



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2192 OF 2014**

**SABINA NAUTUTU WAFULA ..... CLAIMANT**

**VERSUS**

**ELIZABETH MWONGA MZAZA ..... 1<sup>ST</sup> RESPONDENT**

**EMMANUEL MWAZIGHE MZAZA ..... 2<sup>ND</sup> RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 12<sup>th</sup> October, 2018)**

**JUDGMENT**

The respondents employed the claimant as a house-help from 08.05.2010 to 30.09.2014. The claimant filed the memorandum of claim on 11.12.2014 through Moni Wekesa & Company Advocates and prayed for judgment against the respondent for:

- a) A declaration that the rights of the claimant have been violated as indicated in the memorandum of claim and as summarised under paragraph 34 thereof (being inhumane working hours, inadequate rest, underpayment and non-payment for social security).
- b) Payment of leave not taken for 4 years of service Kshs.39, 123.80; service pay for 4.3 years served Kshs.24, 264.00; underpayment for 52 months Kshs.92, 609.40; pay for overtime served but not paid Kshs.1, 128, 171.20; punitive damages; costs of the suit; interest at court rates; certificate of service under section 51 of the Employment Act, 2007; and remittance of NSSF for 52 months.
- c) Such other or further relief as the Honourable court may deem fit, just and reasonable to grant.

The respondents filed the memorandum of response and counterclaim on 28.01.2015 through Kipkenda & Company Advocates. The respondent's case is that the claimant failed to cooperate towards deduction and remission of the NSSF dues. Further, the respondents state that the claimant did not work overtime because she only worked in the morning and evenings with a Sunday off and in residential accommodation provided by the respondents in their home. That the salary had been agreed upon and the Regulation of Wages (General) (Amendment) Order, 2013 invoked for the claimant came into operation on 01.05.2013 and did not apply because it came into force 3 years after the claimant's employment. The respondents' further case is that the claimant is not entitled to leave because she was granted leave to attend to her family issues and further took leave during the Christmas holidays and period. The respondent counterclaims that the claimant resigned without notice and should pay a month's salary in lieu of notice. Further, the claimant showed the respondent's minor son a picture of the claimant's dead mother in a coffin after she arrived back from the burial. The respondents further allege that the claimant exposed their daughter, a minor, to a traumatising picture of the claimant's former husband who had committed suicide by hanging. The respondents alleged that the psychiatric evaluations were undertaken and the respondents counterclaimed for the already incurred medical expenses and those to be incurred in the future. The respondents prayed for dismissal of the claimant's suit with costs and for judgment against the claimant for:

- a) Kshs. 8,000.00 being one month salary in lieu of termination notice.
- b) Special damages being costs of treatment of respondent's minor (to be ascertained at the hearing).

The claimant filed the response to counterclaim on 07.04.2015. The claimant admitted that she resigned but stated that prior to the resignation she had orally informed the respondents about her intention to resign. The claimant denied the respondents' counterclaim and prayed that the same be dismissed with costs.

By consent of the parties on 04.07.2018 it was ordered that the suit be determined on the basis of pleadings and documents on record. The court has considered the pleadings and the relevant material on record including the submissions filed for the parties and returns that the main issue for determination is whether the parties are entitled to the remedies as prayed for. The Court makes findings as follows:

1) The claimant has not established by way of evidence that she worked overtime. She has admitted that she was given a Sunday off or rest day. The Court therefore returns that there is no basis for pay for the alleged overtime or work on rest days. As submitted for the respondents the parties must have agreed on working hours on normal working days so that there is no reason to doubt the respondents' position that most of the day the claimant was idle and mainly worked in the morning and evening. The prayers in that regard will therefore fail. While making that finding the Court returns that it was not established or alleged that there had been a grievance in that regard throughout the service.

2) The Court returns that the claimant is not entitled to pay in lieu of annual leave because she has admitted that she took leave during Christmas period and the claimant has not specifically denied with relevant details and evidence that she was given leave on numerous occasions to attend to her family matters like when she had to attend funeral and circumcision rites or ceremonies. On a balance of probability, the Court returns that the claimant was accorded due annual leave and her prayer in that regard will fail.

3) The Court has considered that the claimant voluntarily resigned from her employment and the prayer for punitive damages was not justified at all. The Court follows the submission made for the respondents that in Abdulhamid Ebrahim Ahmed –Versus- Municipal Council of Mombasa [2004]eKLR, it was held, “**Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant’s conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorised by statute.**” The Court finds that in the present case the claimant has not established any of the grounds for the award of exemplary damages as was prayed for the claimant.

4) The claimant prays for remittance of NSSF for 52 months but the claim being in the nature of special damages was not specifically quantified and in such circumstances the prayer will fail. In any event, enforcement for deduction and remission of NSSF dues may be pursued in accordance with the relevant primary statute. While it is clear that the parties had no alternative arrangements for pension or separation benefits, there were no prayers for service pay as envisaged in section 35 of the Employment Act, 2007. The Court would therefore be hampered towards a remedy in that regard.

5) The claimant is entitled to a certificate of service in accordance with section 51 of the Employment Act, 2007.

6) The respondents have submitted that indeed the claimant was underpaid per the prevailing Regulation of Wages (General) (Amendment) Orders for 2010, 2011, 2012 and 2013. The underpayment as computed for the respondents is **Kshs. 78, 953.10** and the claimant has not objected to that computation in the further submissions as subsequently filed. It is submitted for the respondents that the underpayment would be set off against the accommodation, food, gifts and medical cover provided to the claimant but which were not quantified at all and which the Court finds to clearly constitute separate rights and obligations of the parties under the contract of employment. The set off will therefore fail. The Court returns that the claimant is entitled to **Kshs. 78, 953.10** being underpayment per minimum statutory pay prevailing at all material times.

7) The respondents pray for Kshs. 8,000.00 in lieu of resignation notice. The respondents' case is that the claimant, sometimes in 2014 and prior to the resignation that year, the claimant complained to the 1<sup>st</sup> respondent that she was very bored when the respondents took their 15 year old son to boarding and that the claimant intimated to the 1<sup>st</sup> respondent that she had resorted to performing her daily chores very slowly to avoid being bored. The Court has considered that pleading by the respondents together with the claimant's case that she orally notified the respondents that she was going to resign and the Court returns that in the prevailing circumstances of an oral contract of service, the respondents knew and had prior information that the claimant was about to resign but it is not clear that the notice was, on a balance of probabilities, for the period prescribed under section 35(1) (b) of the Act. The Court returns that the **Kshs.8, 000.00** will be deductible from the final dues payable to the claimant by the respondents.

8) The respondent prayed for medical expenses incurred towards medical evaluation of their son and daughter in view of the exposure to alleged traumatic photographs. The Court returns that there was no evidence of such photographs or such exposure. Further the claim was for special damages which were not specifically quantified in the pleadings and then strictly proved as required in such civil claims for special damages. Accordingly, the prayer will fail.

9) As the claimant has partly succeeded, the respondents will pay part of the claimant's costs of the suit fixed at **Kshs. 40,000.00**.

In conclusion judgment is hereby entered for the claimant against the respondents for:

a) The respondents to pay the claimant a sum of **Kshs.110, 953.10** by 01.12.2018 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.

b) The respondents to deliver a certificate of service to the claimant by 01.11.2018.

**Signed, dated and delivered in court at Nairobi this Friday 12<sup>th</sup> October, 2018.**

**BYRAM ONGAYA**

**JUDGE**