



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 1501 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSEPHINE AYEMBA MUSONYE.....CLAIMANT**

**VERSUS**

**JITENDRA RISHI.....RESPONDENT**

**JUDGMENT**

Vide her statement of claim dated 27<sup>th</sup> August and filed on 29<sup>th</sup> August 2014, the claimant avers that she was unfairly terminated by the respondent. She prays for the following reliefs –

(a) A declaration that the claimant's dismissal was wrongful and unfair.

(b) The claimant be paid terminal benefits as set out below –

|                         |                          |
|-------------------------|--------------------------|
| Notice pay              | Kshs.11,248.09/=         |
| June 2014 salary        | Kshs.7,500.00/=          |
| Leave                   | Kshs.33,744.00/=         |
| House allowance         | Kshs.67,488.00/=         |
| Severance               | Kshs.16,872.00/=         |
| Underpayment            | Kshs.89,954.16/=         |
| 12 months' compensation | <u>Kshs.134,976.00/=</u> |
| <b>Total</b>            | <b>Kshs.361,768.25/=</b> |

(c) The respondent to pay compensation to the claimant equivalent to 12 months' salary.

(d) The respondent to pay costs.

The respondent filed a memorandum of response in which he admits employing the claimant but denies all the other averments in the statement of claim.

At the hearing of the claim, the claimant testified on her behalf but the respondent closed his case without calling any witness. The parties thereafter took directions for filing of submissions but only the claimant filed, the respondent opting to rely on the memorandum of response.

**Claimant's Case**

The claimant testified that she was employed by the respondent as a domestic servant on 8<sup>th</sup> February 2011. Her duties included cleaning and cooking. Her salary was Kshs.7,500 paid monthly. She was not issued with a letter of appointment. She did not live with the respondent. She reported to work from 10 am and left work at 7 pm daily from Monday to Saturday. She was not a member of NSSF or NHIF.

The claimant testified that on 26<sup>th</sup> June 2014 she reported to work and worked as usual. In the evening she was called by the respondent who told her not to report for work from the following day. She was not told why and was not paid salary for days worked or pay in lieu of notice.

She testified that she did not take annual leave during the period she worked for the respondent.

The claimant testified that she was underpaid as she was not paid house allowance, that she earned the same salary for the entire period she worked for the respondent.

The claimant testified that she was not aware of any loss that occurred while she was working for the respondent as none was brought to her attention.

Under cross-examination, the claimant testified that the respondent is not a Kenyan. That he travelled out of the county severally but always left his family behind so she worked normally even during his absence. She denied the averments in the memorandum of response that there were missing items in the house which she could not explain yet she was the only person in the house. She further denied that she was informed of the reason for the termination of her employment and given a chance to defend herself but failed to do so.

### **Determination**

The issues arising for determination are whether the claimant's employment was unfairly terminated by the respondent and if she is entitled to the reliefs sought.

### **Unfair Termination**

Section 41 of the Employment Act provides for procedural fairness Section 43 of the Act provides for proof or reason for termination while Section 45(2) provides that failure to comply with either or both Sections 41 and 43 constitute unfair termination. Section 47(5) further provides that –

**(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

The respondent did not prove that it had a valid reason of termination of the claimant's employment. It further did not prove that she was subjected to a fair hearing.

I thus find and declare that the termination of the claimant's employment was unfair both procedurally and substantively.

### **Remedies**

The claimant is entitled to payment of one month's salary in lieu of notice. She is further entitled to her salary for the month of June 2014.

The respondent did not deny that the claimant did not take annual leave during the 40 months that she worked for the respondent. She is therefore entitled to pay in lieu of 70 days annual leave based on 1.75 days per month worked for 40 months.

The claimant prayed for both house allowance and underpayment. The respondent however pleaded that the claimant was paid a consolidated wage. The consolidated wage for the period the claimant was in the employ of the respondent was as follows –

|                        | Wage     | Add 15% House Allowance |
|------------------------|----------|-------------------------|
| Up to April 2011       | 6,743.00 | 7,754.50                |
| May 2011 to April 2012 | 7,586.00 | 8,723.90                |
| May 2012 to April 2013 | 8,579.80 | 9,866.80                |
| May 2013 to April 2015 | 9,780.95 | 11,248.10               |

The claimant is therefore entitled to underpayments based on consolidated wage (inclusive of house allowance) as follows –

February to April 2011

Kshs.7,754.5 less 7,500 paid

(7,754.5 – 7,500) x 3.....Kshs.763.50

May 2011 to April 2012

(8,723.90 – 7,500) x 12.....Kshs.14,686.80

May 2012 to April 2013

(9,866.80 – 7,500) x 12.....Kshs.28,401.60

May 2013 to June 2014

(11,248.10 – 7,500) x 14..... Kshs.52,473.40

Total Kshs.96,325.30

Having not been declared redundant, the claimant is not entitled to severance pay.

Having worked for 40 months and taking into account the circumstances under which the claimant worked, the manner in which her employment was terminated, the package that the claimant is entitled to, the fact that the respondent failed to prove that the claimant had contributed to the termination of her employment, and all relevant factors I award the claimant 4 months' salary as compensation based on her correct statutory minimum wage at the time she left employment which should be Kshs.11,248.10. I am in doing this guided by the provisions of Section 3(6) and 26 of the Employment Act and Section 48(1) of the Labour Institutions Act, which require that the court reads the statutory minimum terms into a contract where the same provides for less favourable terms.

From the foregoing, I award the claimant the following –

(i) Salary for June 2014.....Kshs.11,248.10

(ii) One month's salary in lieu of notice.....Kshs.11,248.10

(iii) Annual leave 70 days.....Kshs.30,283.30

(iv) Underpayments.....Kshs.96,725.30

(v) Compensation.....Kshs.44,992.40

**Total Kshs.194,097.20**

(vi) The respondent shall pay claimant's costs of the suit.

(vii) Interest shall accrue at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF OCTOBER 2019**

**MAUREEN ONYANGO**

**JUDGE**