



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1720 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 19th June, 2019)

MILKAH WAIRIMU KAMAU.....CLAIMANT

VERSUS

HEKIMA PLACE TRUST INC.....RESPONDENT

JUDGMENT

1. The Claimant commenced this suit vide the Statement of Claim dated 24th September 2015 seeking the following prayers:-

a. A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.

b. A declaration that the Claimant was entitled to a contract of service.

c. 1 months' salary in lieu of notice in the sum of KShs. 20,240.00.

d. The sum of KShs. 1,763,537.60 as particularized below:

House Allowance

i. For the year 2008 in the sum of KShs. 13,500.00.

ii. For the year 2009 in the sum of KShs. 18,000.00.

iii. For the year 2010 in the sum of KShs. 18,000.00.

iv. For the year 2011 in the sum of KShs. 18,000.00.

v. For the year 2012 in the sum of KShs. 18,000.00.

vi. For the year 2013 in the sum of KShs. 7,500.00.

vii. For the year 2013 in the sum of KShs. 21,252.00.

viii. For the year 2014 in the sum of KShs. 36,432.00.

ix. For the year 2015 in the sum of KShs. 12,144.00.

Overtime

i. From April to December 2008 in the sum of KShs. 103,852.80

ii. From January to December 2009 in the sums of KShs. 138,470.40.

iii. From January to December 2010 in the sums of KShs. 138,470.40.

iv. From January to December 2011 in the sums of KShs. 138,470.40.

v. From January to December 2012 in the sums of KShs. 138,470.40.

vi. From January to May 2013 in the sums of KShs. 57,696.00.

vii. From June to December 2013 in the sums of KShs. 163,480.80.

viii. From January to December 2014 in the sums of KShs. 280,252.80.

ix. From January to April 2015 in the sums of KShs. 93,417.60.

Gratuity for the 7 years worked in the sum of KShs. 85,008.00.

12 months' salary for unfair termination for KShs. 242,880.00.

e. Certificate of service.

f. Costs of this suit.

g. Interest on the amount awarded at court rates.

2. On 1st April 2008, the Claimant was employed by the Respondent as a Resident Mum (Childcare) at a gross monthly salary of KShs. 10,000.00 with a 10% increment each year. However, the Respondent refused to pay the Claimant overtime and house allowance. On 1st June 2013, the Claimant's monthly salary was increased to KShs. 20,240.00 exclusive of house allowance.

3. On 14th May 2015, the Respondent's Director issued the Claimant with a 14 days suspension letter in the presence of two board members. On 28th May 2015, she resumed work after the lapse of her suspension and was called to a meeting at the Shade Hotel in Karen in the presence of 5 board members, to what turned out to be her disciplinary hearing.

4. She was interrogated about her relationship with one Samuel Wambugu who worked at the Respondent's green house. She was informed that such relations were not allowed in the organization as it was tarnishing the organization's reputation. Because of this, her employment was terminated at the end of the meeting.

5. During examination in chief, **CW1** and the Claimant in this case admitted that she had been paid KShs.100,000.00 and KShs. 61,000.00 was paid to Waumini Sacco. It was also her testimony that she worked for 4 days for 24 hours and had 2 days off.

6. Upon cross-examination, she denied the allegations raised by the Respondent in its defence and stated that the reason she was forcefully told to resign was because of her poor work. She admitted that clause 6 of her letter indicated that her salary included house allowance.

7. She also admitted that she had lunch breaks between 1pm and 2pm, reported to work at 8 am and would sometimes sleep at 11pm. In her re-examination she reiterated her testimony in chief and added that she would rest only after the kids finished their homework.

8. It is her case that the termination of her employment was actuated by malice and was a breach of the Respondent's statutory duty.

9. In response to the claim, the Respondent filed a defence on 7th December 2015. The Respondent avers that the Claimant worked for only 4 days and had 3 days off because of working long hours hence she was not entitled to overtime pay.

10. The Respondent further avers that the Claimant tarnished its name by demanding a colleague's arrest, publicizing her relationship with her colleagues and causing an obscene photo to be posted in her Whatsapp.

11. It is the Respondent's case that the Claimant was granted the opportunity to present her case but thereafter opted to resign. Further, the Respondent avers that the Claimant was paid all her dues.

12. It is the Respondent's case that the Claimant was not paid salary in lieu of notice as she opted to resign and that her salary was inclusive of house allowance and that she only worked for 10 hours a day, for 4 days in a week.

13. In her examination in chief, **RW1** Cathlyne Fletcher, testified that during the Claimant's disciplinary hearing she was given the option of resigning or be terminated. During her examination in chief, she conceded to the fact she did not have the OB for the reported case or proof of the obscene photo leaked on social media.

Submissions by the Parties

14. In her submissions dated 20th March 2019, the Claimant submits that she was not accorded substantive fairness because the Respondent could not prove the allegations that led to her dismissal. The Claimant further submits that she was not accorded procedural justice as the meeting at the Shade Hotel did not constitute a disciplinary hearing since she was not given notification of the hearing. She relies on the case

of David Gichana Omuya vs. Mombasa Maize Millers Limited [2015] eKLR.

15. The Claimant submits that she was constructively dismissed when she was given the option of resigning or be dismissed. Further, the Respondent breached the contract of employment as the matter was not referred to arbitration. She relies on the cases of Coca Cola East & Central Africa Limited vs. Maria Kgai Ligaga [2015] eKLR, David Maina Ndirangu vs. Tusker Mattresses Limited [2016] eKLR and Christina Sigowa Wadulo vs. Solimpexs Africa Limited [2016] eKLR where the Courts defined what amounted to constructive dismissal in the event an employee resigns.

16. The Claimant submits that she is entitled to the prayers sought because the Respondent did not produce any evidence to show that house allowance had been paid prior to 2013 and that she had worked for extra hours which assertion was not rebutted.

17. The Respondent in their submissions dated 1st April 2019, submit that the Claimant admitted that she had resigned and was paid ½ months' salary for 7 years worked, 1 months' salary in lieu of notice and her salary for May 2015, which the Claimant confirmed. As such, the Claimant is not entitled to any of the prayers sought.

18. I have examined all the evidence and submissions of the Parties. The Claimant has averred that he was terminated unfairly without any valid reasons. She also avers that she was terminated without due process.

19. The Respondent on the other hand aver that the Claimant was terminated for tainting its name by demanding arrest of a colleague, publishing her relationship with her colleagues and causing an obscene photo to be published on here whatsapp.

20. The Respondent's witness testified in Court and when cross-examined she denied having proof of the OB under which she is alleged to her reported her case to the police or proof of the obscene photo on social media.

21. From this evidence, the Respondent's evidence as to reason that led to the termination of the Claimant remained mere allegations. This is contrary to Section 43 of the Employment Act, which demands that the employer must have valid reasons for the termination of an employee. The Respondent however failed to prove that they had valid reason in terminating the Claimant's services.

22. On the issue of due process, the Claimant avers that he was summoned to a meeting at Shade Hotel with the Respondent's directors. She was not informed that it was a disciplinary meeting. There is also no evidence that the Claimant had priory been informed that she was expected to attend a disciplinary meeting and defend herself. The minutes of the alleged meeting and what transpired have not been submitted before this Court to enable this Court determine that there was any hearing that indeed took place and the fairness of the process.

23. It is therefore my finding that the Claimant was not subjected to any due process before the termination.

24. Section 45 (2) of Employment Act 2007 provides as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

25. In the case of the Claimant, there were no valid reasons for her termination nor was she subjected to any due process. I therefore find the Claimant's termination unfair and unjustified.

26. In terms of remedies, the Claimant sought to be paid various remedies including unpaid house allowance, gratuity, overtime and damages for unfair termination.

27. Concerning house allowance, the Claimant in her cross-examination, admitted that Clause 6 of her appointment letter stated that her salary included house benefits. This is in conformity with Section 31(2)(a) of employment Act which states as follows:-

2. "This section shall not apply to an employee whose contract of service:-

a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation".

28. In the circumstances, the Claim for house allowance is untenable.

29. On gratuity the Claimant was a member of NSSF as evidenced from her payslip. She is therefore not entitled to gratuity payment as Section 35(6) of Employment Act also provide that gratuity payment is not payable to a member of NSSF.

30. On overtime pay, the appointment letter indicated the hours of work for the Claimant. She worked for 4 days every week as which translates, to 24×4 hours = 96 hours. She was then allowed 2 days off = 48 hours.

31. This basically means that she worked 96-48 hours = 48 hours weekly translating in 0 hours overtime every week, the maximum hours per week should be 8 hours x 6 days = 48 hours. The claim for overtime is therefore not proved and is not payable.

32. The only award the Claimant is entitled to is therefore:-

1. 8 months' salary as compensation = $8 \times 20,240 = 161,920/=$

2. 1 month salary in lieu of notice = 20,240/=

TOTAL = 182,160/=

3. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 19th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties