



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

**CAUSE NUMBER 335 OF 2015**

**BETWEEN**

**PHERIC BENDERA LUGANJE .....CLAIMANT**

**VERSUS**

**NIELS GUSTAV BIERING.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Nyange Sharia Advocate instructed by Kituo Cha Sheria, Advocates for the Claimant*

*Wanjiku Mohamed & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant states in her Statement of Claim filed on 21<sup>st</sup> May 2015, that she was employed by the Respondent as a Domestic Help on 1st July 2005. She worked until 16<sup>th</sup> December 2014, when the Respondent unfairly terminated her contract of employment. Her last salary was Kshs. 16,200 monthly. She prays the Court to find termination was unfair, and grant the following orders:-

a) House Allowance for year -

i. 2010 at Kshs. 21,060

ii. 2011 at Kshs. 23,760

iii. 2012 at Kshs. 27,360

iv. 2013 at Kshs. 27,360

v. 2014 at Kshs. 29,160

b) Unpaid allowance for extra work done

from December 2009 to July 2011

at Kshs. 5,000 per month.....Kshs. 100,000

c) Compensation for unfair termination .....Kshs. 194,000

**Total.....Kshs. 423,100**

d) Costs.

e) Interest.

2. The Respondent filed his Statement of Response on 30<sup>th</sup> July 2015. He concedes to have employed the Claimant as his Domestic Help, as stated in the Claim. Her duties included, taking care of Respondent's Child of tender age. The Claimant refused to work extra hours taking care of the Baby. The Baby could not be left unattended. The Claimant's contract was lawfully terminated. She was paid 1 month salary in lieu of notice. She was paid a consolidated salary of Kshs. 16,200. Her claim for unpaid allowance for extra work has no merit. The Respondent urges the court to dismiss the claim with costs to the Respondent.

3. The 2 Parties gave evidence, and closed their respective cases, at Malindi, on 6<sup>th</sup> December 2017. The Respondent, in addition to his own evidence, availed the evidence of Domestic Help Salome Karemba Baya, and that of his Cook, Samuel Kitsao Kombe. Parties confirmed filing of their Submissions on 12th March 2018.

#### **CLAIMANT'S CASE**

4. The Claimant reaffirmed she was employed by the Respondent as Domestic Help, on 1<sup>st</sup> July 2005. Her contract was terminated on 16th December 2014. She testified she worked for 10 years. She never received any warning letters.

5. She took care of the Respondent's adopted Baby. The Claimant stayed with the Baby after her normal working hours, from 4.00 p.m. to 8.30 p.m. She did not refuse to work excess hours.

6. The Claimant also took care of Respondent's ailing wife, cleaning her and changing her pampers. The Claimant was not paid for excess hours.

7. Upon termination, the Respondent paid to the Claimant terminal dues at Kshs. 16,260. She was issued a Certificate of Service. The Claimant paid her own rent. She used to sign a register upon receipt of salary. She approached her Trade Union for assistance, before instructing Counsel, who issued demand letter upon the Respondent before initiating Claim. She prays the Court to allow the Claim.

8. Cross-examined, she testified she worked for 10 years. She signed her exhibit 1, a letter from the Respondent dated 16<sup>th</sup> December 2014. The Respondent just called her, and told her to sign. She had an outstanding loan of Kshs. 34,000 payable to the Respondent, at the time of termination. She was paid for years completed in service. She does not claim service pay. Her last salary was Kshs. 16,260 monthly. It did not include house allowance. Prior to the year 2010, she was paid house allowance. She did not make any demands for payment of house allowance through her Trade Union.

9. Every Employee had their own book where they signed on receiving salary. The Claimant was paid for overtime work. She does not pursue overtime pay. The Respondent employed the Claimant before he brought his Baby to the household. The Baby came in 2013. In 2010, the Claimant earned Kshs. 11,700 per month. By the time she left in 2014, she earned Kshs. 16,260 monthly. There was an increment of about Kshs. 5,000 over the period. The Claimant did not know that the minimum wage for Domestic Helps within Kilifi, was Kshs. 4,000. The amount payable would depend on the nature of work carried out.

10. She claims extra payments. Extra payments were availed to other Employees. The Claimant did not have evidence of extra payments, made available to her Colleagues. She worked with the Respondent, and another girl called Salome. The Claimant seeks extra pay of Kshs. 5,000 per month. It is not true that the Claimant refused to take care of the Baby, to allow Salome take her annual leave. Redirected, the Claimant testified employment records were retained by the Respondent.

#### **RESPONDENT'S CASE**

11. Niels Gustav Biering told the Court he employed Pheric Bendera Luganje, the Claimant herein, as a House help, between 1<sup>st</sup> July 2005 and 16<sup>th</sup> December 2014.

12. He adopted a Baby Daughter in December 2003. He requested the Claimant and her colleague Salome, to serve as Nannies. They agreed. This was in January 2014. They looked after the Baby when the Baby's Mother was away. The Respondent also assisted with baby care. Salome was Nanny number 1. The Claimant mainly assisted Salome.

13. In November 2014, the Respondent's Partner travelled to Nairobi. She would be there for 1 month. Up to this time, Salome had been looking after the Baby. The Respondent, the Claimant and Salome consulted on how they would take care of the Baby in the absence of the Baby's Mother. It was explained to the Claimant that she would take care of the baby, and would be compensated for extra hours. Salome was going on leave. The Claimant declined to relieve Salome. The Baby could not be left alone. Another Househelp would have to step in.

14. The Respondent paid house allowance to all Employees, except 2 who occupied Respondent's Servant Quarters. The Respondent frequently held meetings with his Employees where he explained to them about allowances. The Claimant never complained about house allowance in those meetings.

15. The Respondent exhibited extracts from books signed by Employees on receiving their salaries and other benefits. Retirement benefits were paid based on basic salary and house allowance. All employees meriting house allowance, were paid.

16. The Claimant looked after Respondent's ailing Wife. During that period, the Respondent reviewed Employees' salaries. The Claimant

received increment, upon consideration of her additional workload.

17. The book in which Claimant's salary was paid through, and which she signed in acknowledgement of receipt, disappeared after the Claimant left employment. At the time of termination, this book was available at the workplace.

18. Biering explained to Pheric that he would terminate her contract, because she had refused to take care of his Baby. He received a demand letter from Claimant's Trade Union. He called the Union's Secretary, and explained his position. He proposed the Union Representatives meet him at the Labour Office for consultation. They did not turn up. Termination was fair.

19. Cross-examined the Respondent confirmed he employed the Claimant for 10 years. There was no written warning before termination. There are no reasons for termination, in the letter of termination. There was no letter to show cause.

20. The Certificate of Service issued upon the Claimant does not describe her role, to include caregiver and nanny duties. She was paid house allowance. The book where her details were recorded disappeared after she ceased employment. Biering did not have minutes of the meetings held with Employees. He did not have anything to show the Claimant attended these meetings. Biering clarified he did not include all duties performed by the Claimant, in the Certificate of Service. He only gave a summary of her regular duties.

21. Salome confirmed she worked with the Claimant for the Respondent, in the position of Househelp. Salome joined the Household in 2009. She cleaned the residence and took care of the Respondent's Child. The Claimant played a similar role.

22. The Girls looked after the Respondent's ailing Wife between 2009 - 2011. Salome's salary was raised over the period. She was not able to say if the Claimant's salary was. The Respondent adopted a Baby. She was 8 months old when she was brought home. Salome and the Claimant agreed to take care of the Baby. In December 2014, the Respondent's Partner travelled to Nairobi. The Claimant refused to take care of the Baby. Salome earned a monthly salary of Kshs. 17,380, as of the time of giving evidence before the Court. She used to sign a Book on receiving her salary, as did all Employees. Salome was advised by the Respondent this amount included the housing element. Biering held meetings with Employees. He explained to them their monthly salaries were all-inclusive.

23. Cross-examined, Salome told the Court her duties included taking care of the Child, making beds and cleaning. The Girls agreed to take care of the Child. Salaries were paid individually to Employees.

24. Samuel Kitsao Kombe testified he is Biering's Cook. He was a Colleague of the Claimant and Salome. His salary was Kshs. 19,990 - inclusive of house allowance. All Employees regularly attended meetings called by the Respondent, and were advised on their salary structures. Kombe could not recall when these meetings were held, when cross-examined. He reaffirmed on redirection that the meetings took place yearly.

#### **The Court Finds:-**

25. Pheric Bendera Luganje, was employed by the Respondent, Niels Gustav Biering, as a House help. Parties agree she was employed in 2005, and left in 2014. She worked for 9½ years. Her salary as of the date of termination, 16<sup>th</sup> December 2014, was Kshs. 16,200.

26. The problem between the Parties developed when the Respondent adopted and brought into the household, an 8 month Baby Daughter. It was discussed amongst the Baby's adoptive Parents, the Claimant and Claimant's Colleague Salome, that the Claimant and Salome would take care of the Baby.

27. The Claimant appears not to have embraced the new task of baby care. She declined to singularly take care of the Baby when the Baby's Mother travelled to Nairobi for 1 month, in November/December 2014. Salome was due for annual leave. The Respondent felt the Baby could not be left on her own, and sought a replacement for recalcitrant Pheric.

28. The evidence given by the Respondent, which was amply supported by Salome, is sufficient to enable the Court conclude that the Respondent proved valid reason, justifying his decision to terminate the Claimant's contract, under Section 43 and 45 of the Employment Act 2007.

29. There was a common understanding that the 2 Househelps would take care of the Baby. The role of a Househelp in general, would include taking care of children within the household. The Claimant may have felt she was employed when there was no Child within the household, requiring her care. The Respondent discussed the change in roles, once the Baby came along in 2013. If the Claimant was not ready to take care of the Baby, she ought to have asked the Respondent for amicable and mutually suitable separation, rather than sulk, and decline to attend to an 8 month old Baby.

30. The evidence from Salome and Kombe, persuades the Court that salaries paid to Employees by the Respondent, included housing allowance. The extracts of books where Employees signed in acknowledgment of payment, show the monthly salaries, and retirement benefits, took into account the housing element. The salaries paid by the Respondent were way above the minimum statutory remuneration payable to Domestic Workers, in the space and time, subject matter of this dispute. The prayer for arrears of house allowance is without foundation, and is hereby rejected.

31. The Respondent raised Claimant's salary between 2009-2014. He considered additional work performed by the Claimant when she took care of the Respondent's Wife, between 2009-2011. Taking care of the Respondent's ailing Wife, was not a task outside the duty description of the Claimant, but the Respondent took into consideration that it was additional workload, and adjusted his Domestic Workers' salaries proportionately. The Claimant did not show that other Employees, were paid allowances for extra work done. The prayers for unpaid allowance for extra work done, at Kshs. 5,000 per month, between 2009 - 2011, is declined.

32. Biering did not however, give the Claimant the benefit of a fair procedure, under Section 41 and 45 of the Employment Act. He did not convene any disciplinary hearing. The Claimant belonged to a Trade Union, which Biering engaged in attempting to resolve the dispute. He failed to invite the Claimant to a disciplinary hearing, in the company of a Representative of her Trade Union. There were no details of the employment offences committed by the Claimant, communicated to the Claimant by the Respondent in writing. She was not called upon to show cause why she should not be disciplined. She was not asked to answer to any charges. The letter of termination discloses no reason, or reasons, justifying the decision. The Respondent seems to have acted informally, encouraged by the fact that this was a disciplinary process in a Domestic-Worker set-up. ***ILO Domestic Workers Convention No. 189 of 2011***, seeks to protect and promote Domestic Workers' rights of equality and treatment. Domestic Workers are not to be excluded from the scope of labour legislations, as stated in ***Linnet Akasa Shikoli v. Lilian Otundo [2014] e-KLR***. The Respondent ought to have adopted a formal approach in dismissing the Claimant, and accorded her procedural justice.

33. ***The Respondent shall pay to the Claimant the equivalent of 5½ months' salary, in compensation for unfair termination, at Kshs. 89,100.***

34. No order on the costs.

35. ***Interest granted at 14% per annum from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a) Termination was justified, but procedurally flawed.***

***b)The Respondent shall pay to the Claimant the equivalent of 5½ months' salary, in compensation for unfair termination, at Kshs. 89,100.***

***c) No order on the costs.***

***d) Interest granted at 14% per annum, from the date of Judgment, till payment is made in full.***

Dated and delivered at Malindi this 19<sup>th</sup> day of July, 2018.

James Rika

Judge