



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 117 OF 2018

PEYIAI NKOITOICLAIMANT

VERSUS

ARUBA MARA CAMP SAFARIS LTD.....RESPONDENT

JUDGMENT

1. The Claimant, Peyiai Nkoitai, filed this claim vide a Memorandum of Claim dated 30th April, 2018 through the firm of Githui & Company Advocates alleging unlawful and unfair dismissal from employment and non-payment of terminal dues against the Respondent, Aruba Mara Camp Safaris Ltd and seeks the following orders:-

a. A declaration that the termination of the Claimants Employment was unlawful and unfair as the same was contrary to the Employment Act and other employment laws.

b. The Respondent to pay the Claimant one month's salary in lieu of notice calculated as hereunder.

Government legal notice No. 111 of 14th July, 2017 Position: General labourer

Basic salary: Kshs.11,926/
House allowance, 15% x 11,926.40/= Kshs. 1,788/= Total. Kshs, 11,926 + Kshs. 1,788 « Kshs. 13,714/=

Total Claim for payment in lieu of notice Kshs. 13,714/=.

c. The Claimant be awarded twelve (12) months compensation for the unlawful and unfair termination as provided for under section 49 of the Employment Act calculated as hereunder.

Government legal notice No.111 of 14th July,2017.

Position: General labourer
Basic salary: Kshs.11,926/=
House allowance: 15% x 11,926.40/= Kshs. 1,788/= Total. Kshs, 11,926 + Kshs. 1,788= Kshs. 13,714/= Kshs. 13,714
x 12 months-Kshs. 164,563/«

Total claim for compensation for unlawful termination is Kshs. 164,568/=.

d. The Respondent to pay the Claimant service pay for 4 years at 15 days' salary for each completed year of service,

Government legal notice No. 111 of 14th July, 2017 Position: General labourer

Basic salary daily rate: Kshs.571/=
Total: Kshs, 571 x 15 days= Kshs. 8,565/=

Kshs. 8,565/= x 4 years =Kshs. 34,260/-

Total Claim for service pay is Kshs. 34,260/=.

e. The Respondent to pay the Claimant all the amounts emanating from underpayments that was never paid to her during her employment as

calculated

hereunder.

Government legal notice No. 111 of 14th July, 2017 Position: General labourer

Basic			salary.		Kshs.11,926/=
House	allowance,	15%	x	11,926.40/=	Kshs. 1,788/=
Total.	Kshs,	11,926	+	Kshs. 1,788	= Kshs. 13,714/=
Actual		salary,		Kshs.	7,500/=
Monthly underpayments: Kshs, 13,714-Kshs. 7,500=Kshs. 6,214/-					

Total underpayments: Kshs. 6,214 x 52 months=Kshs. 323,128/

Total claim for underpayments is Kshs. 323,128/=.

f. The Respondent to pay the Claimant all the amounts emanating from working on public holidays calculated as hereunder:

There were 50 public holidays during this period Working 8 hours per day: 50 days x 8 hours = 400 days.

Government	legal	notice	No.	111	of	14 th	July,	2017	Position:	General	labourer
Basic		salary	daily			rate:			Kshs.57		1/=
Kshs.	571x	400	days		x	2		=	Kshs.		456,800/=
Total claim for public holidays Kshs. 456,800/-											

g. The Respondent to pay the Claimant all the amounts emanating from unpaid annual leave calculated as hereunder:
Government legal notice No. 111 of 14th July, 2017 Position: General labourer

Basic salary Kshs. 11,926/=

House allowance 15% x 11,926.40/= Kshs. 1,788/-

Total: Kshs, 11,926 + Kshs. 1,788 = Kshs. 13,714/-

Kshs. 13,714/= x 4 year=Kshs. 54,856/-

Total Claim for unpaid annual leave is Kshs. 54,856/=.

h. The Respondent to issue the claimant with a certificate of service and in default the respondent to pay the Claimant Kshs. 100,000/=.

i. The Respondent to pay the costs of the suit and interest.

j. The Court to grant any other relief that it may deem fit to grant.

2. The Respondent filed its Statement of Response to the claim dated 7th May, 2019 on 8th May 2019 through the firm of Okulo and Company Advocates and admitted that it employed the Claimant and basically denied all the averments in the memorandum of claim and alleged that the Claimant deserted employment.

Hearing.

3. This matter proceeded for hearing on 26th January, 2021 and the claimant CW-1 testified and stated that she was employed by the respondent as a laundry and rooms attendant on 24th June, 2013 till her termination on 5th October, 2017. She adopted her witness statement dated 30th April 2018 as her evidence in chief and in addition testified that her employment was terminated without notice or any hearing and sought to be paid compensation for unfair termination.

4. The Claimant testified that, her NSSF deduction were never remitted to the relevant body and produced NSSF statement as her exhibit 1. Further that she was under paid by the respondent who paid her the sum of Kshs. 7500/- instead of the statutory Kshs 13, 714 as provided for a general labourer in the government legal notice no. 111 of 14th July, 2017. Consequently, she prayed that this Court calculates the said underpayment and compel the respondent to compensate her.

5. She alleged that the respondent made her work during holidays and that she never took any leave during the four (4) year worked at the employ of the respondent. She equally sought to be compensated for the leave days not taken and the holidays worked.
6. She testified that she was not issued with certificate of service as required by law and finally sought to be paid cost of this suit.
7. On cross examination, the claimant testified that she was employed on 24th June, 2013 and dismissed on 5th October, 2017. Further that she was paid her salary throughout the said period. She contends that she was not housed by the Respondent neither was she paid a house allowance.
8. The claimant testified that she was pregnant when working and went for maternity leave but did not give notice of the said leave and on reporting after leave she was verbally informed that her services were terminated.
9. The respondent on the other hand did not call any witnesses and proceeded to close its case.
10. This court directed parties to file written submissions which the claimant filed on 12th February, 2021 and the respondent filed on 26th February, 2021.

Claimant's submissions:

11. The claimant submitted largely on whether the claimant termination of employment was unfair and unlawful. Counsel submitted that the claimant was an employee of the respondent as seen in the NSSF Statement produced as exhibit 1. He argues that section 47 (5) of the Employment Act sets the statutory burden an employee should meet before the employer is called upon to discharge its part of the burden. The said section states that; -

“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.”

12. He submitted further that **section 35** of the Employment Act requires an employer to give notice of termination which the respondent failed to issue. Further that Section 41 of the Act requires that an employer conduct hearing and consider the representation of the employee which was never done and finally that section 43 of the Act was not adhered to as the Respondent has failed to demonstrate the reasons for the said termination as required of an employer.

13. In conclusion, counsel submitted that when the Respondent failed to call any witness or file any document in support of its case, the claimants case stood uncontroverted therefore urged this Court to allow the claim as prayed.

Respondent submissions.

14. The respondent submitted that the claimant's employment was never terminated unlawfully as alleged but that the claimant left the respondent employ on her accord as such deserted employment. Accordingly, it was submitted that the claimant prayers are not merited since she contravened the mandatory provision of section 44(a) of the Employment Act by leaving employment without leave or any other lawful cause.

15. It is submitted that under section 47(5) of the employment Act the burden of proving whether termination of employment was unlawful lies with the employee. He argued that the claimant has failed to discharge that burden, subsequently, the Respondent urged this Court to dismiss the Claimants case with cost to them.

16. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;-

- 1. Whether the claimant was terminated by the respondent or she absconded duty;**
- 2. If she was terminated by the respondent, whether the termination was lawful and fair;**
- 3. Whether the claimant is entitled to the remedies sought.**

17. On issue No.1 above the claimant indicated that she was terminated verbally without any reason and without any notice. The respondents on their part failed to call any evidence but filed submissions.

18. The respondent having failed to call any evidence is an indication that the claimant's case was uncontroverted.

19. Despite the respondent filing submissions, they didn't submit any evidence before this court. Section 35 (1) of the Evidence Act provides as follows;

35. Admissibility of documentary evidence as to facts in issue

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that

fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

20. The import of this provision is that even if parties file documents as the respondents herein filed a defence and submissions, these documents remain pleadings unless allowed by consent or a witness addresses court on their intention to rely on them.

21. In **Francis Otile vs Uganda Motors Kampala HCC No.210 of 1989**, it was held that, pleadings are not evidence and nor can they be a substitute thereof.

22. In **CA No.23 of 1997 Edward Murugu through Stanley Murugu VS Nathaniel D. Schilter**, the court found that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as allegation by the defence and not evidence.

23. In **CMC Amation Ltd vs Cruisair Ltd (No1) (1978) KLR 103: (1976 80) KLR 835 Madan J** as he then was rendered himself as follows;

“Pleadings contain the averments of the parties concerned unless they are proved or disapproved or there is an admission of them or any of them by the partner, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation.

Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy the example, the definition of evidence is anything that makes clear or obvious ground for knowledge. Indication or testimony, that which makes truth, evident or renders evident to the mind that it is true”.

24. Being compelled by the findings above, it is my position that the respondents tendered no evidence in court and the claimant's case stand undisturbed.

25. I therefore find that the claimant was terminated by the respondent as stated and she did not abscond duty.

26. On the second issue, the claimant having been terminated by the respondent and there being no evidence of the manner in which this was done, or there being no valid reasons submitted for the termination, I find that the termination of the claimant was unfair and unjustified as provided under Section 45 (2) of the Employment Act 2007 which states as follows:-

45.(1)

(2) **A termination of employment by an employer is unfair if the employer fails to prove?**

(a) **that the reason for the termination is valid;**

(b) **that the reason for the termination is a fair reason?**

(i) **related to the employees conduct, capacity or compatibility; or**

(ii) **based on the operational requirements of the employer; and**

(c) **that the employment was terminated in accordance with fair procedure.**

27. On the issue No.3 on remedies I find for claimant as follows:-

1. Kshs.13,714 as salary in lieu of notice.

2. 10 month salary as compensation for unlawful termination.

$$10 \times 13,714 = 137,140$$

3. Unpaid NSSF deducted and not submitted for 4 years.

$$= 200 \times 12 \times 4$$

$$= 9,600/=$$

4. Underpayment of salary

As per legal Notice No. 111 of 14th July 2017 the claimant was to be paid 11,926 as a general labourer but was paid 7,500/= underpayment

$$= 4,426.4 \times 48 \text{ months}$$

$$= 212,467.2$$

5. Unpaid house allowance

$$15\% \times 13,714 \times 48 \text{ months}$$

$$= 2,057 \times 48 = 98,740$$

6. Unpaid leave for 3 years

$$= 3 \times 13,714 = 41,142$$

$$\text{Total} - 423,803.2$$

7. The claimant be issued with a Certificate of Service.

8. The respondent will pay cost of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF MARCH, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Alwala for claimant - present

Okulo & Co. for Respondents - present