



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 573 OF 2014

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

THE DIRECTOR OF CENTRAL POLICE STATION CANTEEN.....RESPONDENT

JUDGMENT

Introduction

1. Mr. Oscar G. Kituto (hereinafter referred to as the grievant) was employed by the respondent on August 2001 as a cook, earning a basic salary of KShs.2,000.00. His daily work started from 4:30 am and ended at 9:00 pm. Thereafter the salary was increased to a maximum KShs.7,000.00 but nothing more was paid as paid house allowance. As a result of low pay and long hours of service the grievant suffered stress and had to use very expensive medicine forcing him to agitate for better pay. He was however terminated on ground that he was mad and the matter was referred to the labour office for conciliation but the respondent did not attend.

2. As a result of the foregoing matters, the Claimant union filed this case on behalf of the grievant on 7.4.2014 alleging that his employment was unfairly terminated by the respondent on 16th March 2012 after 11 years of service. The claimant averred the grievant was terminated for his persistent agitation for salary increment because his salary was underpaid despite his long hours service as a cook. She therefore prays for the following prayers on behalf of the grievant:

- a. Underpayments between 1st May 2009 to 30th April 2010 in the sum of KShs. 1,452.00.
- b. Underpayments between 1st May 2010 to 30th April 2011 in the sum of KShs. 2,830.00.
- c. Underpayments between 1st May 2011 to 28th February 2012 in the sum of KShs. 2,384.00.
- d. 16 days worked in the month of March 2012 in the sum of KShs. 4,836.00.
- e. House allowance not paid between 1st May 2009 to 30th April 2010 in the sum of KShs. 13, 109.40.
- f. House allowance not paid between 1st May 2010 to 30th April 2011 in the sum of KShs. 13,109.45
- h. House allowance not paid between 1st May 2011 to April 2012 in the sum of KShs. 12,288.00.
- h. One months' pay in lieu of notice in the sum of KShs. 9,420.80.
- i. Public holidays from 1st May 2009 to 30th April 2010 in the sum
- j. Public holidays from 1st May 2010 to 30th April 2011 in the sum of KShs. 2,671.00
- k. Public holidays from 1st May 2011 to February 2012 in the sum of KShs. 2,731.00.
- l. Accrued leave days for the year 1st May 2009 to 30th April 2010 in the sum of KShs. 4,769.00.
- m. Accrued leave days for the year 1st May 2010 to 30th April 2011 in the sum of KShs. 5,097.00.

- n. Off days from 1st May 2009 to 30th April 2010 in the sum of KShs. 11,476.40.
- o. Off days from 1st May 2010 to 30th April 2011 in the sum of KShs. 12,623.80.
- p. Off days from 1st May 2011 to 16th March 2012 in the sum of KShs. 10,196.20.

3. The Respondent filed her Response on 19.6.2014 denying each averment in the Claim. She contended that the Claimant's employment was terminated for lawful cause due to his gross misconduct and absenteeism from work. She denied that the Claimant worked for the long hours but admitted that the Claimant had requested for leave to take medicine. She further denied that the Claimant's mental health deterioration was as a result of the Respondent's unfavorable working conditions and prayed for the suit to be dismissed with costs.

4. The suit was heard *ex parte* on 13th November 2018 despite service of the hearing notice upon the Respondent. The Claimant testified as CW1 and thereafter, filed his written submissions.

The Claimant's Case

5. CW1 testified that he commenced working for the respondent in 2001 as a cook and attendant earning kshs.2000 per month. That he was starting his work at four am and end at 10 pm. That in 2008, he suffered from mental disorder and started using expensive medicine. That, the sickness started after he was denied salary increment despite his stressful long working hours at low pay. That in 2012, the salary was increased to Kshs.7,500 but he was not satisfied.

6. CW1 further testified that in April 2012 he was dismissed for agitating for a better pay for what the employer described as madness. However, CW1 clarified that he had a mental disorder but denied that he was not insane. He contended that his mental condition was due to the stress caused by the many hours of work with low pay. He further contended that dismissal was verbal and without prior notice and his terminal dues were not paid.

7. CW1 also testified that he reported the matter to the claimant union and the Respondent was issued with a demand letter, but the same was ignored. Consequently, the union lodged a dispute at the labour office for conciliation but the respondent never attended and a certificate to file a suit in court was issued.

8. He therefore prayed for the reliefs sought by the Statement of Claim.

The Claimant's Submissions

9. In his submissions dated 3rd December 2018, the Claimant submitted that his employment was unfairly and unlawfully terminated contrary to section 45 of the Employment Act 2007 and prayed for the Court to grant the prayers as set out in his memorandum of Claim.

The Analysis and determination

10. After careful consideration of the pleadings, evidence and the submissions presented by the parties, there is no dispute that the Respondent employed the grievant from 2001 till 16th March 2012 when she dismissed him. There is further no dispute that prior to the dismissal, the grievant had suffered a mental condition which required him to partake of certain medication. The issues for determination are as follows:

- a. Whether the Claimant's employment was unlawfully and unfairly terminated.
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the grievant's employment was unlawfully and unfairly terminated

11. Under section 45(2) of the Employment Act termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.

Reason for Termination

12. According to the statement of defence, the reason for dismissing the grievant was gross misconduct and absenteeism due to a mental illness he suffered while in her service. The said pleading was, however not supported by any evidence, as the respondent never tendered any evidence at the trial. She also never rebutted the evidence by the CW1 that the reason for his dismissal from employment his agitation for better pay and it was done without any prior notice.

13. The respondent also never disputed the fact that she gave the grievant a recommendation letter which contracted with her pleadings in the defence that the claimant was dismissed for gross misconduct. The letter described the grievant as, "**co-operative, disciplined and hardworking under all situations without supervision.**" She then requested that the grievant be accorded assistance in his endeavours.

14. After considering the foregoing recommendation letter and fact that the respondent never tendered any evidence to rebut the evidence by

the Cw1, I find that she has failed to discharge the burden of proving that she had a valid and fair reason for dismissing the grievant as required by section 43, 45 and 47(5) of the Employment Act. She neither proved that the claimant absented himself from work without leave or for no lawful cause. She further failed to prove any other gross misconduct as pleaded in her defence.

Procedure.

15. For the same reason that the respondent never tendered any evidence herein, she also failed to prove that she followed a fair procedure before dismissing the grievant. Section 41 of the Employment Act provides in mandatory terms that before terminating an employee's contract on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands and in the presence of another employee of his choice or shop floor union official, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided.

16. In view of the finding herein above that the respondent has failed to prove that there was a valid and fair reason for dismissing the grievant and that a fair procedure was followed, I return that the dismissal unfair and therefore unlawful within the meaning of section 45 of the said Act.

Whether the Claimant is entitled to the reliefs sought

17. Having established that the Claimant's employment was unfairly and unlawfully terminated, I proceed to award him one month salary in lieu notice plus 12 months' salary compensation based on the gross monthly pay under section 49(1) of the said Act. The claimant pleaded the gross pay as KShs.9,420.80 but the correct sum is KShs.9,421.95.

18. The Claimant claims underpayment as follows:

- a. Underpayments between 1st May 2009 to 30th April 2010 in the sum of KShs. 1,452.00.
- b. Underpayments between 1st May 2010 to 30th April 2011 in the sum of KShs. 2,830.00.
- c. Underpayments between 1st May 2011 to 28th February 2012 in the sum of KShs. 2,384.00.

19. The Regulation of Wages (General) (Amendment) Order for the years 2009, 2010 and 2011 as attached by the Claimant, sets the minimum wage for cooks at KShs. 6,621.00, KShs. 7,283.00 and KShs. 8,193.00 respectively, from 1st May of the respective years to 30th April of the respective succeeding years.

20. The Claimant has therefore justified and proved his claim for salary underpayment, in the absence of evidence to the contrary. However, I have noted that the basis of the Claimant's calculation for the period 1st May 2011 to 28th February 2012 is KShs. 8,192.00 instead of 8,193.00 provided in the Regulation of Wages (General) (Amendment) Order 2011. Since parties are bound by their pleadings, this Court cannot purport to amend the pleadings on the Claimant's behalf to award the salary stipulated in the 2011 Wage Order. The claim is therefore awarded as prayed.

21. The Claimant's payment for 16 days worked in March 2012, succeeds. In the absence of evidence to the contrary, the Claimant's assertion that he worked for 16 days stands. However, the basis of the Claimant's computation is KShs. 8,198.00 instead of KShs. 8,193.00. The Claimant is thus awarded KShs.4,369.60 instead of the KShs.4,836.00 claimed.

22. The Claimant has claimed compensation for house allowance based on 15% of the minimum gazetted basic pay as follows:

- a. House allowance not paid between 1st May 2009 to 30th April 2010 in the sum of KShs. 13, 109.40.
- b. House allowance not paid between 1st May 2010 to 30th April 2011 in the sum of KShs. 13,109.45
- c. House allowance not paid between 1st May 2011 to April 2012 in the sum of KShs. 12,288.00.

23. He based his claim for house allowance on **Section 31 (1) of the Employment Act 2007** which provides as follows:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

24. In the absence of records from the Respondent confirming that she provided housing or paid the claimant house allowance, I award him the allowance as prayed save for the period between 1st May 2009 to 30th April 2010 for which I award him KShs.11,917.80 instead of the KShs.13,109.40 which is not the correct figure.

25. The Claimant claims payment for public holidays and leave days for two years. **Section 10 (3) (i) of the Act** requires an employer to issue an employee with a contract for service containing:

Entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

26. The Claimant has sought compensation for holidays worked as for the period served. He however pleaded no particulars of the public holidays worked and tendered no evidence in support. I therefore dismiss that claim.

27. The Claimant sought compensation for leave days not taken. The Respondent failed to produce records proving that the Claimant had exhausted his leave days, contrary to **section 74 (1) (f) of the Employment Act 2007** which requires an employer to keep records regarding an employee's annual leave entitlement. **Under section 28 (1) (a) of the Act**, an employee is entitled to an annual leave of not less than 21 days. The Claimant has used this as the basis for his computation. The claim is granted as prayed.

28. The Claimant has prayed for off days as follows:

- a. Off days from 1st May 2009 to 30th April 2010 in the sum of KShs. 11,476.40.
- b. Off days from 1st May 2010 to 30th April 2011 in the sum of KShs. 12,623.80.
- c. Off days from 1st May 2011 to 16th March 2012 in the sum of KShs. 10,196.20.

29. The claim was not rebutted by the defence and the claimant relied on **Section 74 (1) (e) of the Employment Act** which requires an employer to keep records of an employment including employee's weekly rest days. **Section 27**, of the Act entitled an employee to at least 1 rest day in a week. I therefore allow the claim as prayed for lack of any evidence to disprove it.

Conclusion and disposition

30. I have found that the termination of the claimant's employment by the Respondent was unfair both substantively and procedurally. I have further found that the claimant is entitled to compensation for the unfair termination plus terminal damages accruing from his terminated contract. Consequently, I enter judgment for him in the following terms:

Notice Kshs. 9,421.95

Compensation (7282 x 12 months) Kshs.87,396.00

Salary underpayment Kshs. 6,666.00

16 days worked in March 2012 Kshs.4,369.60

House allowance arrears Kshs.37,315.25

Accrued leave Kshs. 9,866.00

Off days not taken Kshs.34,296.40

Total Kshs.189,331.20

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Dated, Signed and Delivered in Open Court at Nairobi this 29th day of March 2019

ONESMUS N. MAKAU

JUDGE