



**REPUBLIC OF KENYA**

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

**CAUSE NO.238 OF 2017**

**JANES AWINJA ENOCK.....CLAIMANT**

**VERSUS**

**PREMIUM CLEANING AND PESTS CONTROL LIMITED....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent in November, 2012 as a cleaner and worked until September, 2014 at a monthly wage of Ksh.6, 000 paid in cash and after November, 2014 she would be paid through her bank account.

On 3<sup>rd</sup> March, 2017 while the claimant was at her work station, the supervisor issued her with a form to the effect that she should be remitting Ksh.2, 000 daily to the respondent. Such was to take effect from 4<sup>th</sup> March, 2017. It was impractical and the claimant refused to append her signature on the new contract.

The claimant was directed to hand over her duties at close of day. This led to termination of employment. This was unfair on the grounds that the claimant was informed at 7pm at close of business that his employment had been terminated; there were no disciplinary proceedings and there were no reasons given.

The claimant had worked for 51 months for the respondent.

The claimant was not allowed annual leave, pay for work during public holidays and rest days.

The claimant worked from 7am to 7pm daily and there was no overtime pay. She was not paid a house allowance.

The claimant is seeking the following dues;

- a) Notice pay ksh.10,107.10;
- b) Annual leave ksh.32,653.70;
- c) Underpayments Ksh.148,387.70;
- d) House allowance at 15% basic wage;
- e) Public holidays Ksh.31,098.70;
- f) Rest days Ksh.15,603.70;
- g) Overtime pay Ksh.984,073.50;
- h) Compensation;
- i) Costs
- j) Certificate of service.

The claimant testified in support of her claims that upon employment by the respondent as a cleaner she was placed at Baraka Plaza from

November, 2012 cleaning toilets and all clients attending would pay Ksh.10 for use. His monthly wage was Ksh.6, 000. From January, 2015 the pay was ksh.6, 500 per month and which was increased lastly earning ksh.7, 500 per month.

The claimant also testified that On 3<sup>rd</sup> March, 2017 at 4pm the supervisor came with a form and directed her to be collecting Ksh.2,000 per day and that if such figure would not be achieved her employment would be terminated. This was not possible as use of toilets depended on the visiting clients. In a day she would collect Ksh.1, 200 or Ksh.1, 300. Her work hours were 7am to 7pm.

The claimant thus pleaded to have the supervisor stay with her for a week to see if such amount would be achieved and she refused to sign the form and new contract. Later at supervisor came and asked her to hand over her duties.

The claimant also testified that the due wages were reviewed on 30<sup>th</sup> January, 2017 from Ksh.8, 000 to Ksh.9, 500 but would only receive Ksh.7, 500 working from Monday to Saturday and on Sunday twice a month from 8am to 4pm. All public holidays she would be at work and did not take annual leave.

Employment terminated without notice or payment of terminal dues.

The defence that the claimant had a wage advance with a deduction of Ksh.2, 600 per month is not true as such monies were never advanced to her. The bank statement show payment less such advance was an underpayment.

The alleged loan application is not true at ksh.10, 000. The claimant had applied for a loan to pay school fees but this was not allowed and there was no deposit in the bank.

The defence that the claimant was paid Ksh.100 lunch allowance was not true and no such amount was paid. She only got Ksh.50 for fare and not lunch allowance.

The claimant also testified that the respondent would pay for her NHIF and NSSF dues. All work collections would be sent to the respondent in cash. On Sundays she would work twice a month but there were no clients. In January, 2016 she was paid Ksh.10, 400 less statutory deductions and advance payments.

On 2<sup>nd</sup> March, 2017 the supervisor told the claimant her work targets were reviewed to ksh.2, 000 per day and she refused to sign since she knew it was not possible to achieve.

The claimant also admitted that she applied for a loan but this was never given to her though the application is signed in acknowledgement.

Upon termination of employment the claimant did not do hand over. She did not abscond duty as alleged. It was a summary dismissal.

The defence is that the claimant was employed by the respondent in October, 2014 to March, 2017. The claimant was employed as a casual worker on availability of work from October, 2014 to December, 2015 and paid ksh.500 per day and until January, 2016 when she was employed on permanent basis at ksh.10, 400.

The claimant's wages would be paid through the bank account from October, 2014 to March, 2017.

The claimant was also paid cash;

Advances for October, 2014 to December, 2015;

Ksh.2, 600 advances for January, 2016 to December, 2016;

Ksh.2, 250 and Ksh.800 from January and February, 2017;

Ksh.10, 000 advance loan on 20<sup>th</sup> January, 2016.

These payments were reflected in the records and bank account details.

The defence is also that the claimant worked for a total of 30 months for the respondent and placed at Baraka Plaza working from 8am to 5.30pm on working days and was required to remit daily collections to the managing director by phone.

On 2<sup>nd</sup> March, 2017 the respondent introduced sales target of kh.2, 000 per day after conducting research that showed the claimant's business location would achieve such amount yet the claimant was operating at loss. Such changed sales were to apply in all other locations where the respondent had business. These factors put into account a letter was sent to the claimant on 2<sup>nd</sup> March, 2017 and the new targets were to take effect as of 4<sup>th</sup> March, 2017 but the claimant refused to sign in agreement and such undermined the respondent as the employer and in breach of the employment contract ad rendered herself incapable of working a ground for summary dismissal under section 44 of the Employment Act. The respondent opted to engage the claimant as an employee but she opted to abscond duty. There was no termination of employment.

The claimant left employment on her own accord. She requested to be taken to Highway Towers Branch on 3<sup>rd</sup> March, 2017 but failed to

report on duty and handed over some of the respondent's property in her possession but retained the uniform and work card.

The claims made for payment of terminal dues are not justified. The claimant left without notice putting the business into loss as the respondent was forced to look for a replacement. Where the claimant had any grievances these were not brought to the employer's attention.

The claimant was paid all her dues and would be paid a daily allowance for lunch and transport at ksh.100; Ksh.2, 600 wage advance per month; access to company loan at ksh.10, 000; statutory dues to NSSF and NHIF; and was paid in accordance with the Wage orders.

On Sundays all business locations would remain closed. On Saturday would be open until 1pm and including Baraka Plaza where the claimant was located. The claimant was paid a consolidated wage inclusive of house allowance. The claims made should be dismissed with costs.

Simon Mugwe Kuria the managing director testified in support of defence and produced work records. That the claimant was employed and issued with letter of appointment in January, 2016 and before was a casual employee and was paid in accordance with the law. The claimant had various work benefits and when she was given new work targets she declined to sign and opted to abscond duty and has since failed to do handing over.

The claimant would pay her daily collection less ksh.100 for her lunch and fare. She had a loan and wage advance and was paid all her dues through the bank account.

Mr Kuria also testified that every year he is advised by the Labour Officer on the minimum wage and has applied the same to all his employees including the claimant. There was no underpayment and the claims made should be dismissed.

Maximillah Chumba the supervisor to the claimant testified that the respondent set new sales targets and on 2<sup>nd</sup> March, 2017 she handed the claimant with the same but she declined to accept arguing that he location would not achieve ksh.2, 000 daily but since her absconding duty the sales have gone up and above ksh.2, 000 per day.

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

The claimant's case is that she was employed by the respondent as a cleaner but on 2<sup>nd</sup> March, 2017 she was issued with new work targets to delivery sales of ksh.2,000 per day which was not impossible and thus refused to sign in acceptance and was directed to hand over her duties thus ending her employment. That her terminal dues were not paid.

The defence is that the claimant was issued with new work targets following a research that at her work location this would be achieved at ksh.2,000 per day but she declined to oblige and further absconded duty and has failed to hand over and to date retains the respondent's property. That the claimant was paid her dues.

Section 47(5) of the Employment Act, 2007 (the Act) places the burden of proof of unlawful termination of employment upon the employee;

*...For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer...*

Upon the employee discharging this duty, the employer is required under section 43 of the Act to justify the reasons leading to termination of employment. However where the conduct of the employee is gross misconduct, the employer is allowed to issue summary dismissal on short notice pursuant to section 44 of the Act.

*44. (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.*

The claimant testified that she was given new work targets but declined to accept since she knew she would not achieve them. The respondent gave evidence that upon research and the location of the claimant, new work targets were issued but she declined to accept which was in breach of her terms of contract.

Section 44(3) and (4) (e) allow the employer to sanction the employee with summary dismissal for breach of the employment contract and failure to take lawful and reasonable work instructions. For operations reasons, the respondent issue the claimant with new work targets based on its research and she declined to oblige. Even where the claimant contested the new work targets, recourse was not to decline to take lawful instructions. Reason demanded that her complaints, concerns and other matters challenging the new directives be communicated to the employer as failure to abide lawful instructions is gross misconduct.

From the proceedings and the evidence of the claimant, she declined to sign for the new work targets and handed over part of her work tools. She retains some work tools to date and did indicate she still carries her work card. Such conduct of declining to take lawful directions and instructions of the employer and thus failure to attend work effectively frustrated her own employment. The claim for unfair termination of employment is without foundation.

Compensation and notice pay claims are not justified in this case.

On the remedies claimed, section 10 of the Act places the burden of keeping work record on the employer. Upon a dispute such as this, the

employer is required to file the work records with the court pursuant with section 10(6) and (7) of the Act.

The respondent filed work records with regard to the claimant's employment. These records have not been challenged in any material way.

Section 37 read together with section 10 of the Act allow the employer to convert employment from casual terms to contract terms. By letter dated 5<sup>th</sup> January, 2016 the claimant was issued with letter of employment at a wage of ksh.10, 400 per month and placed on probation for 3 months. This mode of employment is lawful and legitimate. The given terms are commensurate with the minimum Wage Orders which as of such date of employment allowed for a basic wage of Ksh.9, 020 and house allowance of 15% and thus the gross wage of ksh.10, 400 was appropriate.

On the claim for underpayment of wages going back to November, 2012 this is not due. The wages paid were in accordance with the Wage Orders.

On the claim for annual leave, the records filed do not outline the taking of annual leave or payment in lieu thereof. From 5<sup>th</sup> January, 2016 to February, 2017 the claimant under the provisions of 28 of the Act was entitled to 21 days for the full year worked and for the two months prorated leave days at 0.75 days each month being 1.5 days all leave days being 22.5 days payable at basic wage of ksh.9,024 all being Ksh.9,475.20.

On the claim for house allowance, as set out above, from 5<sup>th</sup> January, 2016 to March, 2017 when employment terminated, the claimant was paid in accordance with the applicable Wage Orders at a wage inclusive of the due house allowance.

On the claim for work during public holidays, there is no record of the claimant being allowed such time off save her claim for 40 days of work during public holidays is an exaggeration of the fact. Within this period of January, 2016 to February, 2017 the gazetted public holidays are 9 days only. 9 days based on the basic wage amount to ksh.6, 247.38.

On the claim for work during rest days the claim for work hours from 7am to 7pm is challenged and the defence that the claimant worked from 8am to 5.30 on working days which time does not exceed over one hour for assessment of overtime pay. On Saturdays the claimant worked from 8am to 4pm less one hour of her 8 hours' work time and which adequately compensated for any overtime worked. The evidence that the claimant worked two Sundays each month is not challenged. Such work should be compensated as being over and above. With annual leave noted as dues, I take it the claimant did not enjoy such off days and worked for two Sundays each month.

For the period of 14 months, such are 28 days and the claim for Ksh.15, 603.70 is reasonable.

There are records of the claimant enjoying work benefits of wage advances and loan upon her application. The evidence that these benefits were not paid are without good basis as the claimant applied and was allowed. It was not clarified in defence if the claimant had made full payments. Section 17 and 19 of the Act requires the employer to take such loans and wage advances into account before the payment of terminal dues.

The claimant admitted she had not handed over all her work tool. This should be done as part of clearance for payment of the awards herein and upon which a Certificate of Service should issue in accordance with section 51 of the Act.

**Accordingly, judgement is hereby entered for the claimant with the award of pay for public holiday's ksh.6, 247.38; pay for work on rest day's ksh.15, 603.70; annual leave pay ksh.9, 475.20; the dues paid should abide the provisions of section 49(2) of the Act.**

**The claimant shall attend at the respondent's offices for clearance and payment of the dues.**

**Dated and delivered electronically this 4<sup>th</sup> June, 2020 at 0900 hours**

**M. MBARU JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15<sup>th</sup> March, 2020 the Order herein shall be delivered to the parties via emails.

this 4<sup>th</sup> June, 2020 at 0900 hours

**M. MBARU JUDGE**