



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 1381 OF 2011**

**EMILY SIMANI.....CLAIMANT**

**VERSUS**

**ASHTOSH MISHRA.....1<sup>ST</sup> RESPONDENT**

**KAIKA FLOWERS LIMITED.....2<sup>ND</sup> RESPONDENT**

**SHADES HORTICULTURE LIMITED.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The claimant brought this suit on 12.8.2011 contending that he was employed by the 1<sup>st</sup> Respondent on 10.9.2007 as a house servant at a monthly salary of KShs. 4,500.00 and worked diligently until 15.11.2010 when she was summarily dismissed for no valid reason and without being afforded an opportunity to defend herself. Thereafter she reported the matter to the labour office but the 1<sup>st</sup> Respondent ignored the summons by the District Labour Officer.

2. Consequently, the claimant brought this suit seeking the following reliefs:

***a. A declaration that the Claimant's termination of employment was procedurally and substantively unfair.***

***b. The Claimant be paid her terminal benefits amounting to KShs. 220,012.45 as computed below-***

***i. One month's salary in lieu of notice of KShs. 7,754.45.***

***ii. Salary balance for August, September, October and November amounting to KShs. 18,000.00 (4,500 x 4).***

***iii. Leave balance of 1 year of KShs. 7,754.45.***

***iv. 26 public holidays in double rate (26 x 2) amounting to KShs. 13,441.05.***

***v. Service gratuity of KShs. 11,631.00.***

***vi. Salary underpayments –***

***May 10 - July 10 of KShs. 9,763.35.***

***May 09 – April 10 of KShs. 30,594.00.***

***October 2007 – April 2009 of KShs. 28,010.00.***

***vii. 12 months' salary compensation for loss of KShs. 93,053.40.***

***viii. Certificate of service.***

*c. The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of 12 months gross salary.*

*d. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.*

*e. The Respondent to pay the costs of this claim.*

*f. Interest on the above at court rates.*

3. The 1<sup>st</sup> Respondent filed defence on 26.8.2011 denying that he was the Claimant's employer and averred that the Claimant was employed by the 2<sup>nd</sup> Respondent as a casual worker until December 2009, and thereafter by Shades Horticulture Limited between January 2010 and October 2010, still a casual worker. The 1<sup>st</sup> Respondent further averred that the Claimant absented herself from work from November 2010 and only went back in January 2011 to claim her dues. Again she averred that, following a mutual agreement between the Claimant and the 3<sup>rd</sup> Respondent, the Claimant was paid KShs. 37,500.00 being her full and final settlement for all her dues for the period worked. Consequently, the 1<sup>st</sup> Respondent deemed the claim against her to be misconceived, incompetent, bad in law and an abuse of the court process as the Claimant has no cause of action against her.

4. The said defence prompted the Claimant to amend the claim to enjoin the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to the suit but maintained that only she worked for the 1<sup>st</sup> Respondent in his house and was not privy to the relationship between the Respondents. She clarified that the only reason for the joinder of the respondents was because of the 1<sup>st</sup> respondent's allegations in his defence. The 2<sup>nd</sup> and the 3<sup>rd</sup> respondents never filed defence to the amended claim despite being served with the court process.

5. The matter proceeded to trial but only the Claimant testified tendered evidence and thereafter filed written submissions while the respondents did not.

#### **Claimant's case**

6. The claimant testified as Cw1 and told the court that she was employed by the 1<sup>st</sup> respondent as a House Servant at his residence at Parklands Estate on 10.9.2007 for a monthly basic salary of kshs.4500. and continued till 15.11.2010 when the 1<sup>st</sup> respondent unfairly terminated her employment. The termination was without any prior notice, or without proper reason at all, and without any hearing as required by section 41 of the Employment Act and the rules of natural justice.

7. She further testified that on 8.12.2010, she reported the matter at the labour office and a demand letter was written to the 1<sup>st</sup> respondent but he refused to respond within the 14 days given. Again, the labour officer summoned the 1<sup>st</sup> respondent to a conciliation meeting on 27.1.2011 but the 1st respondent ignored. Finally, the labour officer gave the 1<sup>st</sup> respondent a final chance to attend conciliation on 31.1.2011 but he also ignored.

8. The claimant testified that despite her salary underpayment, the 1<sup>st</sup> respondent failed to pay her salary for the month of August, September, October and November 2010. She further testified that she used to work during public holidays without payment contrary to the law and never went for any annual leave throughout her service for the 1<sup>st</sup> respondent.

9. She denied any privity of the relationship between the respondents herein and maintained that the 1<sup>st</sup> respondent was the only employer she knew. She further denied receiving any terminal benefits as alleged by the 1<sup>st</sup> respondent in his defence and disowned the signature on the payment voucher which she described as a forged document. She, therefore prayed for the reliefs sought in the amended claim.

#### **Claimants submissions**

10. The Claimant submitted that she was not issued with reasons for her summary dismissal, nor did the Respondent present any witness to prove the allegations that she failed to report to work from November 2010. She contended that the onus of proof of the alleged absence from work rests on the employer but in this case the Respondent did not produce any evidence to discharge that burden. She urged that her evidence that she was dismissed unfairly without prior notice, without valid reason and without a fair hearing as required by section 41 of the Employment Act was not controverted. She therefore prayed the court to find that her summary dismissal failed the test of substantive justification and procedural fairness and as such it was unfair within the meaning of section 45.

11. The Claimant submitted that she is entitled to one month's salary in lieu of notice since she was neither issued with a prior notice or paid salary in lieu of notice. She further submitted that she is entitled to the claim for the outstanding leave days because she was never took any leave in the year 2010 or she received payment in lieu the leave earned. She also contended that 1<sup>st</sup> Respondent did not adduce any evidence to rebut the claim for leave.

12. She further submitted that no evidence was adduced to controvert her evidence that she not paid her salary for the months of August, September, October and November 2010 and urged for the same to be awarded. She further submitted that she is entitled to salary arrears of that were occasioned by underpayment below the minimum prescribed wage for the period between October 2007 to April 2009 and May 2010 to July 2010.

13. The Claimant further submitted that she is entitled to service gratuity by dint of section 35 (6) of the Employment Act and in the absence of evidence showing that she was a member of NSSF. She prayed for gratuity at the rate of 15 days salary for each completed year of service. The Claimant further submitted that she is entitled to 12 months' compensation for unfair termination as she has proved that the termination of her employment was substantively and procedurally unfair. Finally, she urges issuance with a certificate of service as she was never given

the same.

### **Issues for determination and Analysis**

14. I have carefully considered the pleadings filed by the parties, the evidence adduced before this Court as well as the Claimant's submission and the following issues arose for determination: –

- a. Who the claimant's employer from September 2007 to November 2010?
- b. Whether the Claimant's employment was unfairly terminated.
- c. Whether the Claimant is entitled to the reliefs sought.

### **The Claimant's Employer**

15. The 1<sup>st</sup> Respondent denied being the Claimant's employer and contended that the Claimant was employed by the 2<sup>nd</sup> Respondent until December 2009, and thereafter employed by 3<sup>rd</sup> Respondent between January 2010 and October 2010, as a casual worker. However the claimant denied any employment relationship with the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and contended that she was employed by the 1<sup>st</sup> respondent as a House Servant in his house at Parklands Estate since September 2007 for a monthly salary of kshs.4500. The said evidence was not rebutted by the respondents who did not adduce any evince during the hearing. Consequently, I return that the claimant has proved on a balance of probability that her employer was the 1<sup>st</sup> respondent from September 2007 to November 2010.

### **Unfair termination of the Claimant's Employment**

16. The Claimant testified that she was summarily dismissed by the 1<sup>st</sup> Respondent, in November 2010 for no valid reason and without being accorded any hearing. However, the 1<sup>st</sup> Respondent adduced no evidence to rebut the said evidence by the claimant and substantiate her defence that the Claimant is the one who deserted the 3<sup>rd</sup> Respondent's employment in November 2010.

17. Section 45 (1) of the Employment Act 2007 prohibits unfair termination of an employee. Subsection (2), provides that termination of an employee's employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason related the employee's conduct, capacity or compatibility or is based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure. Fair procedure includes but is not limited to fair hearing as envisaged under section 41 of the Act.

18. In the absence of evidence from the 1<sup>st</sup> respondent to prove that the indeed claimant absconded duty, and that she was accorded an opportunity to defence herself before the dismissal, I must return that the claimant has proved on a balance of probability that she was dismissed unfairly by the 1<sup>st</sup> respondent contrary to section 45 of the Employment Act.

### **Reliefs Sought**

19. In view of the foregoing holding, I make a declaration that the termination of the claimant's employment was procedurally and substantively unfair. Based on the same holding I find that under section 49 of the Employment Act, the claimant is entitled to salary in lieu of notice plus compensation for the unfair termination of her employment. The claimant prayed for one- month salary in lieu of notice and I grant the same based on section 35 (1) (c) of the Act which provides for 28 days' written notice period before termination. I further grant the claimant 3 months' salary as compensation for the unfair termination of her services considering that she served for less than 3 years, and that it was possible for her to secure an alternative employment within that period. The said award is based on the admitted salary of kshs. 4500 per month because she did not adduce any evidence to prove that she was entitled to any higher pay than that.

20. Claim of leave balance of 1 year is granted as prayed because the 1<sup>st</sup> Respondent did not adduce any leave records as required by section 74(1)(f) of the Act to controvert the Claimant's claim for leave.

21. The claim for service gratuity fails as the Claimant did not provide any evidence to prove that it was provided for in her contract service. Likewise, the claim for public holidays and salary underpayment suffers the same fate for want of particulars and proof. It is now trite law that a special claim must be specifically pleaded and proven.

22. The claim for salary for the months of August, September and October are awarded as prayed since no evidence was adduced by the 1<sup>st</sup> respondent to prove that the said salary was paid. As regards the month of November, the Claimant is awarded salary for 15 days worked her summarily dismissed on 15/11/2010.

23. The claim a Certificate of Service is granted in line with section 51 (2) of the Employment Act 2007.

24. In the end I inter judgment for the claimant against the 1<sup>st</sup> Respondent as follows:

Notice                      kshs. 4500

Compensation            kshs.13500

Leave	kshs. 3634.60
Unpaid salary	<u>kshs.15750</u>
<b>Total</b>	<b>kshs 37384.60</b>

25. The award is subject to statutory deductions but claimant will have Certificate of Service, costs of the suit plus costs and interest at court rate from the date of this judgment.

**Dated signed and delivered at Nairobi this 23<sup>rd</sup> day of July 2020.**

**ONESMUS N. MAKAU**

**JUDGE**