



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2230 OF 2016

IRENE MWENI KIMEU.....CLAIMANT

-VERSUS-

MERCY MAKENA T/A COURT YARD

GARDEN HOTEL.....RESPONDENT

JUDGMENT

1. The Claimants filed suit on 2.11.2016 alleging that they were employed by the Respondent on diverse dates in her hotel but their employment was unfairly terminated by the Respondent on 15.7.2015. They further averred that during their employment, the Respondent paid them basic salary which was below the prescribed statutory minimum and also failed to pay them any house allowance.
2. In the suit they seek to recover arrears of their salary arising from salary underpayment, unpaid salary, accrued leave, salary in lieu of notice, severance pay and compensation for unfair termination totaling to Kshs. 2,240,894.40 costs and interest at court's rate.
3. The Respondent did not enter appearance and therefore the suit proceeded by formal proof on 30.11.2020.
4. Mr. Jackson Mogolo Musuriji testified as CW1. He basically adopted as his testimony, the joint written statement dated 1.11.2016 and signed by all the claimants. He also produced as exhibits, the documents in the list of documents dated 1.11.2016. He then prayed for judgment in terms of the reliefs set out in the statement of claim. After the hearing, the Claimants filed written submissions on 22.1.2021 through their counsel. The submission basically reiterated averments contained in the statement of claim including the computation of damages at Ksh. 2,240,894. Therefore the counsel urged the court to enter judgment for the Claimants and award them costs and interest.
5. After considering the pleadings, evidence and submissions presented by the Claimants, there is no dispute that they were employed by the Respondent in various capacities in the Court Yard Garden Hotel until 15.7.2016. The issues for determination are:
 - a. Whether the Claimants employment was unfairly terminated by the Respondent.
 - b. Whether the Claimants are entitled to the reliefs sought.

Unfair termination

6. Termination of employment of an employee is unfair if the reason for the termination is not valid and fair and if the procedure followed was not fair under section 47(5) of the Employment Act. The burden of proof is on the employee to establish on a balance of probability that unfair termination of his employment has occurred.
7. In this case, the Claimants merely and casually stated that they were unfairly terminated. They never pleaded in details how the termination was done and whether they were faulting the reason or the procedure or both. There is also no scintilla of evidence tendered by CW1 towards discharging the said burden of proof under section 47(5) of the Act.
8. I would say that, a claim for unfair termination of employment must be pleaded elegantly and with a degree of precision so as to set out the basis upon which the employee is accusing the employer for unfair termination. The Claimant must as a principle of good pleadings bring out the real issues in his suit to enable the opposing party to also respond with precision and prepare his evidence. Precise pleadings also enable the court to understand the dispute before it and even help in making direction whether the dispute is a proper subject for alternative dispute resolution mechanism.

9. Having observed that the Claimants did not precisely plead a case for unfair termination and that no evidence was adduced to prove the same, I find and hold that the Claimants did not prove that their employment was unfairly terminated by the Respondent as alleged.

Reliefs sought

10. In view of the foregoing, the prayer for salary in lieu of notice and compensation for unfair termination is declined under section 49 of the Employment Act, the said remedies are only availed to employees in a case where the court makes a finding that the termination of their employment was unfair or unjustified.

11. Likewise, the prayer for severance pay is declined because it is now trite law that such relief is only availed to employees who exit their employment on account of redundancy.

12. As regards the claim for leave, the Claimant did not plead that they never went for their annual leave nor did they tender any evidence to that effect. Consequently, that prayer fails for lack of particulars and evidence.

13. The claim for unpaid salary for April, May, June or July 2015 or both is granted as pleaded for each Claimant.

14. Finally the prayer for salary under payment, is granted as hereunder :

1st Claimant

Underpayment from August 2013 to April 2015

Kshs. 12,148.14 – Kshs. 10,000 = Kshs, 2148. 14 x 21 months = Kshs. 45, 110. 94

From May 2015 to August 2015

Kshs. 13605. 88 – Kshs. 10,000 = Kshs. 3, 605,88 x 4 months = Kshs. 14, 423.60

From September 2015 to March 2016

Kshs. 13, 605.90 - Kshs. 12,000 = Kshs. 1, 605.90 x 7 months = Kshs. 9,635.4

Unpaid salary from April 2016Kshs. 7105.95

Unpaid salary from May to July 2016Kshs. 34014.75

Total = Kshs. 110,290.64

2nd Claimant

Underpayment from December 2014 to April 2015

Kshs. 12, 148.14 – Kshs. 10, 000 – Kshs. 2, 148.14 x 4 months = Kshs. Kshs. 8, 592.56

From May 2015 to March 2016

Kshs. 13, 605. 88 – Kshs. 10,000 = Kshs. 3, 605.88 x 11 months = Kshs. 41,120.70

Unpaid salary for April 2016

Kshs. 13,605.90 – Kshs. 7,000 = Kshs. 6,605.90

Total = Kshs.56319.16

3rd Claimant

Underpayment from December 2014 – April 2015

Kshs. 11, 248.09 – Kshs. 10,000 =Kshs. 1, 248.09 x 4 months = Kshs. 4992.40

From May 2015 to August 2015

Kshs. 12, 597. 90 – Kshs. 10, 000 = Kshs. 2597.90 x 4 months = Kshs. 10, 391.60

Unpaid Salary April to July 2016 = Kshs. 38,500

Total: Kshs. 53,884.00

4th Claimant

Underpayment from December 2014 to April 2015

Kshs. 25,381.59 – Kshs. 10,000 = Kshs. 15,381.59 x 4 months = Kshs. 61,526.36

From May 2015 – 30 November 2015

Kshs. 28, 427.40- Kshs. 10,000 = Kshs. 18,427.40 x 7 months = Kshs. 128,991.8

From December 2015 to March 2016

Kshs. 28, 427.43 – Kshs. 12, 000 = Kshs. 12,472.43 x 4 months = Kshs. 65,708

Unpaid Salary for April – July 2014 =Kshs. 92,997.15

Total: Kshs. 349,223.31

5th Claimant

Unpaid House allowance from June 2015 to March 2016

15/100 x Kshs. 20,000 = Kshs. 3,000 x 10 months = 30000

Unpaid salary for April 2015Kshs. 16,000

Total Kshs. 46,600

6th Claimant

Underpayment from June 2015 to March 2016

Kshs. 13,605.90 – Kshs. 10,000 =Kshs, 3605.90 x 9 months =

Kshs. 32, 453.10

Underpaid salary April to July 2016 = Kshs. 41,120.70

Total Kshs. 73,573.80

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 18TH DAY OF MARCH, 2021

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE