



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 770 OF 2015

BETWEEN

EMILY AKINYI OOKO.....CLAIMANT

VERSUS

JAMES OYONDI t/a BETOYO CONTRACTORS.....RESPONDENT

JUDGMENT

Rika J

Court Assistant: Benjamin Kombe

Kituo Cha Sheria, Advocates for the Claimant

Ogoti & Company, Advocates for the Respondent

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1. The Claimant's case is that she was employed by the Respondent as a Cleaner, from 2nd July 2012 to 4th May 2015. Her last salary was Kshs. 7,700 monthly.
 2. Through her Statement of Claim filed on 9th October 2015, the Claimant states she was summarily dismissed without valid reason.
 3. She asks the Court to find that termination was unfair, and grant to her 1 month salary in lieu of notice at Kshs. 7,700; house allowance for a period of 33 months at Kshs. 38,115; leave over a period of 2 years at Kshs. 15,400; salary for 4 days worked in May 2015 at Kshs. 1,026; pro-rata leave of 8 days for 2015 at Kshs. 2,053; underpayment of salary at Kshs. 3,254 for 33 months, at Kshs. 107,382; and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 92,400 – total Kshs. 171,676. She prays for release of her Certificate of Service, costs, interest and any other relief.
 4. The Respondent filed his Statement of Response on 25th November 2015. The Claimant was an Employee of the Respondent. She deserted duty in the morning of 4th May 2015. She informed her Supervisor that, resignation was to allow her time off to pursue studies. No law was breached by the Respondent. She was on casual basis and not entitled to terminal benefits. House allowance was never paid to the Claimant, and cannot be claimed. Leave pay does not apply to her. The Employment Act does not have provision for underpayment of salary. The Claimant accepted what was paid to her.
 5. The Claimant testified, and closed her case on 18th March 2019. The Respondent and his Witness, Supervisor Charles Kilonzo Shikonde, testified for the Respondent on the same date as the Claimant. Respondent's Cleaner, Grace Kwamboka Ong'uti testified on 8th July 2019, bringing the hearing to a close. The Claim was last mentioned on 20th September 2019 when Parties confirmed filing of their Final Arguments.
 6. The Claimant adopted in her oral testimony, her Witness Statement and Documents on record. Cross-examined, she told the Court that she asked her Supervisor Charles, to allow her time off in the evenings, to attend to her studies. She intended to work up to 3.30 p.m. and study from 5.00 p.m. She was referred to the overall boss. She never sought study leave in writing.
 7. Charles Kilonzo told the Court he was Claimant's Supervisor. In 2015, she informed Kilonzo that she wished to have study leave. Kilonzo told her he could arrange for her to study, without interfering with her work. On 6th May 2015, the Claimant reported minus her work

uniform. She told Kilonzo she did not wish to continue working. Kilonzo wrote to the Managing Director on 17th June 2015, informing him that the Claimant had resigned. Her contract was not terminated by the Respondent.

8. Cross-examined, the Witness told the Court that his Witness Statement and the Statement of Response, state variously that the Claimant was on contract as well as on casual employment. She did not write any letter of resignation.

9. Grace Kwamboka worked with the Claimant as a Cleaner. She later became a Supervisor. The Claimant informed Kwamboka that she wished to go for further studies. The Claimant wished to study front office management. The Respondent encouraged her. Colleagues even donated Kshs. 200 each to aid the Claimant. In May 2015, the Claimant reported to work. She said she was quitting. She left and did not return. Cross-examined, Kwamboka testified she is still working. The Claimant was not in casual employment. It is true that termination was not instigated by the Respondent. Redirected, Kwamboka affirmed that the Claimant left employment voluntarily.

10. James Oyondi told the Court he operates as Betooyo Contractors [not constructors as variously indicated in documents filed in Court].

11. He normally procures cleaning services with different entities. He employs Cleaners, for the life of the commercial contracts between him and these entities.

12. He employed the Claimant in 2012. Her salary, it was agreed, would depend on what Oyondi earned from his contracts. The Claimant just left in 2015.

13. He had a contract with Postal Corporation, which was ending in 2015. She left around this time. Oyondi had informed Employees he was still pursuing renewal with Postal Corporation. Kwamboka informed Oyondi that the Claimant had left to pursue further studies. She did not give notice. Oyondi did not pursue the Claimant because the contract with Postal Corporation was expiring. She was paid a monthly salary of Kshs. 8,000 all inclusive. Postal Corporation closed on public holidays. The Claimant could not work on these days.

14. Cross-examined, Oyondi confirmed that the Claimant was on contract, not casual engagement. She was paid monthly. Oyondi alleged in his Response, that he did not pay the Claimant her terminal dues, because she was in casual employment.

15. Kwamboka told Oyondi that the Claimant had quit. The Claimant did not say this herself. Oyondi and Kilonzo wrote to the Labour Office, saying the Claimant had resigned on 4th May 2015. Redirected, Oyondi reverted to his earlier position that his Employees are basically employed on casual terms.

The Court Finds:-

16. The Claimant was employed by the Respondent as a Cleaner on 2nd July 2012. She states her contract was terminated unfairly by the Respondent, by word of mouth, without notice, hearing or any form of justification, on 4th May 2015.

17. The Respondent refutes having terminated the Claimant's contract unfairly, or at all. According to the Respondent, the Claimant intimated she wished to undertake further studies focusing on front office management. The Respondent was supportive, with his Staff donating Kshs. 200 each, to facilitate the Claimant's endeavour. The Claimant suddenly appeared at the office early May 2015, and informed her Supervisor she was no longer interested in working for the Respondent.

18. The Court does not believe the Respondent on the circumstances leading to Claimant's departure. There is no plausible reason why the Claimant, having been advised by the Respondent that the Respondent was willing to accommodate her in her study pursuit, would suddenly resign. She did not write any letter of resignation.

19. The second reason why the Court doubts the evidence of the Respondent, is that he gave additional reason for termination of the Claimant's contract, beyond saying she deserted. He told the Court that in any event, he had a commercial contract with Postal Corporation which was coming to an end. The Respondent and his Supervisor contrived to generate correspondences to the Respondent and the Labour Office, giving credence to the position that the Claimant had resigned. The correspondences were crafted only after the Claimant had lodged a complaint with the Labour Office.

20. The Respondent ought to have issued the Claimant a contract of employment, specifically aligned to the commercial contracts he claims to have executed with different entities, for him to benefit from the protection of these commercial contracts, in any Claim for unfair termination. There was no contract made to the Claimant, defining her terms of service, more so her period of service. Oyondi told the Court nothing in his business relating to Employees' terms and conditions of service, was in writing.

21. The Respondent has not shown valid reason or reasons, justifying termination, as required under Section 43 of the Employment Act.

22. It is clear from the evidence of the Parties that the Respondent did not advise the Claimant that her contract had come to an end for whatever reason. She was not heard on any allegation, including that of desertion. The Respondent was called several times at the Labour Office for conciliation but persistently made himself scarce.

23. It is declared that termination was unfair.

24. She received Kshs. 7,700 as monthly salary. The Respondent's position on underpayment is that there is no provision for minimum wage under the Employment Act 2007. This may well be so, but Section 43 of the Labour Institutions Act creates Wages Councils, whose functions include investigation of remuneration and conditions of employment, and recommending to the Labour Cabinet Secretary on

minimum wages and conditions of employment. Section 48 of the Labour Institutions Act stipulates that Wages Orders constitute minimum terms and conditions of employment.

25. The Claimant submits that the General Wages Order of 2015 set the minimum wage for Cleaners in cities such as Mombasa at Kshs. 10,954. She however has not explained why the Order of 2015, which came into effect in May 2015, when she left employment, should apply for the entire period worked, dating back to the year 2012. She ought to have systematically taken the Court through the various Wages Orders applicable to the period in employment, indicating what she was paid, and what ought to have been paid, during whichever period. The prayer for underpayment of salary is declined.

26. She was not paid house allowance. The Respondent explained that the Claimant was in casual employment, therefore not entitled to house allowance and other benefits. This is not correct. Oyondi in other instances conceded that the Claimant was on contract. **The prayer for house allowance in arrears of 33 months is allowed at 15% of the basic salary at Kshs. 38,115.**

27. The Claimant was denied her annual leave entitlement for the same reason she was denied house allowance: that she was in casual employment. **Her prayer for annual leave and pro-rata leave is allowed at Kshs. 17,453.**

28. She worked for little under 3 years. She expected to go on working, even as she pursued her studies. She did not desert as alleged by the Respondent. She did not leave employment for any lapse in her disciplinary record, or for poor performance. **She is allowed compensation equivalent to 4 months' salary in compensation for unfair termination, at Kshs. 30,800.**

29. She worked for 4 days in May 2015, going by the common evidence of the Parties. **She is allowed the prayer for salary for 4 days worked, at Kshs. 1,184.**

30. **Certificate of Service to issue.**

31. **Costs to the Claimant.**

32. **Interest allowed at 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED: -

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant: house allowance at Kshs. 38,115; annual and pro-rata leave at Kshs. 17,453; equivalent of 4 months' salary in compensation for unfair termination at Kshs. 30,800; and salary for 4 days worked in May 2015 at Kshs. 1,184- total Kshs. 87,552.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 11th day of October 2019.

James Rika

Judge