



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

CAUSE NO. 261 OF 2017

(Before Hon. Justice Ocharo Kebira)

MISS SHEILA KASITI MATSYI CLAIMANT

VERSUS

MISS MWIKALI SOLO.....RESPONDENT

JUDGMENT

1. The Claimant herein through her statement of claim dated 10th February 2017, alleging that she was at all material times an employee of the Respondent, whose employment the latter terminated unfairly, has sought for various reliefs from this Court.

2. The Respondent upon being served with the statement of claim, filed a response to claim, and counter-claim. In her response, the Respondent denied the Claimant's claim in total, and in the counter-claim claimed a one month's salary in lieu of notice.

The Claimant's case

3. The Claimant through her pleadings and testimony contended that on or about the 3rd August 2013, the Respondent employed her as a house servant at a monthly salary of Kshs. 5,400 per a month.

4. The Claimant asserted that the Respondent terminated her employment on the 29th December 2016, unfairly. She alleges that she left her workplace on the 23rd December 2016 for leave and that subsequently, the Respondent called her and instructed her not get back to work. She invited her to pick her clothes that she had left behind.

5. The Claimant asserted that at all material times, what the Respondent paid her as salary was below the prescribed minimum wage. In her witness statement turned evidence in chief, she stated that between 3rd August 2013 – 31st October 2013, she was earning Kshs. 5,500 instead of Kshs. 9,780.75 as contained in legal notice No. 197 of 1st May 2013. There was an underpayment of Kshs. 4,280.75 monthly therefore.

6. The Claimant further stated that on 1st of November the Respondent increased her salary to Kshs. 6,000.00 per a month. That from this time up to 31st March 2014, a period of 5 months the Respondent maintained this salary, and therefore underpaid her by Kshs. 3,780.95.

7. She further stated that from the 1st April 2014 the Respondent increased her salary to Kshs. 6,500.00 per a month. The salary was maintained for a period of 8 (eight) months up to 30th November 2014. Taking into account the stipulations of the legal notice No. 197 of May 2013, she was therefore under an underpayment of Kshs. 2,780.95 per a month for the eight months.

8. The Claimant contended that on 1st May 2015, legal notice No. 117 came into being, settling the minimum wage for house servants at Kshs. 10,954.70 per a month. From this date up to the time her employment was terminated, it was a period of 20 months. Through this period, she was underpaid Kshs. 3,954.70 per a month, therefore a cumulative figure of Kshs. 19,094.00.

9. Cross-examined by Counsel for the Respondent, the Claimant stated that contrary to the allegations by the Respondent, her starting salary was Kshs. 5,500.00. She admitted that she was being housed by the Respondent.

10. She denied that she used to proceed on leave. The Respondent directed her not to get back to work, she reiterated.

The Respondent's case

11. Though the Respondent filed a response to claim and counter-claim as hereinabove stated. She did not testify on her defence and counterclaim. I will therefore take the pleadings as a mere statement with no probative value.

Analysis and Determination

12. In the circumstances of this matter, I find that the Claimant's evidence that the Respondent terminated her employment, in the manner she described to Court was uncontroverted. The Court therefore accepts her evidence that the Respondents just called her and told her not to report back to work. The termination was abrupt, it was without a prior notice and representation by her as contemplated by section 41 of the Employment Act. Consequently, it is my finding that the termination was not in accord with fair procedure.

13. Section 43 of the Employment Act, 2007, places upon an employer, in matters like the instant one, a duty to prove the reason or reasons for termination of an employee's employment, and where there is a default in so proving, the termination shall be deemed unfair in terms of section 45 of the Act.

14. Sections 43 and 45 of the Act are in regard to the substantive fairness of a termination whenever it is in issue. In this matter, the Respondent did not place before Court any evidence to prove the reasons for the termination of the Claimant's employment, to enable the Court gauge whether or not the reason(s) was valid and fair. In the circumstances it is not difficult therefore to conclude that the termination was not substantively fair.

15. Having found that the termination was both procedurally and substantively unfair, I now turn to the reliefs sought by the Claimant.

16. The Claimant has sought to be compensated for what she terms salary underpayments in the sum of Kshs. 150,943.95. I have gone through the various Regulations of Wages (General) / amendment) Order cited by the Claimant, and I agree that at all material times, she was paid below the minimum wages provided thereunder. Consequently, I award her the figure of Kshs. 150,943.95, pursuant to Section 48 of the Labour Institutions Act, which provides:

“48. Wages Order to constitute minimum terms of conditions of employment.

(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to—

(a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) provide an employee with the conditions of employment prescribed in the order, commits an offence.

(3) If an employer is found guilty of an offence under subsection (2), the Court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.

(4) Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum remuneration or to provide an employee with the conditions of employment prescribed in the order, then—

(a) if an employer is found guilty of the offence, evidence may be given of any like contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence; and

(b) on proof of such contravention, the Court may order the employer to pay the difference between the amount which ought to have been paid during that period to the employee by way of remuneration and the amount actually paid:

Provided that evidence shall not be given under paragraph (a) unless notice of intention to give such evidence has been served upon the employer together with the summons, warrant, information or complaint.

(5) The powers given by this section for the recovery of sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings:

Provided that no person shall be liable to pay twice in respect of the same cause of action.”

17. Section 35 of the Employment Act provides for termination notice. Relevant to the instant matter is section 35 (1) (c) which reads;

1. A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be

a.

b.

c. Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

There was no notice given to the Claimant as contemplated by this provision. Consequently, the Claimant became entitled to a one month's salary in lieu of notice under section 36 of the Act. The Claimant is awarded Kshs. 10,954.00.

18. She has sought for Kshs. 24,332.00 as annual leave accrued for 3 years and 5 months less 14 days taken. In her testimony in Court, she stated that she was asked by the Respondent not to report back whilst she was on leave. This piece of evidence makes this Court draw an inference that the Respondent used to allow the Claimant enjoy her statutory right of leave. I am not persuaded that the Claimant is entitled to an award under this head.

19. There is no evidence that the Claimant was a member of any of those schemes or entity put forth in section 35 (b) of the Employment Act, the Court is prepared to agree with the Claimant that she is entitled to service pay pursuant to the provisions of section 35(5). The pay shall be computed using 15 days for every year worked. This translates to Kshs. 16,432.05 applying a salary of Kshs. 10,954.00.

20. Section 49 (1) (c) of the Employment Act bestows upon this Court authority to grant a compensatory relief in favour of an employee who has successfully assailed a termination of his or her employment or his or her employer's decision to summarily dismiss him or her, in a litigation. The power is discretionary, the extent of the grant depends on the circumstances of each case. Considering the length of the period that the Claimant worked for the Respondent, and that the termination was both procedurally and substantively unfair, I award her 4 months' gross salary, therefore Kshs. 43,816.00.

21. As indicated hereinabove, the Respondents did not testify in support of her counter-claim. The contents of the counter-claim remain unproved assertions therefore. By reason of this premise, I dismiss the counter-claim.

22. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms;

a. One month's salary in lieu of notice – Kshs. 10,954.7.

b. Compensation for salary underpaid – Kshs. 150,993.95.

c. Severance pay – Kshs. 16,432.05.

d. Compensation pursuant to the provisions of section 49 (1) (c) of the Employment Act – Kshs. 43,816.00.

e. Costs of this suit.

f. Interest at Court rates from the date of filing this suit till full payment.

g. The Respondent's counter-claim is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15th DAY OF DECEMBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Ms Njenga for the Claimant.

No appearance for the Respondent.