



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1040 OF 2014**

**ALICE NDINDA JOHN.....CLAIMANT**

**VERSUS**

**MR. & MRS. BIRDI SINGH.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> July, 2019)

**JUDGMENT**

The claimant filed the statement of claim on 24.06.2014 in person. Subsequently the claimant appointed Chwero & Company Advocates to act in the case. The claimant prayed for judgment against the respondent for:

- 1) That the respondent to issue a certificate of employment to the claimant.
- 2) The respondent to pay the claimant Kshs. 266, 583.15 being:
  - a) 11 days worked in April 2014 Kshs.8, 244.10.
  - b) One month pay in lieu of notice Kshs.11, 248.10.
  - c) Annual accrued leave for 15 months (26.25 days) Kshs.11, 356.25.
  - d) Severance pay for one year (at 15 days' pay) Kshs.5, 642.85.
  - e) 12 months salary compensation at Kshs.11, 248.10 per month Kshs. 134, 977.20.
  - f) 120 days weekly resting days Kshs.45, 142.35.
  - g) 22 public holidays Kshs.8, 276.20.
  - h) Underpayment of salary 41, 696.10.
- 3) Costs of the action.
- 4) Interest at Court rates.
- 5) Any other relief the Court deems fit to grant.

The respondent filed on 01.09.2014 the response to the claim through Mogeni & Company Advocates and prayed that the suit be dismissed with costs.

The **1<sup>st</sup> issue** for determination is whether the termination of the claimant's employment was unfair. The respondents employed the claimant as a house help from 04.01.2013 to 11.04. 2014. The claimant testified that on 11.04. 2014 she was sick and did not report on duty for 4 days. The respondents refused to accept her explanation and terminated her employment. She testified that on 11.04.2014 she apologized for being absent for the 4 days. The Court returns that the termination was not unfair because the reason was valid being that the claimant was absent

from duty for 4 days without leave and without giving the respondents a prompt notification about her said ill health. In any event the claimant testified that she apologized confirming that she had engaged in unexplained absenteeism as was leveled against her. The Court finds that the termination was not unfair. As the termination was not unfair, the claimant is not entitled to payment in lieu of notice and compensation for unfair termination.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The findings are as follows:

a) The claimant confirmed that December 2013 attendance register shows Sunday was off. Christmas 25.12.2013 and 26.12.2013 were both off days. She confirmed every Sunday was an off day while also testifying thus, “**When I went Sunday off respondent summoned me to go and take care of the home. I did not rest. I was on rest some and not other Sundays. Christmas and boxing day I was not at work.**” From that evidence the Court returns that on a balance of probability, the claimant had rest days and did not work on public holidays. The claims for 120 weekly rest days and 22 public holidays will fail.

b) The prayer for payment of severance pay was not justified and will be declined especially that it was not a redundancy case as per section 40 of the Employment Act, 2007.

c) The claimant testified that in August and September 2013 Mrs. Birdi was out of Kenya and Mr. Birdi was in charge and he fully paid her salary for the 2 months – and for the 2 months she worked part time as per evidence by RW2. The respondent’s witness (RW1) Mr. Birdi testified that during that period, the workload was low and whenever the claimant failed to take leave she was paid in lieu of leave. Documents filed show that the claimant had been paid in lieu of leave. In view of that evidence, there is no reason to doubt the respondents’ evidence and the claim for pay in lieu of annual leave will fail.

d) The claimant signed for the final payments and the claim for days allegedly worked and not paid will fail. The claimant signed per handwritten notes acknowledging the payment.

e) The respondents do not deny underpayment in their submissions but state that the same is not due in view of gifts given to the claimant and in view that housing accommodation was provided for. Further the issue was not raised during employment and it is an afterthought. The Court returns that statutory wage when not paid amounts to a strict liability on the part of the employer. The Court finds that the claim for underpayment is established but less house allowance because the respondent provided housing but the claimant opted not to use it. She is awarded **Kshs.27, 559.20** in underpayment of wages.

f) The claimant is entitled to the certificate of service.

The Court has considered the parties’ margins of success and the respondent will pay the claimant’s 50% costs of the suit.

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

a) The respondents to pay the claimant a sum of **Kshs.27, 559.20** by 01.09.2018 failing interest at 14 % be payable thereon from the date of filing the suit till full payment.

b) The respondents to deliver the claimant’s certificate of service as per section 51 of the Employment Act, 2007 by 01.08.2019.

c) The respondent to pay 50% of the claimant’s costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 19<sup>th</sup> July, 2019.**

**BYRAM ONGAYA**

**JUDGE**