



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

CAUSE. NO. 1339 OF 2011

IRENE ATIENO.....CLAIMANT

VERSUS

HENRY DE' SOUZA.....1ST RESPONDENT

ANNETTE DE' SOUZA.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 8.8.2011 claiming salary underpayment from 2004 to May 2011, severance pay, accrued leave for one year 30 days, Sunday and public holidays worked plus compensation for unfair termination totalling to Kshs.648,007.25. The respondent filed defence on 18.10.2011 alleging that the claimant was not her regular employee and denied the allegation that she worked continuously from 2.5.1999 to 1.5.2011. She therefore denied the alleged underpayment and claim for unfair termination.

2. The suit was heard on 21.2.2018 when the claimant testified as Cw1 but the respondent called no witness. Thereafter both parties filed written submissions.

**Claimant's Case**

3. Cw1 testified that she was employed by the respondents as a House Help in 1999 and worked for 12 years. She started with a salary of Kshs.3,000 per month which was later increased to Kshs.6,000. She further testified that in 2011 she demanded for salary increment as a result of which she was dismissed. She contended that she served without any disciplinary case. She further contended that she used to sign a book to receive her salary which was retained by the employer. She further stated that she was never paid the salary for the last month of her service. She therefore prayed for the outstanding salary, service pay and other terminal dues.

4. On cross examination, Cw1 stated that she was never given a written contract. She however maintained that she used to sign a salary book which was retained by the employer. She contended that she was dismissed on 1.5.2011 by the first respondent for demanding a salary increment. She contended that she used to be paid on the 5th day of the following month as such the dismissal came before receiving her salary for April 2011.

**Analysis and Determination**

5. There is no dispute that the claimant was employed by the respondent as a House Help until 1.5.2011 when she was dismissed. The issues for determination are:

(a) Whether the termination was unfair.

(b) Whether she, is entitled to the reliefs sought.

### **Unfair termination**

6. Under section 45(2) of the Employment Act termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. In this case, the respondents never testified to discharge the said burden of proving procedural and substantive fairness in the termination of the claimant's employment service. It is trite law that pleadings and submissions filed by defence counsel are not capable of rebutting oral evidence adduced by the claimant at the hearing. Consequently, I find that the claimant has proved on a balance of probability that she worked continuously as a House Help until she was summarily dismissed from employment on 1.5.2011 for demanding better pay. The said termination was not justified and it was done without following due process and that rendered the termination unfair within the meaning of section 45 of the Employment Act.

### **Reliefs**

7. Under section 49 of the Act, he is awarded 12 months salary being compensation for the unfair termination considering her 12 years of continuous service. This works to Kshs.93,053.40 based on a monthly salary of Kshs.7,754.45.

8. She is also awarded leave for one year as prayed being 21 days being Kshs.6,263.20. The claim for salary under payment is also awarded as prayed being Kshs.23,823 for May 2004 to May 2005, Kshs.22,004.40 for May 2005 to May 2006, Kshs.71,073 for May 2006 to May 2009, Kshs.24,594 for May 2009 to May 2010, Kshs.27.053 for May 2010 to May 2011 totalling to Kshs.168,547.40.

9. The claim for severance pay is however dismissed because the termination was not through redundancy. Likewise, the claim for Sundays and public holidays worked is dismissed for want of particulars and evidence.

### **Conclusion and Disposition**

10. For the reasons that the claimant was unfairly dismissed, I enter judgment for him in the sum of Kshs.267,864.00 plus costs and interest from the date hereof . The award is less statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018**

**ONESMUS N. MAKAU**

**JUDGE**