



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1401 OF 2014**

**IRENE NDUNGE MBITHI.....CLAIMANT**

**v**

**MR. & MRS. KANTARIA.....RESPONDENT**

**JUDGMENT**

1. Irene Ndunge Mbithi (Claimant) in a *Statement of Claim* lodged in Court on 20 August 2014 alleged that the Respondents unfairly terminated her employment and were in breach of contract.
2. The Respondents filed a *Response* through Gakoi Maina & Co. Advocates on 9 June 2015 denying unfair termination of employment and breach of contract.
3. On 16 July 2018, the said law firm was granted leave to cease from acting for the Respondents.
4. When the Cause came up for hearing on 7 March 2019, the Claimant informed the Court that she was ready for the hearing.
5. On record was an affidavit of service sworn by one Fredrick Musyoka Mwaniki attesting to service of a hearing notice upon Mrs. Kantaria at Kantaria Commercial Stores along Jainsala Road on 28 January 2019, and another copy through postal address P.O. Box 43035 Nairobi 00100, on the same day.
6. Despite the service, the Respondents did not attend the hearing.
7. The Claimant testified and adopted her witness statement, and also filed submissions on 4 April 2019.
8. The Court has considered the pleadings, evidence and submissions.

**Underpayments**

9. The Claimant, a house help alleged payment of wages below the prescribed minimum wages from 2008 to 2013.
10. For the years of service, the Claimant sought a total of Kshs 89,310/- on account of underpayments.
11. From May 2008 to April 2009, the prescribed minimum wage exclusive of house allowance according to Legal Notice No. 38 of 2006 was Kshs 5,195/- while the Claimant was getting Kshs 5,000/-.
12. From May 2009 to April 2010, Legal Notice No. 70 of 2009 prescribed the minimum wage for house helps as Kshs 6,130/-. The Claimant continued earning Kshs 5,000/-.
13. According to Legal Notice No. 98 of 2010, the prescribed minimum wage for a house help was Kshs 6,743/- , from May 2010 to April 2011. There Claimant still received Kshs 5,000/-.
14. From May 2011 to April 2012, the prescribed minimum wage for house helps according to Legal Notice No. 64 of 2011 was Kshs 7,586/-. The Claimant's wage had increased to Kshs 6,000/-.
15. Legal Notice No. 71 of 2012 increased the minimum wage to Kshs 8,579/-. The Claimant was earning Kshs 8,000/-.
16. The Claimant's evidence remained un rebutted, and the Court can conclude that she was underpaid by Kshs 89,310/-.

## **Wages for June 2014**

17. The Claimant contended that she was not paid Kshs 8,403/- being earned wages up to 19 June 2013 when her services were terminated.

18. The Claimant would be entitled as of right to the earned wages.

## ***Pro rata leave***

19. Annual leave is a statutory entitlement and accrues and is incorporated into all employment contracts. The Claimant sought *pro rata* leave for the 6 months worked in 2013, and she computed the same as equivalent to Kshs 4,644/25. There being no rebuttal, the Court will allow the head of claim.

## **National Social Security Fund/National Hospital Insurance Fund contributions**

20. The Claimant did not prove she was registered with the 2 Funds or was being deducted monthly contributions.

21. The head of claim is declined. The Claimant may wish to follow up with the 2 Funds, if indeed she was registered and deductions were not remitted.

## **Unfair termination of employment**

22. The Claimant alleged unfair termination of employment while the Respondents asserted in the *Response* that it was a case of summary dismissal anchored on theft.

23. The Respondents did not lead any evidence in terms of sections 43, 44 and 45 of the Employment Act, 2007 to justify termination of the Claimant's employment, either as a summary dismissal or as termination on notice.

24. Considering the Claimant's unchallenged testimony that there was no written notice of termination, and in light of the requirements of section 35(1) of the Employment Act, 2007, the Court finds that there was unfair termination of employment.

## ***Pay in lieu of notice***

25. In terms of sections 35(1)(c) and 36 of the Act, the Court holds that the Claimant is entitled to 1 month pay in lieu of notice (prescribed basic wage was Kshs 8,579/-).

## ***Compensation***

26. The Claimant served the Respondent for about 5 years, and in consideration of the length of service, the Court is of the view that the equivalent of 6 months gross wages compensation would be appropriate.

27. In terms of Legal Notice No. of 2012, the gross wage for a house help (inclusive of 15% house allowance) was Kshs 9,865/- (the Court will use the same in computing compensation).

## **Conclusion and Orders**

28. The Court finds and declares that the termination of the Claimant's employment was unfair and further that the Respondent was in breach of contract.

29. The Claimant is awarded

(a) Underpayments Kshs 89,310/-

(b) Wages June 2013 Kshs 8,403/-

(c) *Pro rata* leave Kshs 4,644/-

(d) Pay in lieu of notice Kshs 8,579/-

(e) Compensation Kshs 59,190/-

**TOTAL Kshs 170,126/-**

30. Claimant to have costs on half scale.

**Delivered, dated and signed in Nairobi on this 31<sup>st</sup> day of May 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Okemwa instructed by Okemwa & Co. Advocates

Respondents did not participate

Court Assistant Lindsey