



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 533 OF 2015**

**ESHA OMAR MWAJABE.....CLAIMANT**

**VERSUS**

**IQRA BROADCASTING NETWORK LTD.....RESPONDENT**

**JUDGMENT**

1. On 3 December 2018, the Court issued pre-trial directions which included the filing of Agreed Issues.
2. The parties did not agree on the Issues and on 15 March 2019, the Court adopted the Issues as proposed by the Claimant as the trial issues.
3. The Cause was heard on 2 April 2019 and on 12 November 2019. Esha Omar Mwajabe (Claimant) and a Production Manager with Iqra Broadcasting Network Ltd (Respondent) testified.
4. The Claimant filed her submissions on 6 January 2020 (should have been filed/served before 6 December 2019) while the Respondent filed its submissions on 22 January 2020.
5. The Court has considered the pleadings, evidence and submissions, and will examine the case in terms of the Issues as proposed by the Claimant and adopted by the Court.

**Whether Claimant was an employee of the Respondent/Designation**

6. The Claimant contended that she was employed by the Respondent as a news presenter-reporter/anchor on 30 July 2009.
7. Under section 9 of the Employment Act, 2007, the Respondent had an obligation to issue a formal contract to the Claimant and since it did not issue one, the Court finds that the Claimant was employed by the Respondent as a news reporter/presenter from 24 July 2009.

**Remuneration**

8. The Claimant testified that her salary was Kshs 16,500/- per month from the date of employment while the Respondent countered that it was Kshs 7,000/- per month, and was only increased to Kshs 10,000/- in February 2010.
9. The parties produced salary vouchers and records.
10. The vouchers show that the Claimant's initial salary was Kshs 7,000/- and that it was increased to Kshs 10,000/- by February 2010. The records also show that the Claimant was earning house allowance

of Kshs 6,500/- as of March 2011.

11. From the records, the Court finds that the Claimant's first salary of Kshs 7,000/- was increased to Kshs 10,000/- by February 2010 and that in addition, the Claimant was earning a house allowance of Kshs 6,500/-, making a total of Kshs 16,500/- per month.

### **Unfair termination of employment**

12. The Claimant's employment was brought to an end through a letter dated 9 January 2015 but was preceded by suspension from employment on 6 January 2015. The termination of employment letter referred to previous communication and earlier warning letters.

13. The Respondent produced warning letters dated 23 December 2014 and 31 December 2014, and the subject of the warnings was late reporting to work.

14. The Respondent also produced a Memo of 1 January 2012 advising all employees to report at set times/shifts.

15. The Court has looked at the Claimant's reply to the warning dated 24 December 2014. It admits reporting to work late, but attempts to justify the same on religious and other grounds.

16. The Court is satisfied that the Respondent had brought to the attention of the Claimant the question of her late reporting to work and afforded her time to make explanations and that ultimately there was no change necessitating the termination of the contract.

17. In the circumstances, the Court finds that the termination of the Claimant's employment was procedurally and substantively fair.

18. *Compensation* is therefore not available as a remedy.

19. The Court notes that the Respondent had offered the Claimant the equivalent of 1-month salary in lieu of notice.

### **Breach of contract/statute**

#### **Leave**

20. An employee is entitled as of right to at least 21 days annual leave with full pay.

21. The Claimant sought Kshs 17,250/- as leave allowance.

22. In the view of the Court, leave allowance and the entitlement to leave with full pay are distinct entitlements.

23. The Claimant did not provide any contractual or legal foundation to an entitlement to leave allowance and the Court finds the head of the claim was not proved to the required standard.

24. However, the Respondent produced the Claimant's leave records for 2013 showing that she had a balance of 8 leave days, which commuted amount to Kshs 8,800/-.

25. The Court will allow commuted leave as computed by the Respondent.

### **Underpayments of salaries**

26. The largest head of claim advanced by the Claimant was on underpayment of salaries. She sought Kshs 1,121,250/- under this head.

27. *Underpayment* of salary can arise at least under two circumstances. These include payment of salary below the prescribed minimum wage or below the contractually agreed rates.

28. The Claimant did not prove that her occupation had a prescribed minimum wage in terms of any particular Regulation of Wages Order.

29. The Claimant did not equally prove that the Respondent paid her below what they had mutually agreed to.

30. This head of the claim was not proved.

### **Severance pay**

31. *Severance pay* is ordinarily paid in cases of redundancy.

32. The Claimant did not prove that her case was one of redundancy.

33. In a letter dated 10 January 2015, the Respondent admitted owing the Claimant gratuity of Kshs 45,375/-.

34. However, since the Respondent admitted that the Claimant was entitled to *severance pay*, the Court will allow the head of the claim in the amount set out in the letter of 10 January 2015.

### **Commissions**

35. The Claimant sought commissions with respect to advertisements she voiced over. She produced copies of invoices and proof of payments made to the Respondent.

36. The Respondent's witness testified that where an employee wrote and voiced-over an advert, a commission of Kshs 1,000/- would be paid and where it was only a voice-over, a commission of Kshs 500/- was payable.

37. The Respondent appeared to admit that the Claimant did voice-overs and was owed commissions of Kshs 4,000/-.

38. However, the Claimant did not produce evidence of having written and voiced-over adverts in respect of Imenti Girls High School, marriage enrichment, Kifaru Ngano, kappa oil refineries, proctor & Allan, Nokia Lumia, Al Habibu café, Nairobi water, Uraia trust promotion and Zuku advert.

39. The mere pleadings and repeating the same during testimony was not sufficient to prove this head of the claim (the Claimant did not advance any submissions on this head of the claim).

### **Overtime**

40. The general law of employment, the Employment Act, 2007 does not prescribe working hours and leaves that decision to the agreement of the parties.

41. The Court is aware that various Regulation of Wages Orders prescribes working hours, but the Claimant failed to prove that any of the Orders applied to the sector the Respondent operated in.

42. This head of the claim was not proved.

### **Conclusion and Orders**

43. From the foregoing, the Court finds and declares that the Claimant failed to prove that the termination of her employment was unfair.

44. Despite the finding, the Court finds in favour of the Claimant on breach of contract and awards her

(a) Accrued leave	Kshs 8,800/-
(b) Gratuity	Kshs 45,375/-
(c) Commissions	Kshs 4,000/-
(d) Pay in lieu of notice	Kshs 16,500/-
<b>TOTAL</b>	<b>Kshs 74,675/-</b>

45. If the Respondent made payment of any of the items allowed herein, the same may be deducted.

46. Each party to bear own costs as each party has partly succeeded, and Claimant did not file submissions within the agreed timelines without offering any explanation.

**Delivered, dated and signed in Nairobi on this 7<sup>th</sup> day of February 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant      Mrs. Gulenywa instructed by Gulenywa Jonathan & Advocates

For Respondent    Mr. Kassim instructed by Ali & Co. Advocates

Court Assistant    Lindsey/Judy Maina