



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 455 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

EVERLYNE OUMA KHAGONDI.....CLAIMANT

VERSUS

ANN KAIRU.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The claimant by her memorandum of claim dated 7th March, 2017 filed a claim against the respondent for unlawful termination from employment.
2. The claimant claim against the respondent is for:-

Special damages amounting to Kshs.31,222/= which include

(i) One month salary in lieu of notice	Kshs.15,000/=
(ii) Salary arrears	Kshs. 5,000/=
(iii) House allowance 0.15 x15x3	Kshs. 6,750/=
(iv) Annual leave	Kshs.2,624/=
(v) Weekly rest days and holiday	Kshs.1,848/=
Totalling	Kshs.31,222/=

=====

She also prays for 12 months compensation and

Costs of this suit.

Claimant's Case

3. The claimant evidence is that she worked for the respondent at her car wash at a monthly salary of Kshs.15,000/=. She had no written contract with the respondent.
4. She states that on 5th December, 2016 the respondent unfairly and unlawfully terminated her employment. She had been employed in September, 2016.
5. The claimant say she was paid Kshs.15,000/= in settlement of salary arrears on 18th February, 2017 but there was still outstanding balance of Kshs.5,000/=.

She was also paid salary for November, 2016 but there were still arrears for September and October where she was paid 5000/= each leaving arrears of kshs.5000/=.

6. The respondent's response was filed on 6th June, 2017. She admitted she employed the claimant in September, 2016 as a cleaner in her car wash. She however denies that she used to pay her Kshs.15,000/= salary.

She says she had agreed to pay her minimum wage of Kshs.10,954.70 after the claimant pleaded with her to give her a job.

7. The respondent admits they had no written agreement.

8. She however denies that she terminated the contract of employment of the claimant. Instead she says it was the claimant who absconded from duty.

9. The respondent says she paid the claimant as follows:-

September,	Kshs.5,000/=
October	Kshs.5,000/=
6 th December 2016	Kshs.15,000/=
18 th February, 2017	Kshs.15,000/=

10. She says the claimant is not entitled to leave days and house allowance and further that claimant never worked on Saturdays and Sundays and public holidays.

11. The respondents also called one other witness Peter Masibari who said he used to work as a security guard at the premises of the respondent. He used to work with the claimant.

12. He says that the claimant salary was Kshs.10,000/= or thereabouts and she used work between 8.30a.m to 4.30p.m on weekdays. She never used to work on Saturdays and Sundays.

13. The witness says that the claimant abruptly left employment in November, 2016 and claimed she had got a better job. He says he told the respondent the claimant had got another job and had left.

14. The claimant says she was asked to leave work by the employer via a text message.

She did not produce the said text message.

The claimant's submissions is to the effect that the respondent failed to pay the claimant salary at the end of every month and so contravened section 18 of the Employment Act.

15. The law clearly provides that an employee should be paid his salary at the end of the piece work or at the end of the month.

The court finds the respondent failed to pay the claimant the salary at the end of each month and actually always delayed her salary.

16. The respondent who is in diaspora admits she was struggling financially and so could not raise the money on time. That was wrong because an employer must not withhold the salary of his employee.

Failure to pay the employee their salary as provided in Section 17(1) of the Employment Act and 17(10) is an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or both.

17. The respondent failed to pay the claimant her salary on the stipulated time i.e. end of month. It is also to be noted that she never gave the claimant a contract of employment. Section 9 of the Employment Act provides that a contract of service for an aggregate period of three months shall be in writing.

Section 9 (2) provide that the employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented by the employee in accordance with subsection (3).

18. It is not clear if the claimant left employment because she was not being paid her salary or if she was terminated via a text message as she claims. But both respondent and respondent's witness say the claimant absconded employment. If at all she left employment as testified by the respondent witness that would amount to constructive dismissal.

In the case of **MARIA KAGAI LIGACHA VERSUS COCA COLA EAST AFRICA LIMITED CAUSE NO.611 OF 2009** an employee who kept being transferred from one country to another and from place to another finally tendered her resignation. She then filed a case against her employer of unlawful termination.

The court held that the claimant was constructively dismissed from employment by the appellant and that the constructive dismissal amounted to unfair termination of employment.

19. The respondent in her witness statement admits she paid the claimant's salary as follow;-

September,	Kshs.5,000/=
October	Kshs.5,000/=
6 th December 2016	Kshs.15,000/=
18 th February, 2017	Kshs.15,000/=

It is clear there was delay in paying the claimant and that is against fair labour practices and rules of natural justice.

20. If an employer is struggling in business there is the right procedure to follow either declaring the employee redundant or make other arrangement but not to keep one in employment and yet cannot pay them.

So the court finds the claimant's employment was terminated unfairly since the respondent was not paying her salary on time.

The court therefore enters judgment in favour of the claimant for unlawful termination.

CONCLUSION

The relief awarded to the claimant for unlawful termination is as follows;-

one month salary in lieu of notice	Kshs.15,000/=
salary arrears	Kshs. 5,000/=
House allowance	Kshs. 6,750/=

The prayers for weekly rest days and holidays are declined as it is clarified by the respondent and more so her witness that the claimant used to go on rest days both Saturday and Sunday and public holiday being Mashujaa day only.

Annual leave	Kshs.2,624/=
--------------	--------------

The court does not find any justification to award any general damages as claimant only worked for 3 months for the respondent and it appears she already got another job. So general damages are not awarded.

The total award to the claimant is Kshs.29,374/=. She is also awarded costs of the suit.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 29TH DAY OF OCTOBER, 2021.

ANNA NGIBUINI MWAURE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE