



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1595 OF 2018

EVELINE PERIS WANJIRA.....CLAIMANT

VERSUS

WILD EARTH WELLNESS CENTRE LIMITED.....RESPONDENT

JUDGMENT

I. INTRODUCTION

1. In a memorandum of claim dated 16th February 2018 and filed in court on 10th December 2018, the Claimant herein EVELINE PERIS WANJIRA also known as EVELINE WANJIRA NDEGWA seeks the following reliefs:-

- a. An order compelling the Respondent to pay the sums claimed in paragraph 12 of the memorandum of claim.
- b. A declaration that the termination of the Claimant's employment was unlawful and unfair.
- c. A declaration that the Respondent do issue a certificate of service to the Claimant.
- d. Costs of the suit together with interest to be borne by the Respondent.
- e. Any other relief the Honourable Court may deem just and fit.

2. Together with the memorandum of claim was filed a verifying affidavit and Claimant's witness statement, list of witnesses, documents comprising of pay slips and a demand letter.

3. Summons to enter appearance and the claim were served via registered post to the last known postal address of the Respondent and an affidavit of service is on record to that effect. Subsequently, mention notice and hearing notice were similarly served but the Respondent did not enter an appearance.

4. On 6th July 2021, the Court certified the claim as ripe for hearing and directed that the matter proceeds by way of formal proof as the claim was undefended. The matter was hence set for formal proof on 26th July 2021.

II. PLEADINGS AND EVIDENCE

5. The Claimant alleges in her memorandum of claim, at paragraph 3, that she was engaged by the Respondent as a salon assistant in or about January 2015. The Claimant states that she was earning a monthly basic salary of Kshs.17,764/= and that on or about 7th or 8th of October 2017 the Claimant was terminated on account of redundancy. The Claimant alleges that the redundancy was communicated orally, without notice and no reasons was given. The Claimant states that to this day no written reasons have been communicated to her and that no dues have been paid. The Claimant hence states that the said termination was procedurally unfair, unlawful, unjustified and illegal.

6. The Claimant has reiterated the allegation in paragraph 5 above in her statement of claim and her witness statement.

7. During the hearing by way of formal proof on 26th July 2021, the Claimant testified alone and adopted the contents of the witness statement dated 15th May 2018 and filed in Court together with the memorandum of claim.

8. The Claimant stated that she was not a member of a trade union and that as at the time of termination she was only paid the salary for October 2017 and nothing more.

9. The Claimant in her testimony relied on and produced as exhibits pay slips and a demand letter addressed by her lawyers to the Respondent demanding payment of her dues. The said documents were marked as exhibits 1 and 2 respectively.

III. CLAIMANT'S SUBMISSIONS

10. Counsel for the Claimant filed written submissions dated 29th July 2021 in which counsel reiterated Claimant's claim supporting the same with statutory and case law.

IV. ISSUES FOR DETERMINATION

11. As stated above, this matter proceeded by way of formal proof but still the Claimant is under legal obligation to prove her case as against the Respondent on a balance of probability.

12. From the pleadings, evidence adduced, and the submissions filed, the Court notes the following issues for determination.

- i. Was the Claimant an employee of the Respondent as alleged?
- ii. If (i) above is in the affirmative, what were the terms of the said employment?
- iii. Was the termination of Claimant's employment procedural and lawful?
- iv. Is the Claimant entitled to the reliefs sought, and to what extent?
- v. Who bears the costs of this cause?

V. EMPLOYMENT

13. In the statement of claim and in her oral testimony in Court, the Claimant stated that she was engaged by the Respondent as a salon assistant in January 2015. In the bundle of documents marked "A" and produced as exhibit 1, the Claimant has attached pay slips duly stamped by the Respondent to authenticate her employment to the Respondent. As per the last annexed pay slip for the month of August 2017, the Claimant was earning a gross salary of Kshs.17,764/=. As per the pay slip the said gross salary is also indicated as the basic salary with no additional allowances.

14. There is no evidence on record to controvert the allegation by the Claimant that she was an employee of the Respondent for the period from May 2015, the date of the earliest pay slip produced in Court, to August 2017, as per the last pay slip produced as evidence in Court.

15. However, the Court is not able from evidence on record, to authenticate the allegation by the Claimant that she worked for the Respondent for the period from January 2015 to October 2017. If that were the case, where are the pay slips for the months of January to April 2015 and those of September and October 2017?

16. From the evidence adduced, and based on the exhibits produced the Court, the logical conclusion is that the Claimant worked for the Respondent for the period between May 2015 and August 2017. This position is arrived at based on the documentary evidence placed before the Court by way of pay slips and the oral testimony of the Claimant which was not challenged by way of cross-examination and as such stands uncontroverted.

17. In the circumstances, the Court finds that indeed the Claimant was an employee of the Respondent for the period between May 2015 and August 2017, earning a gross salary of Kshs.17,764/=. It is important to note that the said pay was in form of basic salary as there is no indication on the pay slips of payment of bonus, house allowance, or overtime compensation.

18. Although there are no pay slips produced in Court to evidence continuous engagement of the Claimant by the Respondent in the period from May 2015 to August 2017, the oral testimony in Court stands unchallenged in support of the continuous employment in the said period only that the documentary evidence in pay slips, on both sides of the employment period, point only to the period between May 2015 and August 2017.

19. To this extent, the first issue is returned in the affirmative.

VI. TERMS OF EMPLOYMENT

20. From the foregoing, it is by now clear that the Claimant was in the employment of the Respondent at a basic monthly pay of Kshs.17,674/= for the period between May 2015 and August 2017. It is also clear that the employment contract was oral and no formal contract of employment was produced in Court.

VII. TERMINATION

21. The next issue for determination is how the Claimant and the Respondent parted ways. In other words, how was the employment relationship between the Claimant and the Respondent terminated?

22. The only evidence on record is the oral testimony by the Claimant who stated that she was declared redundant on or about 7th October 2017.

23. The Claimant stated that the declaration on redundancy was oral and that no notice or reason was given in writing. This evidence is again unchallenged by the Respondent.

24. Exhibit 2 marked "B" and filed with the claim is a demand letter by the Claimant to the Respondent through her lawyers. In the said demand letter, the Claimant categorically states that she was terminated on basis of redundancy but no notice or reasons were given.

25. The question to be answered then is whether the substance and the procedure of termination by reason of redundancy was lawful and fair as this has a bearing on the next issue of what reliefs may be awarded to the Claimant.

26. The law on termination by redundancy is to be found in Section 40 of the Employment Act No. 11 of 2017(the Act). Essentially, redundancy is a form of termination of employment at the instance of the employer for no fault of the employee. Given the naturally superior financial position of an employer compared to that of the employee in an economy such as ours, this is a form of termination that can easily be abused and that is exactly why the legislature put in place Section 40 of the Act to ensure that termination on account of redundancy is not violated. **(See the case of Kenya Airways Ltd V. Aviation & Allied Workers Union & others (2014) eKLR.**

27. The law provides for the conditions that ought to be met by an employer before terminating an employee on the basis of redundancy. Some of the conditions include notifying in writing of the Trade union, where the employee is a member, Labour officer, the employee, due regard to security, and payment of all dues to the employee before the employee is let to go.

28. The Claimant testified that she was not issued with a written notice in accordance with the law, as she was not a member of a trade union. The Claimant avers that no dues were paid to her. This position is not countered by any evidence to the contrary and to this extent the court comes to the conclusion that the termination on account of redundancy was unlawful, unfair and unprocedural.

VIII. RELIEFS

29. By now it is clear that the Claimant is entitled to some compensation for unlawful, unfair and unprocedural termination and the only issue is the extent of such compensation. This is because the court has already found that the Respondent did not comply with Section 40 of the Act in terminating the Claimant on the alleged account of redundancy.

30. The Claimant's tabulation of what she considers to be her entitlement is to be found in paragraph 12 of the memorandum of claim and the same is also exhibited in the letter of demand produced as exhibit 2.

a. On house allowance, it has been noted that the pay slips produced in Court as exhibit 1 and marked "A" conspicuously fail to capture the house allowance. The logical conclusion to make is that the Respondent ,contrary to the law and in particular Section 31 of the Act, failed to provide for house allowance or reasonable accommodation for the Claimant during her employment. The court has found elsewhere in this Judgment that the evidence on record can only authentic employment for the period from May 2015 to August 2017, both months inclusive. This counts to 28 months. On this account therefore, at 15% of basic salary, the house allowance due is $15/100 \times 17,764/= \times 28 = 74,609/=$.

b. On severance pay, the Claimant worked for a period of 28 months which amounts in aggregate to at least two years of service completed. Under Section 40(1)(g) of the Act the severance pay may be calculated as follows:-

$15/30 \times 17,764/= \times 2 = 17,764/=$.

c. On damages for unlawful termination, the court takes Judicial notice that the service that the Claimant was offering is not unique or sophisticated and as at that time (2017) before Covid 19 hit the economy, it was not difficult to obtain employment in similar capacity to offer same or similar service in the various establishments available. It would not have taken the Claimant long to obtain similar opportunity of employment. The Claimant in her testimony did not indicate how long it took her to secure another employment. In the circumstances, the Court finds that three (3) months compensation is reasonable in the circumstances and as such the amount payable under this head is calculated as follows:-

$\text{Kshs.}17,764/= \times 3 = 53,292/=$.

d. On leave allowance, the employee completed two years of service and was entitled to one (1) month leave for each year with full pay. On this account the employee is entitled to leave allowance:-

$\text{Kshs.}17,764/= \times 2 = \text{Kshs.}35,528/=$.

e. The Claimant has categorically stated in her memorandum of claim and in her oral testimony that she was not issued with notice prior to termination. In the circumstances the Claimant is entitled to one (1) month's pay in lieu of notice calculated as:-

$\text{Kshs.}17,764/= \times 1 = 17,764/=$.

f. Each and every employee under a contract of service who has worked for a period of more than 12 months is entitled to be issued with a certificate of service under Section 51 of the Act.

IX. COSTS

31. The general rule on costs is that they follow event. A successful litigant, unless for good legal reason, is entitled to costs. In this matter there is no good reason to depart from the general rule or to exercise judicial discretion in any other way and as such the Claimant is hereby awarded costs based on the award.

X. AWARD AND DISPOSAL

32. This Court comes to the conclusion that the Claimant has proved her case on a balance of probability and enters judgment for the Claimant in the following terms:-

a. A declaration be and is hereby issued that the termination of employment of the Claimant by the Respondent on alleged account of redundancy was unprocedural, unfair and unlawful.

b. The Claimant is awarded the following reliefs as tabulated and calculated above:

i. Unpaid house allowance Kshs.74,609/=

ii. Severance pay Kshs.17,764/=

iii. Damages for unlawful termination... Kshs.53,292/=

iv. Unpaid leave allowance Kshs.35,528/=

v. One month's pay in lieu of notice... Kshs.17,764/=

TOTAL Kshs.198, 957/=

c. The Respondent is ordered to issue the Claimant with a certificate of service in accordance with the law. Section 51 of the Employment Act provides that where an employee has worked for more than four continuous weeks, such an employee shall be entitled to be issued with a certificate of service on the terms of that Section.

d. The Claimant is awarded costs of this cause to be agreed or taxed based on the award.

e. The amount awarded in (b) above shall earn interest at Court rates from the date of this Judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 1ST DAY OF SEPTEMBER 2021

DAVID NDERITU

JUDGE