



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.224 OF 2016**

**FLORENCE AUDIAH ADHIAMBO.....CLAIMANT**

**VERSUS**

**KENJAP MOTORS LIMITED.....RESPONDENT**

**JUDGMENT**

The claimant was employed by the respondent as an office messenger for a gross wage of Ksh.12, 000 on 25<sup>th</sup> June, 2009 until 30<sup>th</sup> April, 2016 when employment was terminated.

The claim is that there were no reasons given for the termination of employment or notice. For the duration of employment the claimant took her annual leave only twice; during public holidays the claimant was at work and work hours were 8am to 6pm without pay for overtime hours.

The claims made are as follows;

- a) Notice pay, Ksh.12,000;
- b) Overtime for 7 years ksh.352,800;
- c) Leave days ksh.42,000;
- d) Public days Ksh.16,800;
- e) Compensation.

The claimant testified that on 30<sup>th</sup> April, 2016 she was at work with the respondent which as a Saturday. The manager called her and informed her not to report to work on 1<sup>st</sup> May, 2016 without any reason(s) or notice being issued.

The claimant also testified that she was issued with letter of appointment as office messenger and paid ksh.12, 000 for the entire duration of employment.

Work hours were 8am to 6pm Monday to Friday and up to 1pm on Saturday. On public holidays not at work. The wages due were paid through the bank and upon report to the labour office only notice pay was paid. Hellen Kagiri verbally dismissed the claimant, it was not a case of absconding duty but she said the respondent was reducing its employees. The claimant investigated and established this was the case.

The defence is that termination of employment was communicated to the claimant and the reasons given. The wage due for April, 2016 was paid but the claimant declined to collect as well as the notice pay.

The defence is also that the claimant had no leave days pending and there was no work during public holidays. The claims made are without good cause and should be dismissed.

Hellen Kagiri testified that she is the manager at respondent and worked with the claimant from the year 2009 as office messenger. The claimant was issued with letter of appointment and wages were increased over the years.

In April 2016 the claimant absconded duty and was given a verbal warning. The claimant then would attend work and fail to attend to allocated work. Work hours were 8am to 5pm and no overtime allowed. When there was overtime work this would be paid at month end. During public holidays the respondent premises would be closed and no work.

Ms Kagiri also testified that the claimant was paid for notice in cash and then absconded duty and has since been paid ksh.24, 000 for April, 2016 and notice pay. There were no leave days pending. Employment terminated for absconding duty.

At the close of the hearing both parties filed written submissions.

There is evidence the claimant was paid for the wage due in April, 2016 together with notice pay all at ksh.24, 000. Where these dues are not collected, in the statement of defence, this amount is demonstrated as available.

The claimant admitted the claims for public holidays was erroneous as there was no work on such days.

The only claims in issue are for Overtime for 7 years; leave for 5 years and compensation for alleged unfair termination of employment.

The claimant testified that she only took her annual leave twice for the 7 years in the service of the respondent. The years leave was taken was not explained save the respondent submitted work records to show in the year 2015/2016 the claimant had taken her annual leave and was paid travelling allowance.

Without an explanation thereof and as held in the case of **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR** the due annual leave if not a continuing injury and not taken within the provisions of section 28 of the Employment Act, 2007 is not due beyond the 18 months when it becomes due. Without the claimant testifying when the last annual leave was taken to enable the court assess what is due and owing the same in the context of section 28 is lost.

With regard to the claim for overtime pay, the claimant testified that her work hours were 8am to 6pm with an overtime work for 2 hours each day and that on Saturday she would work until 1pm. This would mean in a week the claimant would be at work for 60 hours taking into account the lunch hour which the claimant was silent about.

In an ordinary week the work hours for 6 days is all 64 hours. The claimant worked for 60 hours.

There is no overtime pay due. The claimant worked within the allowable work hours.

With regard to compensation for unfair termination of employment, the claimant testified that she was verbally dismissed and then she investigated and learnt that the respondent was reducing its work force. On the other hand the respondent witness Ms Kagiri testified that the claimant absconded duty after being issued with warning and after failing to attend to allocated work. There is however no notice issued for any misconduct or gross misconduct.

The employer has the duty to address the provisions of section 44(4) (a) read together with section 41(2) of the Employment Act, 2007 where an employee is of gross misconduct and has absconded duty to issue notice and hear the employee in the defence. Where the employee is notified and invited to attend and fails to do so, the notices issued by the employer can be submitted as evidence to vilify the employer in accordance with section 10(6) and (7) of the Act.

In this case, it was the word of the claimant as against the respondent. The statutory duty to produce evidence is on the employer. Without any notices issued to the claimant for the alleged absconding duty, the court has to believe the claimant that employment terminated without notice and without any reasons being given. This is contrary to section 45 of the Employment Act, 2007 and under section 49 compensation is due and in this case, on a balance of probabilities, the respondent is found to have unfairly terminated employment and compensation is hereby assessed at one (1) month all at Ksh.12,000.

**Accordingly, the claims made are found without justification save for award for compensation at ksh.12, 000 and each party to bear own costs.**

**Delivered at Nakuru this 20<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of:

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