



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO.472 OF 2017

MARY WAITHIRA WAMBUI CLAIMANT

VERSUS

WAGIKA HOLDINGS LTD RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 1st December, 2017. The respondent was served and entered appearance on 31st January, 2018. No defence was filed.

The claimants applied to proceed with their case as no defence was filed within the required time. The respondents were served with hearing notice on 11th September, 2018 and receipt is acknowledged. Under the provisions of Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 the court heard the claimants' case by way of formal proof.

During the hearing of the claimant's case on 1st October, 2018 the respondent's Manager Mr Mureithi was in court. He did not address the court and kept silent throughout the proceedings. I take it he was keen with the proceedings and the outcome.

Claim

The claimant was employed by the respondent through an oral contract in March, 2004 as a Cashier. She was only issued with a job card and her title.

The claimant was paid her wages through the years but was grossly underpaid.

From March, 2004 the claimant was paid Kshs.2, 500.00 per month;

From February, 2007 pay increased to kshs.5, 000.00 per month;

From May, 2013 the pay increased to kshs.5, 500.00 per month;

From May, 2016 the pay increased to Kshs.6, 000.00 per month;

In March, 2017 the pay increased to Kshs.7, 500.00 per month.

On 15th November, 2017 while the claimant was at work, the manager Mr mureithi terminated her employment without notice, no reasons were given or a chance to give a defence. The salary due for days worked was not paid.

The claimant would report to work at 7am to 11 pm each day without payment of overtime hours. Despite working during public holidays, the claimant was not compensated. The due leave days were not allowed or paid for.

The claimant is seeking payment due in underpayment, overtime work, work during public holidays, pay in lieu of taking leave, salary for days worked, notice pay and compensation.

The claimant testified in support of her case.

Determination

As noted in the introduction herein, the respondent entered appearance but failed to file defence. I take this as deliberate. No defence was available to challenge the claims made.

During the hearing, the respondent’s officer and manager Mr Mureithi remained in court. The claimant identified him as the one who terminated her employment.

By entering appearance, the respondent was ware of these proceedings. By attending court through its officers, the respondent was effectively aware of the proceedings and the hearing date. Failure to challenge the claims can only mean one thing; the respondent will respect the outcome.

However, where the employer such as the respondent fails to attend court, the court is denied crucial material evidence in the form of work records. The court has to rely on the word of the employee.

Section 35 read together with sections 41 and 43 of the Employment Act, 2007 requires an employer to issue an employee without notice before termination of employment. The employee should also be invited to a hearing and given reasons given rise to termination so that the employee can get a fair chance to argue any defence. Without following such procedures or attending at proceeding such as these to state why such mandatory provisions of the law were not followed, the resulting termination of employment is inherently unfair.

The evidence is that the claimant was underpaid since her employment in March, 2004. Such underpayments are outline in the pleadings. They relate to the entire duration of employment. These shall be analysed by the County Labour Officer from March, 2004 to November, 2017 for the court confirmation as all such underpayment are due and owing.

Based on the confirmed wages due over the years and starting March, 2004 the wages due for public holidays work shall also be assessed and confirmed.

The due wages from March, 2004 and not March, 2003 shall also be assessed. This shall include the assessment for leave days due and owing, March, 2004 to November, 2017.

Compensation is due to the claimant at one (1) months gross wage. This shall be applied with regard to the due monthly wage in the assessment of the County Labour Officer.

Accordingly, judgement is hereby entered for the claimant with a finding that termination of employment was unfair; the claimant is entitled to the due underpayments, overtime pay, pay for work during public holidays, leave days due and the salary for 15 days worked in November, 2017. The dues owing shall be assessed by the County Labour Officer, Nakuru for the period of March, 2004 to November, 2017. Such dues shall be confirmed by the court.

Mention for judgement award on 1st November, 2018.

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

M. MBARU

JUDGE

In the presence of:.....