



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 2038 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

AGNES GESARE OGUTU.....CLAIMANT

VERSUS

FUN AN SHOP LIMITED.....1ST RESPONDENT

MANJUNATH PRABHU.....2ND RESPONDENT

JUDGMENT

The Claimant entered into an oral employment contract with the Respondent on 22nd September 2007, to be employed as a cashier at Fun An Shop Limited, New Muthaiga Branch. The Claimant's employment was terminated when the Respondent closed the branch without making arrangements to transfer her to another branch. Aggrieved by this decision, the Claimant filed this suit seeking the following prayers-

a. The Respondent to pay her full and final dues which include-

- i. 1 months' notice in lieu of Kshs.16,700.00.
- ii. Accrued leave of 84 days amounting to Kshs.53,953.20.
- iii. Severance pay (15 x 4 = 60) amounting to Kshs.38,538.00.
- iv. Overtime (864 hours) amounting to Kshs.69,379.20.
- v. House allowance arrears of Kshs.120,240.00.

b. The Respondent to pay her salary for the days she was out of employment to date, that is Kshs.16,700.00 and house allowance of Kshs.2,505.00 amounting to Kshs.19,205.00.

c. The Respondent to pay her full and final dues a sum of Kshs.529,270.40.

d. The Respondent to pay the costs of this suit.

The Claimant avers that she was not paid her terminal dues. She reported the matter to the Ministry of Labour and despite attempts from the labour officer to have the matter resolved, the Respondent did not attend any of the joint meetings.

The Claimant avers that the Respondent intended to abolish her position and declare her redundant as it knew it was closing the branch but never transferred her to another one.

The Respondent filed a response on 28th February 2012 wherein it denies the allegations set out in memorandum of claim and urged this court to dismiss the suit herein.

During examination in chief, the Claimant testified that she was never given a letter of appointment but that the Respondent remitted money to NSSF and NHIF on her behalf. It was her testimony that she never went on leave and that she worked from 8 am to 8 pm. Further, that she

was not issued with a notice before her employment was terminated. She also stated that she was not issued with a certificate of service.

The Respondent did not call any witness.

Submissions by the Parties

The Claimant submitted that she should have been transferred to the Respondent's shops which are still operational, instead of dropping her after closing the branch without notice.

It is submitted that the Claimant's assertions should suffice since the Respondent failed to reduce the verbal contract into writing. She relies on the case of *KUDHEIHA vs. Fatuma Mohamed; Nairobi ELRC Cause 1035 of 2015*.

The Respondent submits that its business and head office was closed down after a disagreement between the 1st Respondent and its landlord, which was beyond its control. That all its employees, save for the Claimant who was not formally engaged, were transferred to its Parklands branch.

That the Claimant's averments are baseless and contradictory as she stated that she was employed as a cashier and later placed at records. That the averments made by the Claimant that the Respondent had planned to abolish her position are speculative and should be disregarded.

The Respondent submits that the claim for salary in lieu of notice is without basis as the Claimant has failed to demonstrate how she arrived at Kshs.16,700.00. Further, that the Claimant is not entitled to the claim for leave days as she was not in continuous employment.

It is further submitted that the Claimant is uncertain of the exact time she worked. In appendix 2, she states that she worked from 9:30 am to 7:00 pm whereas she testified that she worked from 8:00 am to 8:00 pm. It is the Respondent's submissions that the claim for overtime and house allowance have no basis relying on the case of *Robert Musinzi vs. Safdar Mohamed Khan [2012] eKLR*.

Analysis and Determination

I have considered the pleadings filed by the parties, the evidence and written submissions. The following are the issues for determination before this Court –

- i. Whether the Claimant was a casual employee.
- ii. If not, whether the Claimant's termination of employment amounted to a redundancy.
- iii. Whether the Claimant is entitled to the reliefs sought.

Nature of the Claimant's Employment

It was the Claimant's evidence that she worked as the Respondent's employee until the time of her termination. The Respondent did not present a witness in court to controvert the Claimant's allegations. The Respondent also failed to produce records as required under Section 10(6) as read with Section 10(7) of the Employment Act which provides as follows-

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

In light of the foregoing, I find that the Respondent has failed to controvert the Claimant's assertion that she was indeed an employee. Further, as the claimant had worked longer than 30 days continuously, her employment converted to a regular contract of service pursuant to Section 37(1) of the Employment Act.

Termination

The Claimant submitted that by closing the branch in which she worked in without transferring her to their other branches, the Respondent rendered her redundant. Section 40(1) of the Employment Act provides as follows-

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;**

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

The respondent has conceded in its pleadings that it closed the shop where the claimant was working and it is evident from the claimant's uncontroverted evidence that the respondent did not comply with Section 40(1) of the Employment Act. This amounted to both a redundancy, and was contrary to the provisions of Sections 41, 44(2) and 45(1) of the Employment Act.

Reliefs Sought

On the reliefs sought by the Claimant, I will handle the claims for house allowance arrears and payment in lieu of notice together. The Respondent did not provide evidence that the Claimant was issued with a notice, paid in lieu of notice or that she was paid house allowance. As such, the claimant is entitled to the same.

Further the Respondent did not provide evidence to controvert the Claimant's evidence that she never took annual leave for the period she worked for the Respondent. Leave is provided for under the Employment Act at 21 days per year. Having worked from June 2008 to 4th May 2012, the claimant is entitled to leave for 4 years being 84 leave days.

The Claim for severance also succeed this Court having found that the circumstances under which the claimant's employment terminated amounted to a redundancy. The claim for salary for the days she was out of employment to date has no basis in law and fails.

In its submissions, the Respondent contested the Claimants assertion that she worked from 8:00 am to 8:00 pm was contradictory as the appendix annexed by the Claimant had indicated that she had worked for 2 hours overtime daily. This was the basis upon which the Claimant's claim for overtime of Kshs.69,379.20 was made. This has not been controverted by evidence from the respondent. No records were produced to show the exact hours worked by the claimant. I find that the claimant is entitled to overtime.

Before I put figures to the claimant's prayers, it is important to resolve the issue of the claimant's salary as it is the basis upon which all her prayers are tabulated. Sections 3(6) and 26 of the Employment Act as read with Section 48 of Labour Institutions Act require the court to read into every contract the minimum statutory terms of employment.

The claimant pleaded and testified that she was employed as a cashier. In its defence the respondent denied ever employing her in the manner she pleaded. It however did not state in the said pleadings what the nature of her employment was. It also failed to produce records or call any witness. All it did was put her on her defence

As provided in Section 10 and 74 of the Employment Act, it is the burden of the employer to keep and to produce employment records in the absence of which the burden to disprove the averments by the employee shifts to the employer.

The respondent having failed to adduce any evidence at all, the averments by the claimant must be taken to the correct position.

The claimant testified that she worked as a cashier. This being so, the salary attached to the position was Kshs.17,118 in 2011. This therefore means that the claimant's salary of Kshs.16,700 did not include house allowance.

I thus proceed to award the claimant the following –

1. Notice Kshs.19,685.60 being consolidated wage as provided under Section 49(1) of the Act (basic salary of Kshs.17,118 plus 15% house allowance)..
2. Leave of 84 days based on basic pay at Kshs.55,304.30.
3. Severance pay for 4 years Kshs.39,503.
4. House allowance Kshs.(2,567.70 x 4) Kshs.123,249.60

5. Overtime (for 12 months only) at 2 hours per day for 6 days a week for 52 weeks is 624. At 1.5 times rate as provided in Rule 6 of the Regulation of Wages (General Order at the rate of 1.5. times. I award the claimant Kshs.69,379.20 although the correct formula amounts to a much higher figure.

I thus award the claimant the total sum of Kshs.307,122

The respondent will pay the claimant's costs and interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE