



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 530 OF 2012
CONSOLIDATED WITH CAUSE NO 724 OF 2012

JOYCE KWAMBOKA OIRIGA.....1ST CLAIMANT

ANNPHERIA KAWIRA KABURU.....2ND CLAIMANT

VS

MRS PAULINE WANJA MUNENE

T/A VISTRALINE BOOK WORLD AND STATIONERY.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated claim is brought by Joyce Kwamboka Oiriga as the 1st Claimant and Annpheria Kawira Kaburu as the 2nd Claimant, against their former employer, Mrs. Pauline Wanja Munene, trading as Vistraline Book World and Stationery. The claims are contained in Memoranda of Claim as amended on 12th May 2014.

2. The Respondent's reply is contained in Statements of Defence dated 8th June 2012 and amended on 14th May 2014.

The Claimants' Case

3. The 1st Claimant, Joyce Kwamboka Oiriga states that she was employed by the Respondent as a Shop Assistant, at a monthly salary of Kshs. 5,000 from 12th October 2008. Her salary was later increased to Kshs. 8,000. The 2nd Claimant, Annpheria Kawira Kaburu was employed in a similar position on 28th July 2008 at a monthly salary of Kshs. 5,000 which was later increased to Kshs. 9,101.

4. The 1st and 2nd Claimants worked for the Respondent until 21st February 2011, when their employment was terminated, without notice. They state that they were underpaid from May 2010 until January 2011 and were not paid house allowance. Further, they did not go on leave and worked on public holidays without compensation.

5. The Claimants plead that after the termination of their employment, they sought assistance from the Ministry of Labour but efforts to settle the matter were frustrated by the Respondent.

6. It is the Claimants' case that the termination of their employment was unlawful and unfair. They now seek the following:

1st Claimant: Joyce Kwamboka Oiriga

a) One month's salary in lieu of notice.....Kshs.10,466.15

b) Salary for February 2011.....6,370.70

c) House allowance for February 2011.....1,365.15

d) Leave pay for 3 years.....22,054.40

- e) Underpayment.....31,195.35
- f) Public holidays.....18,202.00
- g) 12 months' salary in compensation.....125,535.80
- h) Costs plus interest

2nd Claimant: Annpheria Kawira Kaburu

- a) One month's salary in lieu of notice.....Kshs. 10,466.15
- b) Salary for February 2011.....6,370.70
- c) House allowance for February 2011.....1,365.15
- d) Leave pay for 3 years.....22,054.40
- e) Underpayment.....31,195.35
- f) Public holidays.....18,202.00
- g) 12 months' salary in compensation.....125,535.80
- h) Costs plus interest

The Respondent's Case

7. In her Statements of Defence dated 8th June 2012 and amended on 14th May 2014, the Respondent states that at the time of leaving employment, the 1st and 2nd Claimants were earning monthly salaries of Kshs. 8,000 and Kshs. 9,101 as retainer plus a commission of 25% of profit on any sales made by them.

8. The Respondent denies the Claimants' claims of unlawful termination and avers that on 21st February 2011, the Claimants left the Respondent's premises, having informed her that they would not continue working.

9. Regarding the claim on leave, the Respondent states that the Claimants were granted one leave day every week plus ten days in the month of December. The Claimants also used to take leave often to attend social functions.

10. The Respondent avers that after the Claimants left employment, it was discovered that they had been misappropriating the Respondent's funds. The Respondent adds that the Claimants took away salary vouchers and other records from the Respondent's premises.

11. The Respondent denies owing the Claimants any money in salaries or terminal benefits.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimants' employment was lawful and fair;
- b) Whether the Claimants are entitled to the remedies sought.

The Termination

13. The Claimants told the Court that their employment was terminated following a disagreement with the Respondent's Manager, Vinceza Ngima Munene. The Respondent on the other hand, maintains that the Claimants left employment voluntarily. In her final submissions filed on 31st October 2017, the Respondent took the position that the Claimants had resigned from employment. **Black's Law Dictionary (Ninth Edition)** defines resignation as:

"A formal notification of relinquishing an office or position."

14. It is common cause that there was indeed a disagreement between the Claimant and the Respondent's Manager. The Respondent herself confirmed to the Court that the Claimants had escalated the matter to her. The Court did not however see any serious efforts made by the Respondent towards resolving the grievance. Instead, she let the Claimants go. The Court was unconvinced by the Respondent's argument that the Claimants resigned as there was no evidence of any formal notification on this account.

15. That being the case, the Court agrees with the Claimant's plea that their employment was unlawfully and unfairly terminated.

Remedies

16. In light of this, I award each of the Claimants six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service and the Respondent's conduct in the termination process. I further award each of the Claimants one (1) month's salary in lieu of notice. The claim for salary for February 2011 is admitted and is payable.

17. The Claimants also claim house allowance. Section 31(1)and(2) of the Employment Act provides as follows:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(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;
or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

18. The Respondent herself produced salary vouchers showing that the Claimants were paid basic salaries. The averment that they earned consolidated salaries is therefore without basis and is rejected. Consequently, I allow the claims for house allowance at 15% of the Claimants' basic salaries and adopt the resultant figures of Kshs. 9,200 for the 1st Claimant and 10,466 for the 2nd Claimant as their monthly salaries for purposes of this consolidated claim.

19. Regarding the claims for leave pay, I have this to say; the Respondent's assertion that the Claimants took one day off per week was an attempt to mix off days and annual leave which are two mutually exclusive entitlements. At any rate, there were no leave records to counter these claims which therefore succeed and are allowed.

20. The claims for underpayment and public holidays were not proved and are dismissed. In their final submissions filed on 16th October 2017, the Claimants sought to introduce additional claims of overtime and service pay which were neither pleaded nor proved. These claims are unsustainable and are rejected.

21. In the end, I enter judgment in favour of the Claimants as follows:

1st Claimant: Joyce Kwamboka Oiriga

a) 6 months' salary in compensation.....	Kshs. 55,200
b) One month's salary in lieu of notice.....	9,200
c) Salary for February 2011 (9,200/30x21).....	6,440
d) House allowance for 28 months (1,200x28).....	33,600
e) Leave pay for 2 years (9,200/30x21x2).....	12,880
f) Prorata leave for 4 months (9,200/30x1.75x4).....	<u>2,147</u>
Total.....	119,467

2nd Claimant: Annpheria Kawira Kaburu

a) 6 months' salary in compensation.....	Kshs. 62,796
b) One month's salary in lieu of notice.....	10,466
c) Salary for February 2011 (10,466/30x21).....	7,326
d) House allowance for 30 months (1,365x30).....	40,950
e) Leave pay for 2 years (10,466/30x21x2).....	14,652

f) Prorata leave for 6 months $(10,466/30 \times 1.75 \times 6)$3,663

Total.....139,853

22. These amounts will attract interest at court rates from the date of delivery of this judgment until payment in full.

23. The Claimants will have the costs of the case.

24. Orders accordingly.

DATED AND SIGNED AT MALINDI THIS 30TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Miss Nyamwaya for the Claimants

Mr. Juma for the Respondent