



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1748 OF 2015

KENNEDY LIBESE KIDAKE.....CLAIMANT

v

GILBERT NGESU MWENDWA.....1st RESPONDENT

PAMELA NGESU.....2nd RESPONDENT

JUDGMENT

1. This Cause was heard on 28 November 2019. Despite the Respondents advocate on record acknowledging receipt of a hearing notice on 2 August 2019, the Respondents and their advocate did not attend the hearing.
2. The Claimant gave sworn testimony and filed his submissions on 13 December 2019.
3. The Court has considered the pleadings, evidence, submissions and the proposed Issues as filed in Court by the Claimant on 7 September 2017.

Unfair termination

4. The Claimant was employed as a home caretaker by the Respondents on 24 February 2005.
5. According to the Claimant, on 17 September 2014, he sought for leave and he agreed with the Respondents to proceed on leave on 6 November 2014, but come that day, the Respondents computed his terminal dues and informed him that his services were no longer required.
6. Section 35(1) of the Employment Act, 2007 envisages *written notice of termination of employment* while section 41 contemplates a hearing.
7. There was no evidence of *written notice* or a *hearing* and the Court, therefore, finds that the Claimant's employment was terminated unfairly.
8. In their *Response*, the Respondents pleaded that the termination of the Claimant's employment was on account of *poor performance* and *theft*.
9. The Respondents did not attend the hearing to prove that they terminated the Claimant's on account of *performance* and/or *theft* and, the Court in the circumstances conclude that the Respondents failed to discharge the burden placed on them by sections 43 and 45 of the Employment Act, 2007.

Compensation

10. The Claimant served the Respondents for about 9 years, and in consideration of the length of service, the Court is of the view that the equivalent of 6 months wages as compensation would be fair (prescribed minimum monthly wage at separation was Kshs 10,912/- according to computations by Labour Office).

Underpayment and dues

11. The Claimant admitted that he reported a dispute to the Ministry of Labour.

12. The Respondents conceded in the Response that the Claimant reported a dispute to the Ministry of Labour and that the Labour Office computed the amount of dues (underpayments, earned wages, pay in lieu of notice and service pay) due to the Claimant as Kshs 98,286/- out of which the Claimant was paid an advance of Kshs 5,000/-.

13. Considering that the Claimant did not join Issue with the contention by the Respondents on pre-litigation conciliation, the Court will adopt and award the computations on terminal dues/underpayments and leave by the Labour Office.

Conclusion and Orders

14. The Court finds and declares that the Respondents unfairly terminated the Claimant's employment and awards him

(a) Compensation Kshs 65,472/-

(b) Terminal dues Kshs 93,286/-

TOTAL Kshs 158,758/-

15. Claimant to have costs on a half-scale.

Delivered, dated and signed in Nairobi on this 31st day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyasimi instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Ekuru Aukot & Co. Advocates

Court Assistant Judy Maina