unfair termination**

11. The law obliges one who claims to prove. The provisions of Section 107 and 108 of the [Evidence Act](#) reads:-  
Section 107



- i. “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

Section 108 states “ The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

12. In the instant claim one of the orders the claimant seeks states as follows:-‘that the dismissal of employment contract of the claimant was unfair , unlawful and illegal hence null and void and prays for 12 months compensation for damages and suffering.
13. This was undefended cause. The Claimant had burden of proof of existence of facts to proof unlawful dismissal from employment consistent with the provisions of Section 108 of the Evidence Act which states:- “ The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.
14. The Claimant did not lead any evidence on termination of her employment by the respondents. Paragraph 11 of the statement of claim reads: ‘ The claimant avers that she decided to come back home and stay with her parents premises at Matayos village within Busia county and upto date she (sic)still there with her parents being jobless”
15. Section 47(5) reads: ‘For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.” The Claimant had the burden to prove wrongful dismissal had occurred before the burden could have shifted to the employer to justify the dismissal. In the instant undefended cause, the court finds and determines that the claimant failed to prove occurrence of wrongful dismissal. The court finds that under paragraph 11 the claim, the claimant disclosed to the court that she decided to leave the employment and retreated to the village.
16. The court finds and determines that there was no dismissal of the claimant from employment by the respondents and further the claimant failed to discharge her burden under section 47)(5) of the Employment Act that there was wrongful dismissal. The court finds and determines there was no proof of wrongful dismissal or unfair termination of employment of the Claimant by the Respondents.

#### **Whether the claimant is entitled to reliefs sought.**

17. The Claimant tabulated her terminal benefits and other claims under paragraph 13 of the statement of claim and the court proceeds to consider the same.

#### **Notice pay of kshs 12,926.55**

18. The court found there was no unfair termination or dismissal from employment hence the notice pay is not due. The prayer item is disallowed.

#### **Claim for Underpayment**

19. The Claimant pleaded in her witness statement adopted as evidence in court that she was underpaid under the legal notice. The claimant told the court she was paid kshs 10000 and not kshs 12926.55 as per the minimum wage legal notice of 2016 exclusive of housing allowance. The court finds and



determines that the minimum was for house servant in Nairobi where the claimant worked was kshs 12926.55. This evidence was not controverted.

20. Section 90 of the *Employment Act* limits claims to 3 years and reads:- “90. Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
21. The Court of Appeal in *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* [2015]eKLR upheld judgment of the trial court where the court limited underpayment to 3 years. The court is guided by the said authority of Court of Appeal finds and determines any claim of underpayment before the 3 years of filing suit to be stale.

#### **On Claim For Leave Not Taken For 5 Years**

22. The Claimant told the court she took some few days and was deducted wages. The court awards untaken leave for 3 years thus 45242.90/5 x3 total sum of Kshs 27,145.74./- award for untaken leave.

#### **Salary Underpayment Claim**

23. The claim for underpayment is capped to 3 years and awarded as per legal notice 2016 produced as evidence. The claimant was paid monthly salary of kshs 10,000/-. The minimum statutory wage excluding housing allowance applicable to Nairobi house servants as per legal notice of 2016 produced was kshs 12,926.55. The court finds and determines there was underpayment of basic salary by kshs 2926.55 per month and awards for 3 years as follows:- 2926.55x 12 x 3 total award for basic salary underpayment for the sum of kshs 105,355.80/-

#### **Claim For Housing Allowance at 15% of salary**

24. The legal notice for minimum wages is exclusive of housing allowance. The claimant led evidence she was not provided with accommodation and paid rent at Kawangware village. Regulation Number 4 of the Regulation of Wages [General] Order, requires an Employer to provide the Employee with free housing accommodation, or in default, pay the Employee housing allowance equal to 15% of the Employee’s basic salary. This Regulation is to be read together with Section 31 of the *Employment Act* 2007 .see *Kathra Hussein Noor & another v Kaderdina Hajee Essak Limited* [2016] eKLR where the forgoing position of the law on housing allowance was restated.

The court finds and determines that the claimant was entitled to housing allowance at 15% of the minimum wage of kshs 12,926.55. and awards as follows 15/100x kshs 12,926.55x12x 3 total award sum of kshs 69,803.37 as unpaid housing allowance.

#### **Claim For Service Pay For The Period Of Complete 5 Years Worked.**

25. The Claimant in her statement of claim stated she was engaged by the respondent verbally on the November 15, 2011 to work in their home at Mwingi Court House No 46 Kileleshwa within Nairobi County until July 16, 2017 when she left for the village at Busia County. The claim was undefended. Section (5) of the *Employment Act* provides for service pay where the employee did not have any social security like NSSF as follows:- “An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.” Service pay is calculated at 15 days salary for each complete year worked. The court awards the



claimant service pay for the 5 complete years worked at the respondents' home at the minimum wage as prayed thus award for service pay for total sum of kshs 32,316.37/- .

26. The claim for compensation is declined for there was no prove of unfair termination.

**Conclusion and Disposition.**

27. The Court enters judgment for Claimant against the Respondents jointly and severally as follows:-

- i. Award for untaken leave for 3 years total sum of Kshs 27,145.74/-.
- ii. Award for basic salary underpayment for 3 years for the sum of kshs 105,355.80/-.
- iii. Award for unpaid housing allowance for 3 years for the sum of kshs 69,803.37
- iv. Award for service pay for 5 complete years of service for the sum of kshs 32,316.37/-.
- v. Interest at court rates from Judgment date.
- vi. Costs to the Claimant

28. It is so ordered.

**JUDGMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022.**

**J. W KELL,**

**JUDGE.**

**In the Presence of :-**

Court Assistant : Brenda Wesonga

Claimant : Shamalla for the Union

Respondents : Absent.

