



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.81 OF 2015

JANET KAMENE MUSYOKI.....CLAIMANT

VERSUS

DR. ANDREW MULEI.....RESPONDENT

JUDGEMENT

On 28th January, 2015 the claimant filed the memorandum of Claim and served the respondent who entered appearance on 3rd March, 2015 and filed defence on 16th March, 2016.

The claimant was heard on 18th February, 2021 after the court being satisfied that the respondent was served with notice but failed to attend.

The claim is that on 13th may, 2010 the claimant was employed by the respondent as a house servant at his resident situated at Loresho estate in Nairobi at a monthly wage of Ksh.8, 000 without a house allowance.

The wage was increased to Ksh.8, 579.80 per month after 3 months and lastly earning ksh.9, 000 by 13th may, 2014 when employment was terminated without notice or payment of terminal dues.

The claim is that there was underpayment of wages contrary to the Wage Orders.

Work hours were 8AM to 7.30PM from Monday to Saturday with overtime work of 69 hours each week and this was not compensated.

During the public holidays the claimant remained at work without compensation.

No annual leave was allowed for the duration of employment and no compensation.

The claimant is seeking the following dues;

- a. Underpayment Ksh.37,378.44;
- b. Overtime hours Ksh.204,647.56
- c. Public holidays Ksh.31,725.56;
- d. Annual leave for 4 years Ksh.36,340;
- e. 13 days in May, 2014 ksh.5,624.05;
- f. Notice pay Ksh.11,248.42;
- g. Severance pay for 4 years ksh.22,977.20
- h. Compensation.

The claimant testified in support of her claims that upon employment by the respondent she worked diligently but on 13th May, 2014 she asked for a wage increase which led to instant dismissal without notice or being paid her terminal dues.

That during her employment, the claimant was not paid in accordance with the set regulations leading to underpayment, non-payment of overtime work, working during public holidays and for the 4 years she never took her annual leave.

The defence filed is that the claimant was employed on 6th May, 2010 and during her employment she failed to adhere to laid down instructions and would be rude and reported to work late without explanation.

On 7th May, 2014 the claimant without notice stopped coming to work and the respondent did not know her whereabouts.

On 29th October, 2014 the claimant returned to the respondent accompanied by a Mr Jacob and served a demand notice.

The work hours were 9AM to 5PM and the claimant would only work overtime on condition she was paid ksh.1, 000 and would be driven home by the driver. There was no work during public holidays and when required she would report at 10AM and be paid Ksh.2, 500.

The claimant did not get registered with NSSF to enable the respondent pay her due.

There was no termination of employment as alleged, the claimant absconded duty and the claims made have no merit and should be dismissed with costs.

No evidence was called by the respondent.

The claimant filed written submissions.

Determination

The law requires an employer to issue an employee with a written contract of employment pursuant to section 8, 9 and 10 of the Employment Act, 2007 (the Act). Such duty further requires the employer to produce such record(s) with the court once suit has been filed.

The respondent as the employer did not file any work records.

The claimant's case is that on 13th May, 2014 she asked for a wage increase but the respondent opted to terminate her employment. That there was unfair termination of employment without notice or payment of terminal dues.

The defence is that on 7th May, 2014 the claimant did not report to work.

Section 47(5) of the Act places the burden of justifying the reason for termination of employment upon the employer. Where indeed the claimant failed to report to work as alleged by the respondent there is no evidence of what action was taken for such alleged misconduct. There was the option of summary dismissal, warning or invitation to show cause for absenteeism. None is produced.

The court is left with the claim that the claimant asked for a wage increase which led to termination of employment. Such is contrary to section 35, 41 and 45 of the Act which requires notice, hearing and fairness, which is lacking in this case.

The court finds there was unfair termination of employment.

On the claims made that there was underpayments, the respondent has not produced evidence to controvert the outline of wages paid to the claimant.

The claimant being a house servant, her wages were regulated under the Wage Orders. The defence that when the claimant would work overtime she would be driven to her house confirms the claim that she was not accommodated by the respondent.

The wages paid should have been inclusive of a house allowance.

The tabulation of underpayment of wages is hereby found justified all at ksh.37, 378.44.

The claim for overtime is challenged in defence on the grounds that the work hours were from 9 AM to 5PM and when working overtime the claimant would be dropped at home and paid Ksh. 1,000 and while working on public holidays she would report at 10AM and be paid Ksh.2,500.

Upon being served with the response, these averments are not challenged.

On the claim for leave pay for 4 years, there is no evidence that the claimant took her annual leave pursuant to section 28 of the Act. A provision of 21 days each year and based on the last basic wage applicable as of 13th May, 2014 being ksh.9,780.95 all due being ksh.33,904.

The wage for 13 days worked in May, 2014 is not produced. Upon demand and the suit being filed, such amount if paid, the respondent ought to have addressed and filed evidence. Such pay is due for time worked whatever the reasons leading to termination of employment.

On the gross wage due, 13 days wage assessed at ksh.4, 874.

Notice pay is due in a case of unfair termination of employment all at ksh.11, 248 equivalent to one month wage. Such fairly compensates the claimant following unfair termination of her employment.

On the claimant for severance pay, this case did not outline a redundancy situation to justify a claim in this regard. Such is declined.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

a. Notice Pay ksh.11,248;

b. Pay of 13 days worked in May, 2014 ksh.4,874;

c. Leave pay ksh.33,904;

d. Underpayment Kshs. 37,378.44; and

e. Costs of the suit.

DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021

M. MBARU

JUDGE