



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 444 OF 2014

NANCY WUGANGA MWACHARO.....CLAIMANT

VS

ANITA AGGARWAL.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by Statement of Claim dated 20th March 2014 and filed in court on even date, is for compensation for unfair termination of employment as well as payment of terminal dues.
2. The Respondent filed a Memorandum of Defence on 23rd April 2014 to which the Claimant responded on 17th November 2014. At the trial, the Claimant testified on her own behalf. The Respondent also testified on her own behalf and in addition called her employees, Alexander Seru Mwembere and Berita Kanaiza.

The Claimant’s Case

3. The Claimant states that she was employed by the Respondent as a Nursing Supervisor/House help at a monthly salary of Kshs. 14,600 effective 9th January 2006. She adds that she worked as such until 13th June 2013, when her employment was unfairly terminated.
4. The Claimant further states that she was registered with the National Social Security Fund (NSSF) and issued with a Membership Card No 145145824 on 20th November 2009. However, upon follow up with NSSF, the Claimant discovered that the registration did not correspond with her details and the registration number issued to her reflected someone else’s name. The Claimant states that the Respondent continued deducting NSSF dues on a monthly basis but did not make any remittances.
5. The Claimant claims the following from the Respondent:

- a) One month’s salary in lieu of notice.....Kshs. 14,600
- b) Service pay.....54,750
- c) Leave pay.....25,550
- d) House allowance.....197,100
- e) Unremitted NSSF dues.....36,000
- f) 12 months’ salary in compensation.....175,200
- g) Certificate of service
- h) Costs plus interest

The Respondent’s Case

6. In her Memorandum of Defence dated 22nd April 2014 and filed in court on 23rd April 2014, the Respondent denies the Claimant's claim but admits having employed her as a House help at a monthly salary of Kshs. 8,600 from 9th January 2006

7. The Claimant was deployed to take care of the Respondent's elderly and sickly mother. The Respondent states that the Claimant knowingly failed or refused to obey lawful and proper commands within her scope of duty. The Respondent accuses the Claimant of persistently mistreating her employer's mother and misuse of facilities and food supplies. The Respondent adds that the Claimant was warned verbally on various occasions but she failed to improve in her conduct.

8. The Respondent avers that the Claimant had the option of staying in the main house with a night allowance of Kshs. 200 but she refused, thus failing to supervise the other two house helps, contrary to her terms of employment.

9. It is the Respondent's case that the termination of the Claimant's employment was lawful and fair. Further, the Claimant commuted her annual leave and her NSSF dues were duly paid.

Findings and Determination

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

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

The Termination

11. According to the evidence on record, the Claimant's employment was terminated following her failure to report to work on 1st June 2013. The Respondent and her witnesses also accused the Claimant of several acts of insubordination, including using abusive language towards the Respondent and her mother.

12. The Respondent told the Court that she, together with a representative from NSSF by the name Sylvester Ajuoga, and her other staff met the Claimant on 13th June 2013. The Respondent further testified that the Claimant, whose replacement was at hand, was prevailed upon to leave employment. It is therefore evident that the Claimant's employment was terminated at the Respondent's instance. What is more, the Claimant was not given an opportunity to respond to any of the allegations made against her, prior to the termination as required under Section 41 of the Employment Act, 2007.

13. The said allegations were therefore untested and unproved at the shop floor and the Court finds the ensuing termination substantively and procedurally unfair.

Remedies

14. Pursuant to the foregoing findings, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

15. The Respondent admitted paying the Claimant's NSSF dues into the wrong account and having failed to take any corrective measures, service pay is due and payable. That dispenses with the claim for unremitted NSSF dues.

16. Regarding the claim for annual leave, the Claimant testified that from 2012 she was allowed fourteen (14) days in annual leave. The Respondent did not produce any leave records to counter the Claimant's claim in this regard. Based on the Claimant's testimony, it would appear that from 2006 until 2011, she did not go on leave at all and in 2012, she only took 14 days. I therefore allow annual leave at 24 days per year, as admitted by the Respondent, from 2006 to 2011, leave balance for 2012 and prorata leave in 2013.

17. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provide as follows:

(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. Although the Claimant's terms and conditions of employment were not documented, the Court considered the monthly figure of Kshs. 14,600 adequate as basic salary and house allowance for the type of work she was doing. In arriving at this decision, the Court took into account the applicable minimum wage at the time the Claimant left employment. The claim for house allowance is therefore disallowed.

19. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 8 months' salary in compensation.....	Kshs. 116,800
b) 1 month's salary in lieu of notice.....	14,600
c) Service pay for 6 years (14,600/30x15x6).....	43,800
d) Leave pay for 5 years (14,600/30x24x5).....	58,400
e) Leave balance for 2012 (14,600/30x10).....	4,867
f) Prorata leave for 4 months in 2013 (14,600/30x1.75x4).....	<u>3,407</u>
Total.....	241,874

20. This amount will attract interest at court rates from the date of delivery of judgment until payment in full.

21. The Claimant is also entitled to a certificate of service and costs of the case.

22. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF JULY 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr Ogosso for the Claimant

Mr Ongicho for the Respondent