



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO.2394 OF 2016**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**NAOMI OKOTH.....CLAIMANT**

**VERSUS**

**CREATIVE CONSOLIDATED SYSTEMS LIMITED.....RESPONDENT**

**JUDGMENT**

1. Naomi Okoth instituted the suit vide a Memorandum of Claim filed on 24<sup>th</sup> November 2016 suing Creative Consolidated Systems Ltd for wrongful, unfair and unlawful termination of employment and non-payment of employment dues. She avers that the Respondent employed her on or about 12/06/2015 initially at a monthly salary of Kshs.9,800.00/= but unexpectedly terminated her employment on 21/07/2016 without issuing her a termination notice or payment in lieu of notice. It is her claim that the Respondent therefore breached the actual and implied employment contract it had with her despite being aware of the terms of the employment contract and its obligations.

2. The Claimant pleads that she is entitled to recover outstanding pay, vacation pay, house allowance, overtime pay, pay in lieu of reasonable notice, compensation for benefits during the notice period, and severance pay together with interest. Further, that she has also sustained aggravated damages consisting of mental distress, inconvenient and psychological injury as a result of having her employment terminated without any notice.

3. That the Respondent's conduct was wilful and actuated by malice and this suit is an appropriate case for an award of punitive damages. The specific dues enumerated in her Claim include one month's notice pay, unpaid leave, unpaid overtime, service and unpaid salary for 2 months. The Claimant prays for:-

- i. A declaration that she was wrongfully and unfairly dismissed from her employment.
- ii. Unpaid dues totaling Kshs. 56,840.00/=.
- iii. Notice period of one month - Kshs. 9,800.00/=
- iv. 12 months' salary as compensation for wrongful and unfair termination (Kshs. 9,800.00 x 12 = Kshs.117,600.00/=)
- v. Punitive and aggravated damages for breach of the
- vi. Costs and incidental to this suit.

4. The Claimant also filed a Witness Statement wherein she states that on the said 21/07/2016, she received a letter dated 11/07/2016 from the Respondent terminating her employment and that the termination was done despite her protestation of the same, and in utter disregard of her right to be heard. That the Respondent's action was also wrongful and unfair as it withheld compensation owed to her in lieu of benefits and bonuses to them by reason of the termination.

5. The matter proceeded as an undefended cause.

6. Pursuant to an Order of this Court on 23/09/2021, the Claimant filed an Affidavit in support of the Claim wherein she asserts the averments in her claim and further avers that she used to work for 10 hours a day.

7. The Claimant submits that Sections 43 and 45 of the Act contemplate the employer to not only prove the reasons for termination of employment, but that the reasons are valid and fair. The Respondent in the suit however did not take part in the proceedings and therefore failed to discharge the burden. She urges the Court to find that the termination of her employment was therefore unfair.

8. On the claim for leave, she submits that since an employee's right to annual leave is provided for in **Section 28 of the Employment Act, 2007**, she is entitled to the un-utilised leave days arising for the period running from 2013 to 2016.

9. The claim of overtime, she submits that whereas the employment contract stipulated that she was mandated to work for 8 hours a day, her 10 hour work-day from 2015 and 2016 without compensation entitles her to the same.

10. She also submits that Service pay is provided for in **Section 35 (5) of the Employment Act** as being due to an employee whose statutory deductions are not deducted and remitted in accordance with the law or such statutory deductions are effected by a deduction but not remitted as required. That the payslip she has provided shows she was not a registered member of NSSF as the same was never deducted and remitted and the Respondent did not also tender any evidence to challenge this averment. That she is therefore entitled to service at the rate of 15 days' wages for every year worked. The Claimant refers to the case of **JOAB ASHITIBA HASHON V SAMARITAN MEDICAL SERVICES [2017] eKLR** where it was held that;-

“22. The claimant has made claims for payment of his service gratuity on the grounds that he was not registered with NSSF and NHIF also claims for leave for 6 years on the grounds that he did not take such leave for 6 years due to his role in working for the respondent in its formative years...

23. Section 20 and 21 of the Employment Act, 2007 makes it the duty of the employer to ensure statutory deductions are effected and remitted as appropriate. It was thus the duty of the respondent as the employer to ensure that the claimant as the employee, his position notwithstanding that he was compliant with statutory requirements with regard to effecting all statutory deductions for all employees inclusive of himself. Such deductions and remittance become apparent where an employer is able to issue an itemised pay statement to each individual employee.

11. The implications of such a deduction are outlined in the pay statements issued in terms and in accordance with the provisions of section 20 of the Act.

24. Therefore, when the employer fails to ensure the deduction and remittance of the statutory dues as appropriate, the provisions of section 35 (5) and (6) become applicable. The employee whose statutory dues have not been remitted has the benefit of a service pay....”

12. The Claimant further submits that she has demonstrated that the termination of her employment was wrongful, unfair and unlawful and that she is thus entitled to the maximum twelve months' gross wages as compensation provided for in **section 49(1) (c) of the Employment Act**. In support of this submission she relies on the authorities of **JOHN MWANZIA MBITHUKA V MR. MUKESH MALDE (MANAGING DIRECTOR) & ANOTHER [2014] EKL**R AND **ROSE MWIKALI NZUKI V FOOD FOR THE HUNGRY KENYA [2013] EKL**R. She invites the Court to find in her favour as she was indeed denied her legally entitled dues and no evidence in the contrary has been adduced.

## **ISSUES FOR DETERMINATION**

13. (i) Was the Claimant unlawfully dismissed from her employment.

(ii) Is she entitled to the reliefs prayed in her memorandum of claim.

## **DETERMINATION**

14. The Claimant's evidence is that on 21<sup>st</sup> July, 2016 the respondent without any colour or right unfairly terminated her employment. The evidence on record is that on 6<sup>th</sup> December, 2016 one Richard Wachira a process server received notice of summons which he served on the Respondent.

15. The Respondent did not put a defence and so the case proceeded as undefended suit.

16. The Respondent therefore did not adduce evidence as to whether he had a valid reason or not to terminate the Claimant's employment.

Furthermore there are no documents to establish if Claimant was employed by the Respondent or not since the Respondent did not provide any records of employment.

Section 9 (2) of the Employment Act provide that an 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 to by the employee in accordance with subsection 3 of the said Section.

In this instant case there are no records from the employer having not put in a defence.

17. Section 43 of the Employment Act provide that in any claim arising out of termination of a contract, the employer shall be required to

prove the reason or reasons for the termination, and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of Section 45 of the said act.

18. Section 45 (1) also provide that no employer shall terminate the employment of an employee unfairly. Section 45(2) (b) provide that a termination of employment by an employer is unfair if the employee fails to prove that the reason for termination is valid.

19. The Respondent having failed to file a defence failed to give a valid reason or reasons for termination of the Claimant's employment.

20. It also follows that they also failed to prove they followed the right procedure as provided in Section 41(1) of the Employment Act which provide that the employer who wishes to terminate the employment of his employee must explain in a language the employee understands the reason for his termination and employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

21. The Respondent failed to give a valid reason or at all and so in the absence of defence the Claimant's case is uncontroverted and the court can only find that the Claimant was unlawfully terminated.

22. Issue No.2 is whether the Claimant is entitled to the reliefs sought? The response to that is that in view of absence of any defence to rebut the Claimant's claim the court could only find that the Claimant is entitled to some of the reliefs sought.

23. The court finds in the absence of any evidence to prove the Claimant was given leave days and house allowance then the court must award her the same.

24. As for service pay it was held in the case of **JOAN ASHITIBA HASHON VS SAMARITAN MEDICAL SERVICES (2017) eKLR** that a Claimant made claims for gratuity on the grounds that he was not registered for NSSF and NHIF and claims for leave on the grounds that he did not take such leave then the Claimant is entitled to those awards.

25. This instant case in question the Respondent has produced no records to establish he paid the itemised provisions which are provided in the employment law. The court awards some of the reliefs prayed therefore.

## **26. RELIEFS AWARDED**

1. One month salary in lieu of notice.....Kshs.9,800/=
2. Unpaid leave.....Kshs.9,800/=
3. Claim for unpaid overtime is not proved and I see no basis to award the same.
4. Service pay.....Kshs.4,900/=
5. Unpaid salary for two months is not proved and is declined.
6. Compensation for wrongful dismissal for two months.....Kshs.19,600/=

The court is not persuaded to award aggravated damages having awarded compensation for wrongful dismissal.

Costs are awarded to the Claimant.

## **CONCLUSION**

The total amount awarded to the Claimant for unlawful termination is Kshs.44,100/= and costs and interest at court rates.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**