



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.273 OF 2016

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS...CLAIMANT

VERSUS

CHINA SACH HOLDINGS LIMITED

(Now Trading As HAOJUZ HOLDING KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant filed the Memorandum of Claim on 29th July, 2016. The respondent was served and failed to enter appearance or file defence. The requisite returns are filed to confirm service upon the respondent.

2. On 3rd July, 2018 the claimant obtained leave to amend the Memorandum of Claim, this was done on 18th July, 2018. The respondent was served with the amended Memorandum of Claim on 23rd July, 2018 and returns in this respect have been filed. There was no appearance or defence filed.

3. The Court, satisfied that the respondent was aware of these proceedings and opted not to attend heard he claimant under the provisions of Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

Claim

4. The claimant is a registered trade union under the provisions of the Labour Relations Act, 2007 and filed the claim for and on behalf of the grievant, Christine Akoth Aloo.

5. The grievant was employed by the respondent on 3rd February, 2014 as a General Clerk and stationed in Nakuru town. The grievant was paid a wage of Kshs.10, 000.00 per month without a house allowance.

6. On 4th February, 2015 the grievant was terminated in her employment by the respondent without notice or being given reasons. There was no hearing or opportunity to make any defence. The grievant had then requested to take her annual leave and instead, her employment was terminated. The claimant had served for one year.

7. The claim is also that on 4th February, 2015 when the grievant reported to work, around midday, other employees were paid for their leave days but the grievant's name had been deleted. No reasons were given. She was sent out of the respondent's premises.

8. Despite the claimant seeking the respondent out to resolve the matter, they have remained adamant and refused to respond.

a) The claimant is seeking notice pay at kshs.15, 838.60;

b) 4 days wages worked in February, 2015;

c) Leave pay at Kshs.11, 124.10;

d) Underpayments Kshs.43, 261.00;

e) Compensation Kshs.190, 056.00;

f) Costs.

9. The grievant testified in support of the claimant's case.

10. Upon employment on 3rd February, 2014 the grievant was paid a wage of Kshs.10,000.00 per month and which was increased to kshs.13,000.00 per month at the time of termination of employment on 4th February, 2015. The claimant completed a full year in her employment with the respondent in February, 2015 and therefore requested to take her annual leave. This was not taken well by the respondent and Mr Jay, removed the grievant from the list of employee who were paid in lieu of taking leave. The grievant was then dismissed in her employment.

Determination

11. The fact of a respondent served with summons to enter appearance and defend a claim before the court is imperative. Without filing defence, the claim before court is not challenged. This erodes the Rule of Law as the law under **section 10 of the Employment Act, 2007** requires an employer, upon a claim being filed in court and is served, a response thereto should be filed attaching all work records. Without such work records, the court is left with the word of the employee only. Crucial work records and documents necessary in assessing the claimants are denied of this court. The word of the claimant, the employee is the only available material.

12. In this case, in the absence of defence, the claims made shall be assessed based on the pleadings, the evidence of the claimant and the grievant and the applicable law.

13. Termination of employment is regulated under the provisions of section 35 of the Employment Act, 2007 (the Act). There must be notice issued to the employee and even where such notice is issued, reason(s) leading to termination of employment must be given in terms of section 43 of the Act and such reason(s) must be genuine, fair and valid in accordance with section 45 of the Act. Where no such reason(s) are given, the termination of employment is inherently unfair in accordance with section 45 of the Act.

14. Even where the employer has the right to terminate employment of any employee, the motions and procedures of section 41 of the Act are mandatory the employee must be given a hearing even on short notice.

15. In this case, the court finds the respondent failed to adhere to procedural and substantive justice in terminating the grievant's employment. Such is contrary to the law and therefore unfair.

16. Compensation and notice pay are due.

17. The claimant case is that the grievant was underpaid for the duration of employment. The regulation of wages requires every employer to pay the minimum wage and where not paid, this is due in terminal dues. On the evidence before court, the grievant is entitled to the claimed underpayment all at Kshs.43, 261.00.

18. Leave is a right secured under section 28 of the Act. Where not take, leave encashed should be at Kshs.11, 124.10.

19. On the finding there was unfair termination, compensation at 3 months gross pay is hereby found appropriate. The grievant had served for one year and is awarded kshs.47, 515.80 as compensation.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

(a) compensation at Kshs.47,515.80;

(b) Leave pay at Kshs.11,124.10;

(c) Underpayments Kshs.43,261.00;

(d) pay for 4 days worked in February, 2015 at Kshs.2,112.00; and

(e) costs of the suit.

Dated and delivered in open court at Nakuru this 18th day of October, 2018.

M. MBARU

JUDGE

In the presence of:.....