



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1663 OF 2016

TERESIA NYAMBURA MACHIRA.....CLAIMANT

-VERSUS-

TOSHA FILLING STATION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 10th July, 2020)

JUDGMENT

The claimant filed the statement of claim on 19.08.2016 through Kimani Kagwima & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) 3 months' pay in lieu of notice Kshs.12,000.00 x 3 = Kshs.36,000.00.
- b) Salary for September 2015 Kshs. 12,000.00.
- c) 12 months' salary compensation for unfair termination Kshs. 144, 000.00.
- d) Severance pay 15 days for 2 years' service Kshs. 12,000.00.
- e) Unpaid leave for 2 years Kshs. 24,000.00.
- f) Overtime worked for 2 years Kshs. 308,000.00.
- g) A declaration the termination of employment was unfair, un-procedural, wrongful and illegal.
- h) Costs of the claim.

The claimant pleads that she was employed as a petroleum pump attendant by the respondent at Kshs. 12,000.00 effective December 2013. Further, on 14.09.2015 she reported on duty and her supervisor summoned her and she was dismissed with immediate effect without cause and due process. The claimant alleges she was never granted annual leave and she worked overtime without pay.

The claimant testified to support her case and filed final submissions. It is submitted that despite service the respondent failed to enter appearance, to file defense or to attend at the hearing. The Court has considered all the material on record and makes findings as follows:

- 1) As per the claimant's pleadings and evidence parties were in a contract of service.
- 2) The termination was on 14.09.2015 and the suit filed on 19.08.2016. The Court finds that the claim for overtime was in the nature of a continuing injury and the 12 months of limitation under section 90 of the Employment Act 2007 had lapsed as at the time the suit was filed. The prayer will fail accordingly.
- 3) As at termination the claimant had served from December 2013 to 14.09.2015 making 20 complete months. Prorate and under section 28 of the Act, the claimant is awarded **Kshs.20,000.00** in lieu of annual leave due but not granted.
- 4) For the 14 days worked in September 2015 and not paid the claimant is awarded due pay at **Kshs. 5,600.00**.
- 5) The claimant testified that she requested and obtained permission from her manager to be off duty for 2 days on a Friday and

Saturday to attend a funeral service and a dowry meeting. She left duty on Thursday and was away on Friday and Saturday and resumed duty on Monday 14.09.2015 when the supervisor summoned her and told her to go back home promising to recall her but she was never recalled. She checked with the supervisor who told her to surrender the uniform and go away. She was subsequently locked out and threatened. The Court has considered the claimant's evidence and returns that the termination was unfair for want of a valid reason and due procedure as per section 43 and 45 of the Employment Act, 2007.

6) The Court has considered the claimant's evidence. She had worked for 20 months. No reason was advanced for her termination. The Court considers that her contract was terminable by about one-month notice under section 35 of the Act. Taking all the circumstances into account she is awarded one month pay **Kshs.12,000.00** for unfair termination and **Kshs.12,000.00** in lieu of termination notice.

7) The respondent to pay the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) The declaration that the termination was unfair and wrongful.

2) The respondent to pay the claimant **Kshs.49,600.00** by 01.09.2020 failing interest to be payable thereon at court rates from the date of the judgment till full payment.

3) The respondent to pay costs of the suit.

4) In view of the prevailing Covid 19 situation there be stay of execution of the decree herein till 01.09.2020.

Signed, dated and delivered by the court at Nairobi this Friday, 10th July, 2020.

BYRAM ONGAYA

JUDGE